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NEUTRAL CITATION NUMBER: [2023] EWHC 1660 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

7 Rolls Buildings
Fetter Lane
London

Before HHJ PAUL MATTHEWS

IN THE MATTER OF

(1) M L TECHNOLOGY LIMITED
(2) NAUREX LIMITED (Claimants)

-v-

B.E.A.T SAM & OTHERS (Defendants)

MR THOMAS ELIAS appeared on behalf of the Claimants
MS DENISE MCFARLAND appeared on behalf of the Defendants

JUDGMENT
8th JUNE 2023
(AS APPROVED)

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JUDGE PAUL MATTHEWS:

1. These are two sets of applications in two application notices in this intellectual property dispute between two United Kingdom registered companies on the one hand and a number of corporate entities and individuals who are from different European states. The matter arises out of a sale and purchase agreement of shares in the first defendant, whereby the ownership and control of the first defendant passed from the claimants, or a group owned by the same persons as the claimants, to the defendants. (I leave on one side the second defendant, which has not taken any part in these proceedings so far, and nor has it been served with this application.) The claim form with which I am concerned was issued on 2 November 2021, with particulars of claim making claims against the defendants in trademark infringement, passing off and copyright infringement, including, and this is important, joint liability amongst the defendants. The remedies sought include injunctions, delivery up, inquiry as to damages including exemplary damages, payment of what has been found due, interest and costs.

2. So there are two application notices. The first one is an application notice by the defendants dated 20 February of this year. This asks for three separate forms of relief. The first is a case management stay of these proceedings in England on the basis that there are other proceedings in Switzerland (to which I will return). Secondly, there is an application for security for costs and a stay in the meantime. Thirdly, there is an application for an extension of time for service by the defendants of their defence and any counterclaim. That application notice is supported by a number of witness statements. There are two by Jonathan Evans, an English solicitor, two by Marco Villa, who is a Swiss lawyer, and one by Jean-David Zerdoun. It is opposed by a number of witness statements. There are two witness statements by Lahiru Walawage, who is the claimants' solicitor, two witness statements by the claimant's Swiss lawyer, Boris Vittoz, and a witness statement by each of two shareholders in the first claimant, Mr Maechel and Ms Bootle.

3. The second application notice is that issued by the claimants themselves on 1 March 2023. This is for judgment in default of defence under CPR rule 12.4. It is supported simply by the evidence contained in the application notice in box 10. It is opposed by the third witness statement of Mr Evans, the defendant's solicitor.

4. The background to the matter in brief is this. In 1999 Mr Maechel, who is I think a French national, founded Naurex Group to provide consultancy advice and services in the oil, gas, marine, petrochemical, nuclear and construction industries. The claimants and the first defendant at that time were a part of this group. In 2010, the business having been built up,

lawyers produced a draft consultancy contract for serial use by the second claimant. That was amended, I think, in 2014. As I understand it the second claimant has an exclusive licence to use that draft contract and therefore can sue in respect of infringements of copyright. Also in 2010, the second claimant filed for a UK trademark in the word Naurex, and in 2012 it filed for an EU trademark in the word Naurex. Both of these applications, I understand, were later successful. In 2015, the first claimant retained a Mr Andrew Perron to redevelop the Naurex website. (Subsequently the copyright and the design right in that website were transferred to the first claimant.) In March 2019, the second claimant assigned the Naurex trademarks to the first claimant. This was shortly after Mr Maechel had indicated that he wished to retire and was looking to sell his property and therefore his business. He had entered into negotiations with the defendants for this purpose.

5. Ultimately, the sale and purchase agreement, the SPA, was entered into on 17 June 2019 in relation to shares in the first defendant, where the business was located. This was B.E.A.T SAM, S-a-m standing for *Société Anonyme Monégasque*. Under that SPA the fifth defendant, Capefront SA, which is a Swiss company, agreed to buy and the shareholders in the first defendant agreed to sell, 90 per cent of the shares in the first defendant. Mr Maechel would remain a shareholder for the remaining 10 per cent. Payment was to be effected in three tranches. First of all €875,000 immediately. Secondly €500,000 was to be paid on the completion of various conditions, one of which (importantly) was the transfer of the Naurex brand to the first defendant. And the third tranche was 1.825 million euros to be paid by 30 October 2019, provided that the second instalment had been paid and conditions met. On the same day, 17 June 2019, the first defendant took control of the Naurex website. The following month, in July, the seventh defendant, that is to say Mr De Villemeur, according to Mr Maechel, told Mr Maechel not to attend at the first defendant's premises any longer, even though he remained both a director and a shareholder.

6. In September 2019, the first defendant ceased making any payments which the first claimant says were due to it under the service agreement which it had with the first defendant. In October 2019, the first defendant ceased to make any payments which would otherwise be due to Mr Maechel under the consultancy agreement which he had with the first defendant. Whether the cessation of those payments was justified is obviously another matter. On 16 October 2019, the sixth and seventh defendants, Mr Sylvestre Blavet and Mr De Villemeur told Mr Maechel, according to the latter's evidence, that no further payments would be made in relation to the SPA. So that means, according to Mr Maechel, another 2.325 million euros would not be paid. There is an email in the bundle dated 19 November

2019 from Mr Maechel to Mr Mark Gullion, who appears to have been an officer of some kind of the fifth defendant, Capefront, the purchaser under the SPA. This asks for confirmation that the 500,000 euros which was the second tranche would be paid on the signature of the assignments. So far as the evidence goes there is no reply to that email. I note that the fifth witness statement by Mr Evans dated 10 May 2023 deals with events at this time, including the refusal by Mr Maechel to transfer the trademarks, but he does not deal with this evidence from Mr Maechel.

7. On 27 November 2019, documents were written threatening proceedings by the first defendant and the fifth defendant, that is B.E.A.T and Capefront, against the second claimant, Naurex Limited, and another company controlled by Mr Maechel. In fact no such proceedings were ever issued. On 14 January 2020, there was notice given of a board meeting of the first defendant the agenda for which contained an item proposing the removal of Mr Maechel as a director. On 24 January, a letter of claim was written by solicitors (not the present solicitors) on behalf of the claimants to the fifth defendant. The claims intimated were for trademark infringement and passing off. The letter also said that any licence to use Naurex rights had been terminated.

8. The evidence of Mr Maechel is that on 30 January there was a meeting between him and Mr Blavet at which Mr Blavet had said that the defendants could simply continue to use the rights to the Naurex intellectual property. On 12 February 2020, Mr Andrew Perron assigned his copyright in the website to the first claimant. On 20 February 2020, the shareholders of the first defendant voted at a general meeting to remove Mr Maechel as a director. On 6 November 2020, a further letter of claim was written on behalf of the claimants to the defendants. This was addressed to the first defendant and intimated further claims in relation to infringement and copyright.

9. On 26 November 2020, drafts of a claim form and particulars of claim were sent to the defendants. On 23 December that year, proceedings were issued in England in the IPEC. The IPEC is not the High Court. It is a court designed to bring legal proceedings for intellectual property claims within the reach of small and medium sized companies. On 9 February 2021, the defendants acknowledged service of these proceedings but indicated in their acknowledgement of service that they would challenge the jurisdiction.

10. On 11 June 2021, proceedings were issued in Switzerland by the fifth defendant, Capefront, the purchaser under the SPA, against (effectively) the shareholders and vendors of the shares in the first defendant. These proceedings were however issued in a form which is

provided for in the Swiss system, *en conciliation*, which basically means with a view to trying to settle the matter without going all the way to a trial.

11. On 28 July 2021, the claimants discontinued their proceedings in the IPEC. Although that would ordinarily entail the claimants paying the defendants' costs, the parties had agreed that no order as to costs should be made, and that was in fact what happened. So, by that stage there had been claims intimated brought in England but now discontinued, and Swiss proceedings had been issued but were still at an early, conciliatory stage, if I may put it that way.

12. On 11 August 2021, there was a pre-action protocol letter sent on behalf of the claimants to the defendants or one more of them in relation to potential proceedings in the High Court. In that letter it was explained that the powers of reach of the High Court in relation to intellectual property claims were rather greater than those in the IPEC. And, as I have already said, the claim form in the present claim was issued on 2 November. A week later, on 9 November, the Swiss proceedings moved from conciliatory proceedings to an ordinary payment claim when that claim was issued in the *Tribunal de Genève*.

13. The claimants obtained permission from the High Court to serve the defendants out of the jurisdiction. This was because, although by that stage the defendant had already retained English solicitors, they declined to accept service upon them. The High Court gave permission to serve out of the jurisdiction by order dated 7 February 2022. The first defendant, fourth, fifth, seventh and eighth defendants were served relatively rapidly, by the end of April 2022. It took a lot longer to serve the third and fifth defendants because they are Swiss companies, and Swiss rules are rather strict about the effecting of service in Switzerland by a foreign court. So, they had to be served through the foreign process section of the High Court. That happened I think on 20 December 2022.

14. On 10 January 2023, the defendants filed their acknowledgements of service, so their defences would have been due on 24 January 2023. That is about six months ago. On the 17th of that month however, the defendants sought certain documents from the claimants and also sought a 28 day extension to file their defences. Evidently that was not forthcoming, and so, on 23 January 2023, they applied to the court for an extension of time. On the 24th, the next day, Master McQuail extended time for service of the defence to 21 February 2023. On 20 February, the day before that time expired, the defendants filed the present application before me which includes an application for a stay and for an extension as well as for security for costs. That application was originally listed for a hearing in the window beginning on 4 May, but on 12 April the defendants applied for an adjournment. On 21 April this year Leech J

granted that adjournment, but as he put it really only on the basis that the matter could be relisted as quickly as possible and there was no order made as to costs.

15. So, even today in June there are still no formal defences, although there has been some attempt at an explanation of the defence in the fifth witness statement made quite recently by Mr Evans. This explanation of the defence consists in asserting that there are inconsistencies and holes in the claimants' case, that the defendants have at least a licence to use the trademarks and other IP rights and that the claimants are in breach of duties of good faith to the first defendant as its principal and so on. I will come back to that.

16. In the meantime, the Swiss proceedings, as I say were begun in the *Tribunal de Genève* on 11 June 2021, but only in November 2021 did it become an ordinary payment claim. Sitting here today, I have been hampered by the fact that the translation into English of these proceedings is not I am afraid of the highest quality. Indeed, some of the paragraphs that I have read are, I am afraid, incomprehensible.

17. On 6 January 2022, the fifth defendant, Capefront, applied in the Swiss proceedings for a provisional injunction. That application was dismissed in May 2022. The fifth defendant appealed and on 23 September 2022 the appeal was dismissed. There is evidence from Swiss lawyers on either side on behalf of each side as to how long it is going to take for the Swiss proceedings to come to a conclusion. And of course one cannot hold anyone to these kinds of estimates because they are simply their best estimate based on their experience in the past.

18. The position appears to be this, that so far as a decision at first instance is concerned the defendants' lawyer says that should be capable of being attained by the end of 2024, whereas the claimants' lawyer says it is more likely to be during 2026. The defendants' lawyer says an appellate decision could be obtained during 2026. I do not think that the claimants' lawyer actually says anything about that.

19. So far as judgment at the third instance is concerned, the Federal Supreme Court, the defendants' lawyer says it could happen between the middle of 2026 and 2027 and the claimants' lawyer says towards the end of 2028. So, a fair difference between them, but, certainly depending on which end of the proceedings you are looking at, whether you are looking at the end of the first proceedings or the appellate proceedings, there are several years between them.

20. I have, as I say, seen a lot of evidence in this case but for present purposes, apart from the evidence I have just summarised about the Swiss proceedings, the important aspect of that evidence seemed to me to come to this. Mr Maechel has said that his resources are very limited, he has had to sell properties to pay the costs, he is now quite elderly, almost 80 years

old, he is in poor health, he has a heart condition, and he is under medical treatment. He is now reduced to financing the current litigation by borrowing money from his family and friends. He has calls on his income including paying his ex-wife a certain amount, and he does not have the resources to put up security for costs. His co-shareholder in the first claimant, Sandra Bootle, is living on two pensions which amount to certainly not as much as £3,000 a month and she has very little capital. She is also unable therefore to contribute in any significant way to any application for security.

21. The evidence of Mr Maechel is that the fifth defendant, Capefront, has not paid the sums said to be owing under the SPA, that the consultancy fees from the first defendant have stopped, and that there are no more commissions being paid on consultant supply because contracts are now signed with the second defendant rather than with the second claimant.

22. Now that last point at least is met by the defendants in the evidence. The defendants say “We do not have to give our commission work to you, we can give it to who we like”. There are arguments to be had about the effect of the agency agreement, but it remains the position that the defendants accept that they have not paid the sums said to be owing under the SPA. They say that they do not have to because the claimants have not transferred the intellectual property rights which they had effectively bought under the SPA.

23. In his evidence Mr Maechel also makes some points about the quality of his claim. This was amplified by counsel on behalf of the claimants saying that they at least had filed particulars of claim verified by a statement of truth, and yet there is no defence from the other side, even despite the fact that they have made an application for judgment in default.

24. Counsel for the claimants says that there is strong prima facie evidence of the use of the website material and of the standard contracts drafted by their lawyers now used by the defendants. He also says that there is prima facie evidence of use of the Naurex mark and so on. One response made by the defendants is that maybe they are using it, but if so it is because they have a licence or other right to use it. That is something that will have to be sorted out in the course of the proceedings.

25. The case against the individual defendants certainly and one or two of the other defendants is however based essentially on *joint liability*. That is pleaded in the terms of inference from the primary facts which have been pleaded against the other defendants.

26. There was considerable agreement between the parties as to the law to be applied. In relation to a stay of proceedings it is perfectly plain that the court has power to grant a stay for a case management reason, that is, that there is some good reason in the litigation why it should not proceed at the moment. That is recognised by section 49(3) of the Senior Courts

Act 1981. It is also explicitly provided for in the case management context by rule 3.1(2)(f) of the Civil Procedure Rules. The general principle that was cited to me is that stated by the Supreme Court in *Unwired Planet International Limited v Huawei Technologies (UK) Limited* [2020] BLR 2422. Unusually, that is a single judgment of the whole court rather than of an individual justice in which the others agree.

27. At paragraph 99 of the decision it says this:

“The English courts have wide case management powers and they do include the power to impose a temporary stay on proceedings where to do so would serve the overriding objective. (See CPR 1.2(a) and 3.1(2)(f)). A temporary stay may be ordered where there are parallel proceedings in another jurisdiction raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay. But this would be justified only in rare or compelling circumstances.”

28. That paragraph was quoted by the Court of Appeal in the decision in *Athena Capital Fund v Holy See* [2022] 1 WLR 4750 at paragraph 56. And then Males LJ (with whom Peter Jackson and Birss LJ agreed) went on at paragraph 59,

“There is it seems to me no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all the usual function of a court is to decide cases and not to decline to do so. Access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.”

29. The court will obviously take into account all the circumstances in coming to a decision as to what is in the interests of justice. However, some guidance is available from the decision of Gloster J in *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) where at paragraph 21 the judge set out a number of factors. The ones which I think are relevant to the present case are these.

“(1) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has voluntarily brought the two sets of proceedings, a stay should only be granted in very rare circumstances. (2) Even where there are such reasons

for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party. (4) A stay will not, at least in general, be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed. (5) A stay will not, at least in general, be appropriate if the parties to the other proceedings are not the same.”

30. The court will also take into account the effect of granting a stay on the parties. So, for example, in *Minister of Finance (Inc v International Petroleum Investment Company)* [2020] BLR at page 45 in the Court of Appeal, Sir Geoffrey Vos, C, giving the judgment of the court which (included Newey and Males LJ) said, at paragraph 64,

“Fifthly, the result of imposing a stay is that in order to continue their court applications challenging the consent award, the claimants must first defend themselves against large financial claims in the second arbitration. If those claims were to succeed, the defendants would no doubt seek to enforce the awards in their favour in any jurisdiction where the claimants may have assets and would seek to do so before the determination of either (a) the claimant’s existing court applications or (b) any applications which they might make to challenge the awards in the second arbitrations. That possible outcome would be inappropriately burdensome for the claimants. It is a factor that should be taken into account in exercising the court’s discretion.”

31. In relation to extension of time, it is clear that the parties can agree to extend the time for service of the defence under rule 15.5. But in addition the court has a general case management power to extend time for compliance with a requirement under rule 3.1(2)(a). And in this case it is right to note that the defendants issued their application notice before the period ran out. In the first instance, it is clear that in applying for an extension of time some justification has to be given to the court for that purpose. That is clear, for example, from the decision of Nugee J, as he then, was in *The Guide Zone Limited* [2014] 1 WLR 3278 at paragraph 76. And also it appears that the *Denton* factors are relevant by analogy, as was held by Coulson LJ in *Jalla & Anor v Shell International Trading & Shipping Co Ltd* [2021] EWCA Civ 1559 at paragraph 33, with whose judgment Edis LJ agreed (Underhill LJ did not dissent but he gave his own separate concurring judgment).

32. Coulson LJ said,

“I consider that the approach in *Denton v White* is of some relevance when considering the particular circumstances of this case. This was a situation where, just as if they were facing an unless order with which they had not complied, the claimants needed the court to get them out of a major difficulty; where

they were throwing themselves on the mercy of the court in order to prevent the vast majority of their claims from coming to a shuddering halt. No extension of time meant no continuing claim for the vast majority of these claimants, just as if the order of 2 June 2021 had indeed been an unless order. Accordingly, it seems to me that the general principles identified in *Denton v White* are applicable, at least by analogy, when considering the application of the over-riding objective to this case.”

33. That I think is all I need to say about the law relating to the court’s power to grant an extension.

34. Thirdly, in relation to the law on the security for costs, it is again agreed between the parties that the defendant may apply to the court for security for costs under rule 25.12(1). The court may grant security for costs if it is satisfied, first of all, that it is *just* to make such an order under 25.13(1)(a), and if secondly, under 25.13(1)(b), one of the conditions set out lower down on the rule applies. One of these is 25.13(2)(c). This is relied on in this case. It is that the claimant is a company and there is reason to believe that it would be unable to pay the defendants’ costs if ordered to do so. So, in this case, happily for me, it is accepted that the condition in 25.13(2)(c) is satisfied and the question therefore is whether it is *just* to make the order in the circumstances of this case.

35. The general principle which has stood for nearly 30 years is that stated by Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. At page 540, Peter Gibson LJ says this.

“The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that it must weigh the injustice to the defendant if no security is ordered and at the trial of the plaintiff’s fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff’s impecuniosity. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.”

36. That is the statement of principle. There is the knotty question of “stifling”, and what the relevance of stifling the claim might be. In considering this question, one part of the

problem is to know whether the company is able to raise the money to put up the security for costs. If it can do so then the claim is not being stifled. So, that is the question, can the company raise the money? It is clear that it is *the company* that you look at and not *the shareholder*, as explained by the Supreme Court in *Goldtrail Travel Limited v Onur Air Tasimacilik AS* [2017] 1 WLR 30414 at paragraph 18. But the Supreme Court in the same case also made clear (at [23]) that the burden lies entirely on the claimant company resisting the application for security for costs to show this. Has the company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person as would enable it to satisfy the requested condition?

37. A second aspect, making the position more serious, is whether the defendants had any part in causing or contributing the impecuniosity. That appears very clearly from the decision of Vos J (as he then was) in *Mastermailer Stationery Ltd v Sandison & Ors* [2011] EWHC 4304 (Ch). At paragraph 28 of his judgment, Vos J said that, in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* at page 626G,

“Lord Denning did not suggest that the matter must be viewed on the basis that either the conduct must be unconnected with the subject matter of the dispute or that it must be looked at on the basis that the claim would be unsuccessful. It seems to me that the true factor to consider is whether the conduct alleged has, if it is proved, in fact brought about or contributed to the insolvency of the claimant company.”

38. So, as counsel for the defendants put it, is there a thread connecting the two things? Accordingly, the question of stifling is not a question of whether simply the defendants’ conduct has created a problem for the company which renders it unable to raise the security for costs. It is whether the company is able to raise the money for the security for costs or whether, if it cannot do so, the claim cannot continue and will in effect be stifled. The position is simply made worse from the point of view of whether or not an order should be made if it can be demonstrated that there is some contribution being made by the defendants to the claimants’ inability to provide the security.

39. There is then the question of how far the substantive merits of the claim are relevant. In a recent decision of the Court of Appeal, *Chernukhin & Ors v Danilina* [2018] EWCA Civ 1802, at paragraph 69, the court says that the court should not deal with the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. The problem is that everybody asking for security for costs, or resisting it, immediately tries to show that the claim in their case is either bound to succeed

or bound to fail as the case may be. And that is quite clearly what the court is saying should not happen. It should only be in those rare cases where it is clearly demonstrated that there is a high degree of probability of success or failure that merits come into play.

40. Lastly, it is clear from the *Mastermailer* decision of Vos J that the court is entitled to take into account in considering the question of security whether to grant security, that the defendant has so far failed to plead a substantive defence.

41. So, I turn now to consider the application of those principles to the remedies sought by this application. First of all there is the question of a stay on case management grounds. The defendants say that the first claimant should have assigned the trademarks to the first defendant under the SPA. It was Mr Maechel's own choice not to do so, and if he had complied there would not be any problem about a cause of action in the UK, because there could not be an infringement of trademarks if he had transferred them from the first claimant to the first defendant.

42. The defendants further submit that the Swiss proceedings are in fact going to deal with this point. They say that it is an argument arising out of the SPA, the SPA is governed by Swiss law and there is an exclusive Swiss jurisdiction clause there. And therefore the English court should stay this proceeding until the Swiss court has dealt with that litigation. Moreover, the defendants say, amongst other things there is no evidence of any prejudice to the claimants if any stay were to be granted.

43. The claimants on the other hand say that, first of all, the result of the Swiss proceedings will not bind all the parties. It will only ever bind the fifth defendant because the fifth defendant in these proceedings is the only one who is a party to the Swiss proceedings. And that means that all the other parties in any other litigation, that is to say the English litigation, may be able to run exactly the same cases and the same points indeed as the fifth defendant could run.

44. Secondly, the claimants say that the result of the Swiss proceedings will not resolve all the issues. For example, at best they could resolve the trademark claims, but not the copyright claims. Those are not going to be resolved by the Swiss proceedings. Even in relation to the trademark claims, the claimants say it is not certain that they would even resolve that. And there is no assurance that the fifth defendant would actually pay the price in, as it were, cash to Mr Maechel, rather than claim to set off in some way the price as against claims for damages for breach of warranty of the SPA (which are live in the Swiss proceedings).

45. Thirdly, the claimants say there would be a considerable delay in the English proceedings if we waited for the result of the Swiss proceedings. It could be any time between the end of 2024, which is 18 months away, and 2028 which is considerably longer, five and a half years away. A delay of that length would have a significant impact on the quality of the evidence which could be given in these proceedings because of the deterioration of memory and so on. But it would also be significant because Mr Maechel himself is almost 80 and in poor health. He may not survive to the end of the proceedings and, even if he did, he may not survive in circumstances which would enable him to give evidence at all, whatever the quality of his memory.

46. And then lastly the claimants say that this application for a stay is purely tactical, it has not being done for any other reason.

47. In my assessment, the problem here for the defendants, in a case where there are parallel proceedings in two jurisdictions, is to show that there is some rare or compelling circumstance to stay the English proceedings which are otherwise up and running and can go forward, when the parallel proceedings in Switzerland are quite a long way from any resolution, and especially in circumstances where it is clear that the Swiss proceedings will neither bind all the parties nor resolve all the issues.

48. On the face of it, it seems to me inappropriate to grant a stay. Even looking further and saying that, suppose it were otherwise appropriate to grant a stay, the problem is that the result of the Swiss proceedings would not be available for at least 18 months and maybe over five years. And as I say that will have a significant impact on the quality of the evidence and it may well have an impact on Mr Maechel bearing in mind his age and his health. It seems to me that these are very far from rare or compelling circumstances for the purposes of granting a stay in relation to English proceedings. In my judgment, it is not in the interests of justice to grant a stay in this case. The benefits to the defendants do not, in my judgment, outweigh the disadvantages to the claimants, so I dismiss that part of the application.

49. I turn therefore to the question of an extension of time for the service of the defence and any counterclaim. Originally the application was for 28 days after provision of all outstanding documents, but it is accepted now that that has fallen away. Now it is simply for 28 days after my decision in the stay application which means 28 days from today since I have now made that decision. The defendants did, to their credit, apply in time, which does not always happen. They have not yet filed their defence, they say, because they wanted to save costs and they wanted to wait until the claimants had amended their particulars of claim so that they were responding to, as it were, the full claim in its completed form. It is also

now the case that the witness evidence recently filed on behalf of the defendants has explained some aspects of the defence to be put forward.

50. But first of all this is very late, secondly it is fragmentary and thirdly it strikes me as odd that it was not in any way foreshadowed in the correspondence. Normally solicitors acting for a defendant are anxious, especially if it is going to cost a lot of money to draft a full defence, at least to give an idea of how uphill a struggle it is going to be for the claimant, given that the defendants usually say they have conclusive defences available in advance of finally getting around to pleading them.

51. The problem as I see it is that no good reason has been given for not doing that here. It is not a good reason to say that I am choosing to spend my money on applying for a stay rather than in drafting a defence. The defendants have had a long time to consider what their defences should be and, in my judgment, as the claimants submit, this is simply a delaying tactic. If there were to be any extension given, it should be a short extension and it should be backed up by some sanction such as an unless order.

52. In my assessment of the situation, I am very struck, as I think I said during the argument, by the complete lack (in what I was shown) of any statement even in correspondence as to what the defence is, until we get to the most recent witness statement. The defendants have actually spent what seems to me to be a small fortune on litigation by correspondence without ever saying what their case is. It seems to me that if one looks at it through the prism of the *Denton* criteria, you might say first of all this is pretty serious. You are after all supposed to get on and say what your case is. Has a good reason been put forward? And, I would say, reasons have been put forward, but, in my judgment, not good ones. Where does the overall justice lie? Well, one is always very tempted in cases like this to say well you brought it upon yourself, you decided not to do something and there we are, you take the consequences.

53. But in my judgment, it would be disproportionate to refuse any extension of time at all here. This is because what would immediately happen is that the defendants would draft something as a defence and then apply for relief from sanctions. They would say: look, here we are, we have done our defence, please let us back in. The court would almost certainly say Yes, I will let you back in, so long as you pay the costs, and so on. So, in my judgment, it is not sensible for me just to say No, I am not going to extend time at all. It is much better, as it seems to me, for the court to say, I will give you time. But I will not give you a lot of time and I will back it up by a sanction to make sure you do it. In my judgment, the appropriate order to make is that the defendants have 28 days from today to file their defence. If they do

not file it by 4 pm 28 days from today, then they are debarred from defending and each of the claimants may have judgment in default of defence.

54. I turn therefore to the third aspect of this claim which is security for costs. The defendants say that the claimants will be unable to pay any adverse costs order and I do not think that is challenged as things stand. They rely on the authority of *Brainbox Digital Limited v Backboard Media GmbH & Anor* [2017] EWHC 2465 (QB) which was a decision of deputy judge Richard Salter QC. They say that that case shows that it is possible for the court to grant security even before a defence has been ordered. I accept that that is correct. They also say, again rightly, that no guarantees or other security have been offered. They originally estimated £200,000 would be needed. Their current and, as they say, conservative estimate is that £364,000 will be needed to take the matter only as far as the costs of case management conference. I have to say that that strikes me as an awful lot of money to get not very far. But perhaps IP cases are different from other cases. They also say that there is no demonstration made by the claimants to the effect that the defendants' conduct has contributed to, let alone caused, the claimants' inability to put up security.

55. On the other side, the claimants accept the condition rule 25.13(2)(c) is met in principle. But they say that security for costs would stifle their claim because they do not have the money. They say that Mr Maechel's resources are dwindling. He is now reduced to borrowing money from his friends and relatives in order to finance the litigation. Ms Bootle who is the other shareholder in the first claimant is not able to assist in any material way. They also say that the impecuniosity has at least been contributed to by the fifth defendant in first of all and not paying the purchase price. And the evidence was unchallenged on the part of the defendants, that Mr Maechel had been told that they would not be paying the rest of the purchase price. With the loss of his consultancy fees and the loss of the commissions at three per cent, the claimants say these are the reason why they do not have the money to put up any security. They also say that they have got a high probability of success in the claim.

56. My assessment of all this is that plainly the claimants are unable to pay the costs. I have looked at the financial statements exhibited to the witness statement. It is plain as a pikestaff that the company cannot satisfy a significant security for costs order. But it is equally plain that nobody in their right minds would lend these companies any money, not only because they are not making a lot of money by way of business, indeed some years they are losing it, but more than that they do not have the assets which might be used to provide security.

57. So, it is obvious that there is not going to be any commercial lending solution available. Mr Maechel might be expected to finance the company in its hour of need. But he has given significantly detailed evidence as to his resources and also to his age and health problems. And he has candidly accepted that he is borrowing in order to finance the existing litigation. As I have already said, it is clear that Ms Bootle on her evidence cannot put up security. I have no doubt in my mind that the failure by the defendants to pay the purchase price has contributed to the problem.

58. Indeed, you may say that, if the second tranche of the purchase price had been paid in the sum of 500,000 euros, Mr Maechel could have financed the security for costs. But, as counsel for the claimants said, we probably would not be here now anyway if that had happened. In relation to the loss of commission on the agency agreements, there is more to be said on both sides about that. I do not think that I can properly say that I should take that into account as something which has been contributed by either the defendants by breach of their obligations. That is something to be established.

59. On the one hand, I do think that the claim as it is drafted has reasonable prospects of success. On the other hand there are a number of unknowables because we do not know exactly how the defences will be put forward. I do not think in these circumstances I can say there is a high probability of success, so I do not think I can take account of the merits in the case. Still, it is the defendants by not putting in their defence who have created or at least contributed to the situation where it is not possible to make an assessment of the probability one way or the other. They have refused in effect to divulge the substance of their defence. I have the distinct impression of their approach to conducting this litigation as being tactical. If I stand back and I look at the overall justice of this case, I am entirely satisfied that it is not an appropriate case for me to order security for costs. I will therefore dismiss that part of the application.

60. That means I dismiss the application for a stay and for security for costs. I allow the application for an extension of time as I have already said. And it follows that I dismiss the application for a default judgment.
