Neutral Citation Number: [2019] EWHC 286 (Comm)

Case No: CL-2018-000289

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 15/02/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

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Between :

(1) CONSULT II s.r.o. (formerly named DFRG INVEST II s.r.o) **(2) PAVEL IVANYI** **(3) JOSEF EIM** **(4) RADEK STACHA**	**Claimants**
- and –	
(1) SHIRE WARWICK LEWIS CAPITAL LIMITED **(2) MR PERRY LEWIS** **(3) MR SOLOMON PACHTINGER** **(4) SHIRE WARWICK LEWIS HOLDINGS INC**	**Defendants**

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Andrew Fletcher QC (instructed by **Bryan Cave Leighton Paisner**) for the **Third and Fourth Claimants**
Mr Perry Lewis (acting in person) for the First to Fourth Defendants
The First and Second Claimants did not appear and were not represented

Hearing date: 1 February 2019

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Approved Judgment

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ANDREW HENSHAW QC

Mr Andrew Henshaw QC :

(A) INTRODUCTION

1. The Defendants apply, pursuant to an application notice dated 30 November 2018, for an order pursuant to CPR 3.9 for relief from the sanctions imposed by an order of Moulder J, dated 26 October 2018 and sealed on 29 October 2018, made by consent at a time when the Defendants were legally represented.

2. The Defendants' application is supported by the sixth witness statement of the Third Defendant, Mr Pachtinger. The Defendants are no longer legally represented, and were represented at the hearing by the Second Defendant, Mr Lewis. Mr Lewis is a chartered accountant, and told me that he is an FCA-approved individual with a diploma in corporate finance.

3. Moulder J's order included at § 1 provision that unless, by 4pm on the date 14 days after the date of order, costs of £102,700 ordered by Jacobs J on 17 August 2018 to be paid had been paid in full to the Claimants' solicitors, then (a) the Defendants would be debarred from defending these proceedings, any defence served prior to that date would be struck out, and the Claimants would have permission to obtain judgment in default of defence pursuant to CPR 12.4; (b) various sums held by the Claimants' solicitors by way of security pursuant to previous orders would be discharged from all restriction imposed by those provisions; and (c) the Claimants' solicitors would be released from their undertakings in respect of those sums as recorded in previous orders.

4. For the reasons set out below, I have come to the conclusion that relief from sanctions should not be granted, and that the sanctions imposed by the order of Moulder J should take effect.

(B) BACKGROUND TO THE PROCEEDINGS

5. The Third and Fourth Claimants, who are the active claimants in the proceedings, claim damages of €4,448,416.24 against the First to Third Defendants, jointly and severally, for fraudulent misrepresentation, conspiracy, and breach of contract.

6. The claim arises from currency trading transactions. Briefly, it is alleged that between September 2016 and March 2017 the Claimants paid sums in respect of margin totalling more than €2.3 million to the First Defendant for the purpose of implementing (by way of a joint venture) a Euro/Czech Koruna currency trading strategy, with profits to be split 75/25 between the Claimants and the First Defendant. The Claimants say that the strategy was successful, and that as at 4 October 2017 the sum of €4,448,416.24 was admittedly due from the First Defendant to the Claimants pursuant to the joint venture.

7. It is alleged that the First Defendant did not pay any part of that sum to the Claimants, because the Claimants were persuaded by the Third Defendant, Mr Pachtinger (on behalf of the First Defendant and with the approval of the Second Defendant, Mr Lewis), to enter into debt for equity agreements by which the Claimants were instead to receive shares in the First Defendant's holding company, which is the Fourth Defendant.

8. The Claimants' pleaded claims include claims for rescission of the joint venture agreement and the debt for equity agreements, return of the margin they paid, and damages for conspiracy to defraud and for fraudulent misrepresentation. The Claimants' claims are put at €4,448,416.24.

(C) PROCEDURAL BACKGROUND

9. On 30 April 2018 Popplewell J granted a freezing injunction against the First to Third Defendants, which was varied by Picken J on 4 May 2018 and by Mr Christopher Hancock QC (sitting as a Deputy Judge) on 11 May 2018.

10. By an application issued on 1 August 2018, the Defendants applied to discharge or set aside the freezing injunction, leading to a hearing before Jacobs J on 15-17 August 2018 at which the Claimants were represented by leading counsel and the Defendants by leading and junior counsel. The application was originally made on the grounds of both lack of arguable case and material non-disclosure, but due to timing constraints the hearing and Jacobs J's judgment dealt only with the issue of whether the Claimants had a good arguable case.

11. Jacobs J dismissed the application based on lack of a good arguable case, concluding in a judgment delivered on 17 August 2018 that the Claimants' case at least met the threshold of good arguable case overall and, specifically, in relation to misrepresentation, falsity, fraud, causation, damages and rescission.

12. Jacobs J ordered the Defendants to pay £100,000 in respect of the Claimants' costs of that application, and a further £2,700 (by consent) in respect of an application the Defendants had made for security for costs, making a total of £102,700, to be paid within 21 days (the "***Jacobs Costs Order***").

13. On 26 October 2018, by consent, Moulder J made orders including the 'unless' order referred to in §§ 1 and 3 above ("***the Unless Order***").

14. The Defendants failed to make any payment in respect of the Jacobs Costs Order by the deadline set out in the Unless Order, 9 November 2018, with the result that the sanctions set out in the Unless Order came into effect subject only to the outcome of the Defendants' present application.

15. On 12 November 2018 the Claimants filed a request for judgment in default of Defence pursuant to the Unless Order ("***the Judgment Application***").

16. On 16 November 2018 the Third and Fourth Claimants applied to Teare J to vary the freezing injunction in certain respects in the light of the deadline set out in the Unless Order having passed. Teare J varied the injunction in the respects set out in paragraphs 2-5 of his order ***("the Teare Order")***. The broad effect of these variations was that if the Defendants did not apply for relief against sanctions by 4pm on 30 November 2018, then (a) the freezing order would continue until the conclusion of the proceedings or (if judgment were entered pursuant to the Judgment Application) until the judgment were satisfied; (b) the limit stated in the freezing injunction would be reduced to the extent of any part payments made by the Defendants; and (c) the First and Second Claimants would be released from their undertakings in damages, and certain other variations would be made to the freezing injunction.

17. Teare J also directed in his order that any application by the Defendants for relief *"be supported by a witness statement which is to include such documents as the Defendants are able to supply copies of in relation to that application"*, and made this clear at the hearing (at which both Mr Lewis appeared and Mr Pachtinger was also present).

(D) APPLICABLE PRINCIPLES

18. CPR rule 3.9 provides that:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

19. In *Denton v TH White Ltd* [2014] EWCA Civ 906 at § 24 the Court of Appeal stated:

> "… A judge should address an application for relief from sanctions in three stages.

> The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.
>
> The second stage is to consider why the default occurred.
>
> The third stage is to evaluate "*all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"*…."
>
> (paragraph breaks interpolated)

"Factors (a) and (b)" are those referred to at (a) and (b) of CPR 3.9(1), i.e.:

> "the need— (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders".

20. As to the application of these principles to litigants acting in person:

i) The Court of Appeal in *Denton* said at § 40:

> "Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) co-operation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. …"

ii) In *Elliott v Stobart Group Ltd* [2015] EWCA Civ 449 Tomlinson LJ said at § 39:

> "In *Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633 this court took the opportunity to give guidance on the approach that should be taken to applications for extensions of time for filing a notice of appeal, in the light of the decisions of the court in *Mitchell* and *Denton*. … At paragraph 44 it was pointed out that being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the CPR or, I would add, court orders."

iii) More recently, in *Barton v Wright Hassall LLP* [2018] UKSC 12, Lord Sumption (giving the majority judgment) said:

> "18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants

> may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue "*at the margin*", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR r 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

iv) On this point Lord Briggs (giving the minority judgment) was of the same opinion:

> "42. Save to the very limited extent to which the CPR now provides otherwise, there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them."

21. I agree with the Claimants that there is no basis for distinguishing in this regard between compliance with rules and compliance with court orders, which are direct and bespoke obligations binding the parties subject to them. Moreover, in the present case the Unless Order was entered into by consent.

(1) Stage one: seriousness and significance of failure to comply

22. I consider, and the Defendants did not seriously seek to contest, that the Defendants' failure to comply with the Unless Order is serious and significant.

23. The Jacobs Costs Order was for a significant sum of money representing expense to which the Claimants had been put as a result of the Defendants' application, held by Jacobs J to be unmeritorious, to set aside the freezing injunction on the ground that the Claimants had no good arguable case. As Sir Richard Field pointed out in *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 § 29, the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation is that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.

24. The length of time for which the Jacobs Costs Order has remained unpaid since its original due date of 7 September 2018, and since the deadline of 9 November 2018 imposed by the Unless Order, increases the seriousness of the breach.

25. Further, the fact that the non-payment is a failure to comply with an unless order and is ongoing underlines its seriousness and significance in the present case. As Jackson LJ pointed out in *British Gas Trading v Oak Cash & Carry* [2016] EWCA Civ 153:

> "41. The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the Draconian sanction of strike out).
>
> 42. On the other hand, as Mr Weston rightly says, not every breach of an unless order is serious or significant. In Utilise the claimant was just 45 minutes late in complying with an unless order. He filed his budget by 4.45 p.m., rather than 4 p.m. when it was due. The Court of Appeal held that a delay of only 45 minutes in compliance was "trivial". The court also noted that, contrary to the district judge's view, there was no underlying breach of the rules onto which the unless order was attached."

In the present case, the breach of the Unless Order has remained unremedied (as at the date of the hearing before me) for almost three months from the deadline set out in that order.

26. Moreover, by consenting to the Unless Order, while still legally represented, the Defendants accepted that the consequences set out in the order would at least *prima facie* be appropriate in the event of failure to comply.

27. The Defendants submitted that they are entitled to apply to set aside the order of Jacobs J on the ground that the Claimants failed to make full and frank disclosure when obtaining the freezing injunction, citing the decision of Popplewell J in *Fundo Soberano*

de Angola v Jose Filomeno dos Santos [2018] EWHC 2199 (Comm). As noted earlier, an application on those grounds had been due to be argued before Jacobs J but was held over. No such application has to date been pursued. Even if the Defendants were to pursue and succeed in any such application, it would not necessarily follow (indeed, probably would not follow) that the Jacobs Costs Order would be set aside. I do not consider the possibility of any such application being made is relevant to my consideration of the present application.

(2) Stage two: why the breach occurred

28. CPR 3.9(2), which I have already quoted, expressly requires an application for relief from sanctions to be supported by evidence.

29. I agree with the Claimants that when a party seeks relief from a sanction, the applicable standard of evidence required to explain its failure to comply with the obligation in question should be no lower than the standard that applies when the court decides whether to impose a sanction in the first place. It would be illogical and contrary to the underlying policy mentioned above for a party to be relieved from a sanction based on a lower standard of evidence than would have been required to avoid the imposition of the sanction.

30. Relevant guidance, including as to the evidence required, was provided by Sir Richard Field in *Michael Wilson & Partners v Sinclair* at § 29 (subsequently followed and applied by Norris J in *Jackson v Feeney* [2018] EWHC 1490 (Ch)):

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
>
> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR ; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position

> including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."
>
> (my emphasis)

31. As I have already noted (§ 17 above), Teare J on 16 November 2018 made clear both in the hearing and in his written order that any application by the Defendants for relief from sanctions needed to be supported by a witness statement attaching copies of such relevant documents as the Defendants were able to supply.

32. The only evidence provided by the Defendants in support of their present application is the sixth witness statement of Mr Pachtinger, dated 30 November 2018. The witness statement provides no details of the Defendants' general financial position, save to state that the freezing injunction has caused all the Defendants great difficulty in accessing funds from their bank accounts.

33. As regards the direct effect of the freezing injunction on the Defendants' ability to pay the Jacobs Costs Order, Mr Lewis accepted in the hearing before me that the existence of the injunction would not prevent the Defendants from satisfying the order, if only because the Claimants would obviously consent to the Defendants using funds for that purpose or, if necessary, the court would approve it. The witness statement of the Claimants' solicitor, Mr Tuson, dated 14 December 2018 confirmed that the Claimants would so consent and that, to date, no request for such consent had been received.

34. Mr Lewis in submissions made a broader point, to the effect that the issue of the freezing injunction and the publicity to which it had given rise had had a huge impact on the Defendants' investors and business, the perceptions of parties which whom they did business and of persons from whom the Defendants had gone for funding. He added that the Defendants had been unable to trade, had laid off their staff, and had lost a 120 million trading credit facility. However, Mr Pachtinger's witness statement provides no information about these alleged wider effects, or (most pertinently) how they are said to have prevented compliance with the Jacobs Costs Order.

35. It was common ground that pursuant to the freezing injunction, affidavits had been served in relation to the Defendants' financial position. Those had led to correspondence between the parties, and the Claimants had not been satisfied that full and frank disclosure had been given. There had been a hearing before Cockerill J on 30 November 2018 at which the Claimants had cross-examined Mr Pachtinger and Mr Lewis about the Defendants' assets. On 14 December 2018 Cockerill J ordered the

Defendants to pay the Claimants' costs of the cross-examination hearing, summarily assessed at £27,683.88, indicating in her judgment on costs of 13 December 2018 *inter alia* that:

i) the cross-examination order was made necessary by reason of the Defendants' failure to comply with the disclosure orders made in conjunction with the freezing injunction;

ii) the Defendants had not complied with Moulder J's order requiring documents and information to be provided by 9 November 2018, and no information or documents were supplied until 30 November 2018; and

iii) the information remained unsatisfactory and therefore not compliant with Moulder J's order.

36. Mr Pachtinger's witness statement of 30 November 2018 focusses on attempts which the Defendants say they have made to obtain funds to satisfy the Jacobs Costs Order either from their own assets or from third parties. These fell into three categories, to which Mr Lewis added a fourth in the course of his submissions.

(a) The Strom transaction

37. First, Mr Pachtinger states in his witness statement that he was able to agree with an unnamed third party a loan of €340,000, which Mr Pachtinger intended would be converted into sterling by a Mr Avrum Strom, who Mr Pachtinger describes as a foreign exchange dealer from Geneva with offices in Hatton Garden, associated with Thomas Exchange (an FCA-registered dealer), and well known for highly competitive rates. The sterling proceeds would be remitted to various recipients including the Defendants' then solicitors, Carter Perry Bailey, who would receive £173,082.95. Mr Pachtinger states that Mr Strom agreed to the transaction, and that the €340,000 was remitted to him on 19 October 2018. However, Mr Strom did not remit the sterling funds to Carter Perry Bailey, and subsequently explained that the transfer had been delayed as a result of a number of anti-money laundering questions and requests for supporting documents from his compliance department. Mr Pachtinger states these questions and requests were answered but that Mr Strom still did not pay. Mr Pachtinger says an 'accommodation' was eventually reached with Mr Strom via the good offices of Mr Pachtinger's spiritual leader, Rabbi Dovid Cohen, and that on 4 November 2018 Mr Strom agreed to arrange for a bankers draft for £165,000 to be delivered by 4pm on Friday 9 November 2018 to the offices of the Claimants' solicitors, Bryan Cave Leighton Paisner. Mr Pachtinger exhibits a copy of a manuscript note, mainly in Hebrew, on Rabbi Cohen's notepaper which Mr Pachtinger translates as stating:

> "I Dov Pachtinger of London England, hereby give a legal undertaking to Mr Avrum Mordecai Strom of Basel Switzerland, before the jurisdiction of Rabbi David Cohen. That the aforementioned sum of £165,000 to be paid by Mr Avrum Mordecai Strom the payer, to the law firm of Bryan Cave Leighton Paisner LLP no later than Friday 9th November 2018 before 3.30pm, will be fully reimbursed to Avrum Mordecai Strom in the event that Dov Pachtinger does not prevail in HM

> Commercial Court in the case DRFG Invest II SRO and others v Shire Warwick Lewis Capital Ltd, and others"

38. Mr Pachtinger states that he asked Mr Strom agreed to have the draft couriered to the Claimants' solicitors, and on 11 November 2018 Mr Strom confirmed that he had arranged this. Mr Pachtinger says:

> "On Monday 12 November, Hu Sol, who I understand to be an associate of Mr Strom, emailed to me a document from the couriers, S Express, being the said proof of delivery. A copy of the email and document I received from him is attached. I subsequently called S Express, Edgware Office, who confirmed to me that they had delivered an envelope to the Claimants' solicitors at around 3 p.m. on the Friday, as stated by Mr Strom."

39. Mr Pachtinger exhibits a copy of an email from a "*Hu Sol*" dated 11 (not 12) November 2018 apparently attaching a delivery receipt from "*S. Express*" purporting to indicate a "*complete delivery*" of a letter to "*Berwin Leighton Paisner*" at the Claimants' solicitors' address, with date "*11/09/2018*" and "*P.O. Number 1935Strom*".

40. Subsequently, Mr Tuson of the Claimants' solicitors stated in his sixth witness statement dated 13 November 2018 and his seventh witness statement dated 14 December 2018 that, despite careful enquiries he had made (the details of which he set out), no trace could be found of any such letter being received. He made the position known to Mr Sturge, a partner in Carter Perry Bailey, on 12 November 2018 and (Mr Tuson deposes) Mr Sturge confirmed that he had not himself seen a copy of the cheque.

41. All Mr Pachtinger says on the topic of the apparent non-delivery in his witness statement dated 30 November 2018 is that *"Since this time, I have been unable to communicate with Mr Strom who continues not to answer my telephone calls or emails or meet with me in person. I have asked for help in this connection from Rabbi Cohen. Mr Strom continues to hold onto the subject funds and I continue to make efforts to secure their release."*

42. The only documents Mr Pachtinger exhibits are the declaration before Rabbi Cohen, and the email and S Express receipt referred to above. Mr Tuson in his responsive witness statement of 14 December 2018 pointed out that Mr Pachtinger had provided no documentary evidence or details of numerous aspects of his account of these events, including:

    i) the unnamed third party's agreement to lend the €340,000;

    ii) Mr Strom's agreement to the currency exchange transaction and proposed payments;

    iii) the sending of the €340,000 to Mr Strom;

    iv) Mr Pachtinger's answers to Mr Strom's requests for information and documents for anti money laundering purposes;

v) Mr Pachtinger's request that Mr Strom arrange for the banker's draft to be delivered to the Claimant's solicitors' offices;

vi) Mr Pachtinger's subsequent efforts to make contact with Mr Strom to find out what had happened to the money; or

vii) Mr Pachtinger's conversation with S Express;

43. Mr Tuson's witness statement made clear the Claimants' position that the Defendants had not provided the supporting documents required in order to comply with the order of Teare J, and that if Mr Pachtinger's account were true then such documents would exist. Mr Tuson added that he had been unable to find from internet research any evidence of Mr Strom's identity or existence.

44. The Claimants' solicitors in a letter of 9 January 2019 reminded Mr Lewis and Mr Pachtinger of the deadline for evidence in reply under CPR 58.13, but stated:

> "Notwithstanding that the deadline for evidence in reply has passed, we are prepared to agree an extension of time for you to provide any such evidence (should you wish to do so) **until 4.30pm on 16 January 2018**. We reserve our clients' right to object to the service of any evidence after this date."

The Defendants did not, however, seek to serve any further evidence.

45. In my judgment Mr Pachtinger's evidence about this transaction is very unsatisfactory:

i) The first steps in the transaction are said to have been an agreement by an unnamed third party to lend the Defendants €340,000, followed by the transmission of that sum to Mr Strom. The agreement would in the ordinary course almost certainly be reflected in some documentary form, however formal or informal, and the transfer of the money itself should inevitably be capable of proof by documentary evidence such as a copy of a transfer instruction. However, no such evidence has been provided.

ii) Mr Lewis submitted at the hearing before me that the explanation was that the third party does not wish to be disclosed at all in these proceedings, being concerned about exposure to legal costs should the Defendants lose, and that the transfer document would show the person's name. Even leaving aside any question about the propriety of a third party wishing to remain unidentified in such circumstances, the reason put forward by Mr Lewis does not explain why redacted copy documents showing the loan agreement and funds transfer could not have been produced. Moreover, this explanation was put forward only by Mr Lewis in submissions: there is no evidence in Mr Pachtinger's witness statement about the reason for the failure to exhibit basic documents of this nature.

iii) The declaration before Rabbi Cohen, as translated by Mr Pachtinger, is difficult to square with Mr Pachtinger's account of the transaction. On Mr Pachtinger's evidence, Mr Strom received a payment of €340,000 which he was simply to exchange for sterling and disburse. It is unclear why on that basis there could

be any question of Mr Pachtinger having to "*fully reimburse[]*" Mr Strom in the event of the Defendants losing in the litigation (as the declaration states). Indeed, that aspect of the declaration seems more consistent with Mr Pachtinger having sought to borrow the money from Mr Strom, rather than Mr Strom having already received the funds in Euros as Mr Pachtinger deposes. Mr Lewis's explanation in submissions was that Mr Strom felt he would have a financial exposure for being seen to contribute to the Defendants' legal costs in the event that they failed in the litigation. However, (a) if Mr Strom's role were merely to exchange a sum in Euros for the equivalent in sterling, it is difficult to credit any assertion that he could thereby feel exposed to legal costs in the litigation, and (b) any such perceived exposure would at most be consistent with an agreement to reimburse him if (but only if) he incurred a costs liability. As a result, I consider that the declaration appears inconsistent with, and tends to undermine the veracity of, Mr Pachtinger's account of the transaction.

iv) Equally significantly, I consider it implausible that there would be no documents of any kind that the Defendants could produce in respect of any of the other matters listed in § 42 above.

46. As a result, I do not consider the Defendants to have given a full and frank account of this alleged transaction.

(b) The PTC Position

47. The second potential source of funds which Mr Pachtinger mentions is that *"the Claimants will be aware that we have been seeking to realise a position held by Shire Warwick PTC. We are making progress in this regard but we have not yet been successful in obtaining release of the funds."*

48. The background to this statement is that in addition to the trade agreed between the Claimants and the First Defendant, the First Defendant and Mr Pachtinger were involved in placing a further trade with a BVI company, Shire Warwick PTC ("***PTC***"). This transaction ("***the PTC Position***") is said to have been intended to exploit the same currency trading strategy and to have taken place in September 2016. The Defendants say that the First Defendant and Mr Pachtinger each became entitled, by novation, to a share of the proceeds of the PTC Trade, with the First Defendant's share of the trade having been estimated to be worth £3,203,396 as at 31 March 2018.

49. In oral submissions, Mr Lewis referred to this as being the Defendants' largest asset: a Euro/Czech OTC derivative position with a value of €3.6 million as at 31 March 2018. Mr Lewis said the position was held with a counterparty, PTC, an entity which he said had no connection in terms of ownership or common directorships with the Shire Warwick Lewis Group or the First Defendant.

50. It was common ground that documents have been produced in the litigation in relation to the placing of the transaction itself. However, none have been produced in relation to the difficulties the Defendants now claim to have in realising it.

51. Mr Lewis stated in his oral submissions that PTC had refused to release the value of the PTC Position to the First Defendant because of concerns about US federal law, the

Defendants' dealings with the Claimants, and issues about the sources of funds the Claimants had advanced to the First Defendant.

52. The skeleton argument served on behalf of the Defendants made a series of allegations against the Claimants, including that (a) in September 2016 the Third Claimant had told Mr Pachtinger that he represented a named individual who was said to be a smuggler and suspected of involvement in financing Islamic terrorist groups (citing an internet news item about the named individual); (b) the Third Claimant had *"as stated in evidence"* attempted on a number of occasions to sell counterfeit travellers' cheques to Mr Pachtinger; (c) the Fourth Claimant had admitted to Mr Pachtinger that the source of funds for a subordinated loan it had made to the First Defendant was fraudulently diverted from the proceeds of a bond issue by a named Czech company; (d) the Third and Fourth Claimants had represented to Mr Pachtinger that the First Claimant engaged in false accounting and was using funds fraudulently diverted from third parties; and (e) when third parties had sought to acquire *"the shareholdings of the Claimants"*, the Claimants had refused to provide evidence that the source of funds used to make the subordinated loans was from legitimate sources. The skeleton argument adds that the Fourth Defendant owns the First Defendant, is a company incorporated in Delaware and subject to US federal law, and that the payment of costs would cause the Fourth Defendant to infringe US federal law.

53. None of these matters is referred to in the Mr Pachtinger's sixth witness statement or its exhibits. Most importantly for present purposes, he gives no evidence, and provides no documents, in support of the assertion that any such matters or concerns have caused PTC to refuse to pay to the Defendants the value of the PTC Position.

54. Moreover, as Mr Lewis accepted at the hearing, it is not suggested by the Defendants that the PTC Position was bought using funds from the Claimants at all. Nonetheless, he said, PTC's concern was that *"the money they pay to us will be contaminated by the toxicity of the funds that the claimants have injected into the company. And there are very strict federal rules. Also the claimants have got shareholdings in the holding company and [PTC] would be advancing funds into a group which would provide benefit to the claimants, and apparently that is caught by federal law as well"*.

55. Mr Lewis told me that the discussions with a Mr Zucker, who represents PTC, were not evidenced in writing. However, I find it almost inconceivable that if concerns of this nature existed, and had led PTC to refuse to make payment in respect of a substantial transaction of the order of (on the Defendant's case) €3.6 million, then they would not be reflected in some way in documentary form. I also note that the Defendants' skeleton argument provides no dates on which the alleged concerns referred to in § 52 above are said to have arisen, save that the first matter is said to have arisen in September 2016 i.e. well before the litigation commenced.

56. In any event, the Defendants have put forward no *evidence* of PTC's refusal to allow the Defendants to realise the value of the PTC Position, even in Mr Pachtinger's witness statement. I conclude that they have failed to provide full and frank disclosure, or indeed any disclosure or evidence, on the question of why the PTC position could not be realised in order to pay the Jacobs Costs Order.

(c) Funds en route as at 30 November 2018

57. Mr Pachtinger stated in his witness statement of 30 November 2018 that *"As at the time of making this witness statement, I am informed that funds are [en] route through the banking system to enable us to discharge the costs order made by Mr Justice Jacobs and that this will be paid within the next working day or so. On that basis, and for the reasons given below, the Defendants seek relief from sanctions."* He elaborates: *"As stated … above, we have recently been in discussions with a third party, and obtained funds to enable us to meet the costs due to the Claimants …"*.

58. It is undisputed that no such funds were ever paid to the Claimants. Mr Lewis told me that the third parties changed their minds at the last minute. Mr Pachtinger's witness statement provided no details or documentary evidence about the availability of these funds. Nor has Mr Pachtinger subsequently provided any further evidence explaining why these funds did not materialise. This is a further respect in which the Defendants have failed to provide full and frank evidence about their attempts to satisfy the Jacobs Costs Order.

(d) Further source of third party funding

59. At the hearing before me Mr Lewis stated that there was another party who expected to provide the Defendants with the funds "*next week*". However, no evidence of any kind was provided in relation to this alleged further alternative source of funding.

(e) Conclusion on Stage two

60. For the reasons set out above, I conclude that the Defendants have failed, by a considerable margin, to provide any adequate explanation of the reasons why the Jacobs Costs Order has not been satisfied, whether from their own assets (in particular, the PTC Position) or from third party funding, still less full and frank disclosure of such reasons.

(3) Stage three: evaluation of all the circumstances

61. At this stage, the court has to evaluate all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) to enforce compliance with rules, practice directions and orders.

62. I agree with the Claimants that the effect of the Defendants' failure to pay the Jacobs Costs Order has been both:

    i) to hamper the efficient conduct of the proceedings, seriously interrupting the flow of pleadings and thus progress towards trial; and

    ii) substantially (and unreasonably) to increase the costs of the litigation to date.

63. Had it not been for the Defendants' failure to comply with the Jacobs Costs Order, their Defence would have been due for service on 16 November 2018, time having already been extended at their request on 3 October 2018 (until 2 November 2018) and on 26 October 2018 (until 16 November 2018). 16 November 2018 is already nearly three months ago, and even now no draft Defence is available. The delay is arguably longer,

in that the Defendants' requests for extensions of time for their Defence were in part said to be in order to enable them to respond to the Claimants' application for the Unless Order. Further, service of the Defence had already been delayed by the Defendants' unsuccessful challenge to the freezing injunction.

64. The costs orders which the Defendants have been ordered, but have failed, to pay now total £203,083.88, comprising:

    i) £102,700: the Jacobs Costs Order made on 17 August 2018;

    ii) £62,700 ordered by Moulder J on 26 October 2018;

    iii) £12,000 ordered by Teare J on 16 November 2018, and

    iv) £27,683 ordered by Cockerill J on 14 December 2018.

65. The first three of these, totalling £177,400, comprise the Jacobs Costs Order itself and further orders directly or indirectly resulting from the Defendants' failure to pay that order.

66. The Cockerill costs order related to the cross-examination hearing which resulted from the Defendants' separate failure to comply with their disclosure obligations under previous orders, a factor which separately has some bearing on the overall justice of the matter.

67. Further, bearing in mind the policy considerations stated in *Michael Wilson* and *Barton*, it is clear that the purpose of an unless order – encouraging compliance with the court's rules and orders – would be undermined if parties who fail (particularly in a significant manner as in the present case) to comply with unless orders were permitted to avoid the resulting sanction without providing a clear, full and frank explanation of the reason for their failure that satisfies the court that it is just to grant relief. The Defendants in the present case have clearly failed to do so.

68. The strength of a party's case is of at best limited relevance when considering relief from sanctions. In *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64 Lord Neuberger said at § 30:

> "… it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms."

69. It is notable in the present case that (a) Jacobs J found the Claimants to have a good arguable case against the Defendants, including in relation to fraud, and (b) despite being invited to do so in the Mr Tuson's witness statement of 14 December 2018, the Defendants have so far not produced a draft of their proposed Defence. Mr Lewis made the point in the hearing that the Defendants considered themselves disentitled, based on Teare J's order and observations, from serving a defence unless and until they had

obtained relief from sanctions. Mr Tuson's witness statement was clear in distinguishing between service of a defence and provision of a draft defence, and the Claimants made the point in submissions that the Defendants had been legally represented until shortly after the hearing before Moulder J on 26 October 2018, and had obtained an extension of time to 16 November (only one week after the Unless Order sanction took effect) for their Defence, which one might therefore expect to have been reasonably well advanced by that stage. Mr Lewis explained in submissions that the Defendants had been unable to afford to pay their legal representatives since prior to the hearing before Jacobs J in August 2018, and so had had very limited support from them since then. In view of Lord Neuberger's comments quoted above, I do not regard this factor as having great significant in the context of this application, but it does mean (as I indicated to Mr Lewis) that I am unable to give more than limited weight to the Defendants' submissions to the effect that they have a compelling defence.

70. Viewing the matter in the round, I conclude that relief from sanctions should not be granted. The Defendants, having consented to the making of the Unless Order, have now been in breach of it for three months. No adequate explanation has been provided for the breach, nor full and frank disclosure made. On the contrary, such explanations as have been provided have been highly unsatisfactory in the respects set out above, and almost completely unsupported by documentary evidence even on matters where it is probable that (were the account correct) documents would exist. The breach of the Jacobs Costs Order has delayed the litigation significantly, and given rise to further costs, both of which constitute prejudice to the Claimants. The Defendants' record of compliance with previous orders, in particular in relation to asset disclosure is poor. In all the circumstances, and even making allowance for the Defendants' lack of legal representation, it would not be just to grant relief from the sanctions imposed by the order of Moulder J.

(E) OVERALL CONCLUSION

71. The Defendants' application is therefore dismissed. I shall hear further from the parties as to the precise formulation of the order, if not agreed. My provisional view is that in addition to the sanctions imposed by Moulder J on 26 October 2018 taking effect, the measures set out in §§ 2-5 of Teare J's order of 16 November 2018, which I outline in § 16 above, should have effect. Teare J, having heard argument, considered that those measures should apply if the Defendants did not apply by 30 November 2018 for relief from sanctions. It appears logical that the same measures should apply upon such an application having been made but dismissed.