Neutral Citation Number: [2017] EWHC 1416 (Comm)

Case No: CL-2011-001129

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2017

Before :

Ms Sara Cockerill QC

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Between :

NEWLAND SHIPPING & FORWARDING LIMITED	**Claimant**
- and –	
(1) TOBA TRADING FZC **(2) MR SEYED MAJED TAHERI** **(3) MR HOSSEIN RAHBARIAN** **(4) MR SEYED AMIN JAVADI** **(5) MR AHMED SAKR MOHAMMED SALEM AL QASSIMI [sic]**	**Defendants**

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Mr Nicholas Bacon QC (instructed by **Gentium Law**) for the **Claimant**
Mr Philip Edey QC and **Mr Luke Harris** (instructed by **Baker & MacKenzie LLP**) for the **Defendants**

Hearing dates: 26 May 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Ms Sara Cockerill QC :

Introduction

1. This is a dual application by the Fifth Defendant Shaikh Ahmad Saqer Mohamed Alqasemi firstly for relief from sanctions under CPR 3.9 and secondly to dispute jurisdiction under CPR 11. The need for relief from sanctions arises from the fact that the claim form in this matter was amended to include him in August 2014 and alternative service having been granted, the steps in the order made were complied with at that time. The essence of the Fifth Defendant's case is that he was not aware of the proceedings until late 2016 and so he should be allowed to dispute jurisdiction belatedly, that the court has no jurisdiction against him and that the basis of claim is in any event misconceived.

2. By way of background, the claim arises out of a contract for the sale of gasoil made between the Claimant (as seller) and the First Defendant (as buyer) on 6 February 2011. The First Defendant is a company registered in the Free Trade Zone of Ras Al Khaimah, one of the seven Emirates of the UAE. I will refer hereafter to the Ras Al Khaimah Free Trade Zone as the RAK FTZ.

3. The Claimant's case is that, pursuant to this contract, it shipped the cargo in March 2011 under a bill of lading naming the First Defendant as consignee; but that the First Defendant failed to pay the price when due. The Claimant alleges that the First Defendant concocted a dispute with an Iranian entity, Chirreh Tejarat Araten Co, said to be owned or run by the sister of the Third Defendant (Mr Rahbarian), which led, in April 2011, to the arrest of the cargo when it arrived in Iran and its discharge into shore tanks; and the First Defendant then spirited the cargo away without paying for it.

4. The claim was commenced in October 2011, originally against only the First Defendant. The basis of jurisdiction against the First Defendant is understood to have been that the sale contract contains an English jurisdiction clause. Since then, the Claim Form has been amended on four occasions: first, in May 2012, to add the Second Defendant; second, in February 2013, to add the Third Defendant and to introduce a claim in conspiracy and conversion against the First Defendant, the Second Defendant and the Third Defendant in connection with the alleged theft of the cargo; third, in December 2013, to add the Fourth Defendant to the claims against the Second Defendant and the Third Defendant; and finally, in August 2014 to add the Fifth Defendant to those same claims.

5. The Second Third and Fourth Defendant are all Iranian nationals. The Second Defendant appears to have been served in France on the basis that he was domiciled there, the Third Defendant and the Fourth Defendant were both served out of the jurisdiction with the permission of the Court on the basis that they were said to be necessary and proper parties to the claim against the First Defendant.

6. At the time of the application to join the Fifth Defendant and serve him out of the jurisdiction in August 2014 the Claimant had recently served Re-Amended Particulars of Claim, setting out its conspiracy case against the Second to Fourth Defendants. That case was based on their alleged personal involvement, as directors, shareholders and managers of the First Defendant, in the relevant events. Further, in February 2014

judgment on the claim had been entered against the First Defendant for breach of orders made by the Court (*"Newland 1"* [2014] EWHC 210 (Comm) [2014] 2 Costs L.R. 279 per Hamblen J); and judgment was also entered against the Third Defendant for failing to acknowledge service ("*Newland 2"* [2014] EWHC 1986 (Comm) per Males J). The claim was therefore "live" only as against the Second and Fourth Defendants.

7. The application for permission to serve out was made on the basis that the Fifth Defendant was a necessary and proper party as the director and shareholder of the First Defendant. That permission and permission for service on an alternative address was given by an Order of Cooke J on 26 August 2014. By that order the Claimant was permitted to serve the order and the Amended Claim Form by email at the email addresses of the First Defendant and the PO box which was the postal address for the First Defendant at the RAK FTZ. The Fifth Defendant did not acknowledge service in the time prescribed by the Order. As indicated above, it is his case in this application that he had no knowledge of the proceedings until much later.

8. In October 2014 the Claimant entered judgment in default against the Fifth Defendant for a total of $7,355,108.65. A copy of the judgment was sent to the Fifth Defendant on 9 September 2015 by priority mail to First Defendant's postal address, by email to a hotmail address bearing the name alqassimi ("the Hotmail address") and by DHL to an address in the Hilton Park Lane Hotel in London. The basis for the latter two addresses was information provided by a firm of private investigators. Their report was not before me but was unlikely to be of assistance since Mr Parish of Gentium Law gives evidence that they would not disclose the source of their information. It was also sent to a residential address in RAK (Dubai Islamic Bank Building, Alnakheel Road). This address was given to DHL by the owner of the Hotmail address, who signed himself alqassimi alqassimi and indicated his willingness to receive an unspecified parcel from DHL.

9. Since the claim against the Fifth Defendant was made, the claim against the Fourth Defendant has on 22 May 2015 been struck out on the grounds of the Claimant's failure to comply with orders against it for the payment of the Fourth Defendant's costs of various applications (*"Newland 3")*. The claim against the Second Defendant is progressing but has not yet come to trial.

10. Meanwhile in April 2016, the Claimant made an application for the Fifth Defendant to attend for questioning, and to serve that order on the Fifth Defendant out of the jurisdiction. It appears that Teare J on 25 April 2016 made an order for service out of the jurisdiction of that application that the Fifth Defendant attend the court for questioning about his assets. The progress of this application is a little unclear. The order made by Teare J was clearly only for service of an application for examination, and was not an order for examination itself. However a few days later an order appears to have been made by Master Roberts ordering the attendance of the Fifth Defendant on 27 October 2016, which date was later amended to 13 January 2017. An order (presumably that of Master Roberts) was sent in July 2016 to the Fifth Defendant at the Hotmail address to which the default judgment had been sent; and to the same postal address in RAK that the owner of the Hotmail address had given to DHL and to which the default judgment had been sent. There is no evidence before me that anyone sent to any of the addresses an order requiring the Fifth Defendant's attendance at a hearing on 13 January 2017.

11. While the application for cross examination was pending here the Fifth Defendant says that he first became aware of the proceedings. His evidence made by his own statement and the statements of Mr Al Chawa, the senior legal counsel of the RAK FTZ and Mr Abraham, a partner in Baker McKenzie, is that the court documents sent with the Amended Claim Form were found along with a file relating to the First Defendant at the RAK FTZ. The Fifth Defendant has, he says, no connection with the First Defendant. He is however a member of the ruling family of Ras Al Khaimah and the chairman of the RAK FTZ. As such, when these documents were discovered they were brought to his attention for the first time. The Fifth Defendant instructed Baker McKenzie to investigate matters. This they did, unearthing (on the court file) the default judgment, though not the order that Fifth Defendant attend for questioning, which was not on the court file.

12. On 25 January 2017, some two and a half years after the proceedings against him were issued and about four months after they came to his attention, the Fifth Defendant acknowledged service, indicating an intention to challenge jurisdiction. Just within the 28 days permitted in the Commercial Court, he issued that challenge, seeking at the same time permission to serve the acknowledgment of service out of time.

The application and the objections to it

13. By this application therefore the Fifth Defendant has applied for the following relief:

    i) A retrospective extension of time in which to acknowledge service to 25 January 2017;

    ii) That the acknowledgement of service filed on 25 January 2017 do stand as a valid acknowledgment;

    iii) That the order of Cooke J made on 27 August 2014 granting permission to the claimant to join the Fifth Defendant to the proceedings and granting permission to serve the amended claim form out of the jurisdiction by alternative method be set aside;

    iv) That the court declares the court has no jurisdiction in respect of the claim against the Fifth Defendant;

    v) Service of the claim against the Fifth Defendant be set aside;

    vi) All subsequent proceedings against the Fifth Defendant be set aside;

    vii) In so far as necessary, all proceedings against the Fifth Defendant be stayed

    viii) Further or other relief.

14. The grounds of the application are essentially two-fold:

    a. The Fifth Defendant contends that he did not receive the Claim Form until early October 2016 and did not know he had to file and serve an acknowledgment until long after the time for complying with the order of Cooke J had expired. This, he

says, justifies the court in granting an extension of time in which to file the acknowledgement of service very considerably out of time.

b. The requirements of CPR 6.37 and paragraph 3.1 of the PD 6B were not met when permission to serve out was secured from the court in August 2014. In particular The Fifth Defendant is not a director or shareholder of the First Defendant, still less was he at any material time.

15. One point with which I should deal here is that the Fifth Defendant does not make any discrete application to set aside the default judgment against him on 1 October 2014. The reasons for the approach taken by the Fifth Defendant have been debated between the parties. The Fifth Defendant says that it is simply in order to avoid any risk of submission to the jurisdiction. Logically in order to seek to have the default judgment set aside the Fifth Defendant would be acknowledging the jurisdiction of this court, which he disputes and would be asking it to rule on the merits. The only step which he can safely take is the one which he has taken: to acknowledge service solely for the purposes of disputing jurisdiction and disputing jurisdiction accordingly.

16. The Claimant contends that the wrong application has been made. It says the correct step to have taken would have been to purge the Fifth Defendant's contempt for failing to attend for questioning and to apply to set aside the default judgment. It argues that the result is that even if the Fifth Defendant were to succeed in his application setting aside service of the Claim Form, the default judgment would remain in place.

17. The Claimant also contends that the decision not to challenge the default judgment is a strategic decision; in that in order to engage any of the grounds of CPR 13.3, the Fifth Defendant would have to show that he had a real prospect of defending the claim which would expose him to interrogation regarding the role he played in, on the Claimant's case as set out in the witness statements of Mr Parish, assisting Iranian citizens and/or entities in evading the incremental sanctions regime. The Claimant also suggests by reference to the judgment of Hamblen J (as he then was) in *Newland 1* that the appropriate procedure for challenging the judgment was CPR 13 and not CPR 3.9. It says that the Fifth Defendant cannot obviate this rule. A suggestion was made by Mr Parish in his evidence for this application that the wrong application was made intentionally by those acting for the Fifth Defendant. That accusation was however explicitly withdrawn and an apology was very properly offered after the hearing before me.

18. While I can appreciate that from the Claimant's perspective the lack of challenge to the default judgment may seem anomalous I consider that the Claimant's argument does not really bite. I do not accept the argument that the Fifth Defendant is making the wrong application; the authorities, including the excerpts from Briggs and Dicey cited by Mr Abraham in his second witness statement, make clear the very great degree of caution which a party who is challenging jurisdiction must exercise. The point appears to be open; neither party referred me to authority which dealt with this point in terms. It certainly seems possible that an argument that challenging the default judgment in partnership with a jurisdictional challenge might be said to amount to a submission to the jurisdiction in circumstances where the authorities tend to suggest that taking any step in relation to the merits of the claim can amount to a

submission (see *Global Mutimedia International v ARA Media Services* [2006] EWHC 3612, [2007] 1 All E.R. (Comm) 1160 and *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226 [2015] 1 WLR 4225). Accordingly it seems to me that the Fifth Defendant was entitled to form the view that it was unsafe to apply to set aside the default judgment now and the course of action taken cannot fairly be described as wrong. On the contrary, challenging jurisdiction was logically the first step, whether or not it might have been combined with a very cautiously worded challenge to the default judgment.

19. Further I do not accept the submission that if the Fifth Defendant succeeds the default judgment stands. If the service of the Claim Form is set aside the basis for the judgment is removed, a fortiori if the Claim Form is itself set aside. So far as the point on Hamblen J's judgment is concerned, I do not accept the position is analogous. The *Newland 1* case was a case where no acknowledgement of service had been lodged. The Fifth Defendant is not seeking to challenge the judgment by reference to CPR 3.9, but to challenge jurisdiction by reference to CPR 11 – for which purposes he absolutely needs to grapple with the need for relief from sanctions under CPR 3.9.

20. I therefore turn to the main issues on the application: relief from sanctions and the jurisdictional challenge itself.

21. Logically the first point concerns the Fifth Defendant's ability to bring this challenge out of time, as unless that application succeeds, the jurisdictional challenge cannot arise. However the facts surrounding the jurisdictional challenge are said to be relevant to the exercise of the power under CPR 3.9 in this case, and it is therefore appropriate to consider the question of jurisdiction first, so that the relevant facts can be brought into the equation under the relevant test under CPR 3.9 where appropriate.

The challenge to jurisdiction

The Rules

22. The relevant rules and principles are not in issue. CPR 6.37 requires an application for permission to serve out of the jurisdiction to state:

    c. which ground in paragraph 3.1 of Practice Direction 6B is relied on ((1)(a));

    d. that the claimant believes that the claim has a reasonable prospect of success ((1)(b)); and

    e. where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B (necessary and proper party), the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the Court to try (2).

It also provides that the Court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim. It is therefore implicit that an application for permission to serve out should deal with this aspect (see White Book paragraph 6.37.6).

23. Those provisions of CPR reflect the common law rules as to what a claimant must show in order to found jurisdiction over a foreign (non-European) defendant as re-stated by Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 W.L.R. 1804 at [71]:

> "*On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: ...First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: .... Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: .... Third, the claimant must satisfy the court that in all the circumstances [England] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.*"

24. In this case the relevant jurisdictional gateway relied on by the Claimant was that set out in paragraph 3.1(3) of Practice Direction 6B. It provides:

> *"The Claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where:*
>
> *...*
>
> *(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and:*
>
> > *(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
> > *(b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim."*

25. In *AK Investments*, Lord Collins cited with approval at [73] what Lloyd LJ had said in *The Goldean Mariner* [1990] 2 Lloyd's Rep.215 at p.222 in relation to the precursor to this gateway contained in the old RSC:

> "*I agree… that caution must always be exercised in bringing foreign defendants within our jurisdiction [on that basis]. It must never become the practice to bring foreign defendants here as a matter of course, on the grounds that the only alternative requires more than one suit in more than one different jurisdiction.*"

26. An application for permission to serve out attracts a duty of full and frank disclosure – which means bringing to the attention of the Court "any matter, which, if the other party were represented, that party would wish the Court to be aware of": The White Book at 6.37.6 quoting Waller J in *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485 at p 489; and paragraph 2(c) of Appendix 15 to the Commercial Court Guide.

The jurisdiction arguments

27. The Fifth Defendant says that the application for permission to serve out failed on each limb of the relevant test: there were no merits, the jurisdictional gateway could not be reached and this court was not the forum conveniens. Further he says that the evidence supporting the application was deficient, and while no application was made to set aside the order on the grounds of failure to make full and frank disclosure, it was clear that such a failure was considered to have occurred. I am also reminded that in questions of jurisdiction the burden is on the Claimant, not on the party who is sought to be brought before the court.

28. On the first issue, the merits, the Fifth Defendant submitted that the claim against him had no reasonable prospect of success or, in other words, there was and is no serious issue to be tried on the merits.

29. The essential basis of the Claimant's claim against the Fifth Defendant and hence its application to join and serve the Fifth Defendant out of the jurisdiction was founded on the assertion that he was both "the" director and shareholder of the First Defendant. On that basis it was said that the corporate veil should be lifted or pierced under English and UAE law so that the Fifth Defendant is personally liable for the alleged conspiracy to steal the cargo.

30. What was not specifically raised in the evidence in support of the application (which was not supported by draft Re-Amended Particulars of Claim, but only a draft Re-Amended Claim form setting out the relief sought) was the timing issue. The claim in the litigation concerns a misappropriation of cargo in and around February to April 2011. This is a wrong for which the First Defendant is prima facie liable. If the corporate veil were to be pierced so as to make liable the directors or shareholders standing behind the company, this could only be at the relevant time for the purposes of the misappropriation of cargo.

31. How this was put in the application notice before Cooke J was that "at all material times" the Fifth Defendant was the director and shareholder of the First Defendant and hence liable for the debts and/or liabilities of the First Defendant. In the witness statement of Mr Parish in support of the application it was asserted in a number of paragraphs that the Fifth Defendant was or acted as "the shareholder and director of" the First Defendant and was its sole owner. Mr Parish also submitted that there was a compelling legal case for piercing the corporate veil and that the Fifth Defendant's "alleged involvement as the director and shareholder of a company that has been used as a vehicle to commit theft and/or conversion of the cargo provides a compelling reason [for joining the Fifth Defendant] so that the Claim Form accurately reflects the occurrences between all relevant parties in March and April 2011."

32. The evidence relied on by the Claimant underpinning this witness statement comprised an unsigned report from a private investigator, Pelican, and a follow up email from a Mr Austin of Pelican, both from July 2013. This report was given before the Claimant applied to join the Second to Fourth Defendants as the shareholders and directors of the First Defendant. The contents of those documents are said by Pelican to reflect conversations by one of their operatives with unnamed sources at the RAK FTZ. The identities and roles of the employees questioned are not given, nor is material given on an anonymised basis to indicate their general position, to assist in evaluating the degree of credibility to be given to their information. The operative who performed the enquiry is not named or his experience given.

33. The thrust of the evidence from the report relied on in the application for permission to serve out was as follows: "the operative … confirmed that ownership of [the First Defendant] changed from a partnership to that of a sole ownership in the name of [the Fifth Defendant] prior to he [sic] expiration of its license." The main part of the email relied upon stated: "the company was renewed on the immigration system last year. … The immigration file is in the name of Al Qasmi. The apparent reason for this is that [the Fourth Defendant] and [the Third Defendant] were both denied a visa due to failing "security clearance"."

34. The Fifth Defendant highlighted a number of points arising from these documents:

    f. The report does not purport to deal with the relevant period of time. It is apparently a report of the position in July 2013 or shortly before.

    g. Nowhere in the Pelican report/email does it suggest that the Fifth Defendant is or has ever been a director of the First Defendant, let alone its sole director.

    h. There is not a single underlying document in evidence that supports the allegation. In evidential terms it appears to have come from nowhere.

    i. If the Pelican report evidences anything, it evidences a replacement ownership, inconsistent with that of the Second to Fourth Defendants. There is no explanation of the fact that this report was not relied on against the Fifth Defendant for over a year or the inconsistency between it and (i) the continuing case against the Second Defendant (ii) the judgment obtained against the Third Defendant and (iii) the application to join the Fourth Defendant on the basis that he was a director and the majority shareholder in the First Defendant.

    j. The evidential highlight is the email's statement that the immigration file was at 2013 in the Fifth Defendant's name, but the same email makes it clear immigration is nothing to do with free trade zone papers, so this has no evidential value regarding ownership or directorship.

35. Mr Edey QC for the Fifth Defendant also submitted that the "case theory" behind the allegations against the Fifth Defendant did not hold water. He noted that the reason given in Mr Parish's statement as to why the Fifth Defendant was the sole shareholder is a scheme to avoid sanctions (fronting for the Second – Fourth Defendants). He submitted that there were three problems with this. First, there was no evidence to support it other than some generic articles about sanctions busting. Secondly as a matter of law a front does not give rise to liability because its essence is that there is no direct involvement. Thirdly he pointed out that while the witness statement in

support of joinder/service out placed the need for steps to evade sanctions "from June 2010 onwards", Mr Parish in his twenty first witness statement, made for this application, tied the events which would require fronting to a time period from 2012 – ie. after the critical time period for this litigation.

36. The Fifth Defendant submits that even by itself this evidence, which is second or third hand hearsay evidence does not come close to the level needed for service out. In particular, he says that, properly analysed, it disclosed no evidence that the Fifth Defendant was a director, let alone the sole director and shareholder of the First Defendant, and no evidence of his actual involvement in relevant events.

37. The Fifth Defendant says the position is a fortiori when set against all of the First Defendant's contemporaneous corporate documents, namely that the only shareholders or directors of the First Defendant at any time in its existence, and in particular at the time of the relevant events, have been the Second Defendant, the Third Defendant and the Fourth Defendant. He points to paragraphs 19-24 of Mr Parish's witness statement in support of the application to join the Fourth Defendant, dated after receipt of the Pelican Report, which relied on some of these documents to show that the Fourth Defendant was the manager, director and majority shareholder of the First Defendant and likely to have been involved in the relevant events.

38. The Fifth Defendant also points to evidence of the Second Defendant, the Third Defendant and the Fourth Defendant in these proceedings to the effect that one or more of them were the only directors and shareholders of the First Defendant at the relevant time; and the evidence of the Fourth Defendant that he does not know the Fifth Defendant, or how he is said to be connected to the relevant events, and that the Fifth Defendant was not a director or shareholder of the First Defendant.

39. The Fifth Defendant also relies on his own evidence and that of Mr Al Chawa to the effect that he is not and has never been a director or shareholder of the First Defendant, let alone its sole director and shareholder, let alone at the time of the events in question, and that his only connection to the First Defendant is as Chairman of the RAK FTZ in which it is registered.

40. The Claimant joins issue on this argument robustly. It says that the Fifth Defendant's case that he does not accept on the facts that he was a director or shareholder of the First Defendant is not a matter of "jurisdiction". It may well provide him with an alleged defence, but it is no basis to contest jurisdiction. The Claimant says that there is an inherent contradiction in the Fifth Defendant's approach; in that the Fifth Defendant gave as his reason for not applying to set aside the default judgment as that would require him "to engage with the claim on its merits", yet this argument does precisely that.

41. Moreover it submits that the question of the Fifth Defendant's involvement in the First Defendant is a matter on which the Claimant is entitled to challenge the Fifth Defendant. The Claimant does not accept the evidence that he was not a director or shareholder of the First Defendant, or for that matter, that he knew nothing of these proceedings until "early October 2016". I was referred to the fact that the court does have the power to allow cross-examination of a signatory of written evidence and to

order further disclosure and further information: *Bank of Credit and Commerce International SA v Al Kaylain* [1999] I.L.Pr. 278, Ch D. The Claimant suggested that given the extent of the dispute between the parties on this crucial issue, directions should be given for cross examination of the Fifth Defendant.

42. The Fifth Defendant's second point is to argue that the Claimant does not get close to having much the better of the argument that the claim against the Fifth Defendant passes through the relevant gateway. He relies on two points.

43. The first is that the "necessary and proper party" gateway requires, as a first step, the existence of a live issue between the Claimant and a defendant other than the party sought to be joined ("the anchor defendant") and that it is to that issue which the prospective defendant must be a necessary or proper party. He contends that the Claimant's application failed anywhere to state, as required by the rules, that there was a real issue between the Claimant and the First Defendant (as the anchor defendant) which it was reasonable for the court to try. The Fifth Defendant points to paragraph 55 of Mr Parish's witness statement in support of permission to serve out and says that it addressed the wrong question, simply asserting that there was a real issue as between the Claimant and the Fifth Defendant which it was reasonable for the Court to try.

44. The Fifth Defendant then submits that if one poses the correct question, it could not possibly be said that the test was satisfied, in circumstances where, by the time of the application, judgment had been entered against the First Defendant for non-compliance with orders, such that there was no longer any issue, real or otherwise, in these proceedings between the Claimant and the First Defendant; and there was therefore nothing for the Court here to try, reasonably or otherwise.

45. Secondly the Fifth Defendant submits that he was not a necessary or proper party to the claim against the First Defendant because there was going to be no claim against the First Defendant in circumstances where judgment had already been given; but also because there was no realistic claim against the Fifth Defendant on the evidence.

46. This argument as to the approach to the gateway has the force of clear logic behind it. Indeed, no submissions were made in opposition to it on behalf of the Claimant. While I tentatively explored with Mr Edey QC whether one of the other "live" Defendants could have been used as an anchor defendant, he correctly pointed out that this was not the basis on which the argument had been advanced and that it was hard to see how the Second or Fourth Defendant could serve as an anchor defendant even if that had been addressed. Again, no submission was made to the contrary for the Claimant.

47. So far as concerns forum conveniens, the Fifth Defendant noted that the Claimant's application to serve out did also not address this third critical requirement. The Fifth Defendant submits that the hurdle could not have been met in circumstances where the claim against the First Defendant was over by the time of the application, and there is no connection between the parties or the facts and England; rather all the connections are with RAK or possibly Iran, where the alleged theft of the cargo is said to have occurred. No contrary case was put by the Claimant.

48. The result is that it is clear that this Court has no jurisdiction. In particular there is effectively no issue that the jurisdictional gateway could not be accessed, and that being the case, no real case for England being the convenient forum could be made. It also appears clear that the application for permission to serve out was flawed, with relevant questions not being addressed, and that the case for jurisdiction was not made out as required by the rules at that stage.

49. So far as concerns the merits hurdle, this is therefore in a sense academic. Consequently arguments as to the appropriateness of ordering cross examination on a jurisdictional challenge to do not have to be considered.

50. However I consider that the first hurdle too was not met and that this would be unaffected by any areas of dispute disclosed by the evidence before me. This is because even setting aside such arguments as were very properly raised by Mr Bacon QC for the Claimant as to the status of the respective parties' evidence relating to the Fifth Defendant's possible role in the First Defendant, the Claimant's evidence at its highest simply did not deal with the relevant period of time for the purposes of the claim in this action. Whether or not the Fifth Defendant may have been owner, director or shareholder of the First Defendant in 2013 is irrelevant; there is no evidential basis advanced for saying that he was so in 2011 and no case has been made for why a role later could expose him to direct liability via a veil piercing argument. It follows that cross examination would not in any event have been arguably appropriate.

51. I would add however that the evidential basis for any case as to the Fifth Defendant's involvement in the First Defendant appears extremely insubstantial; and the more so when placed against the strands of evidence including from sources other than the Fifth Defendant which point in the other direction.

Relief from Sanctions

52. Consequently I conclude that the jurisdictional challenge which the Fifth Defendant wishes to advance is one which would succeed, and indeed that the Claimant's case as to jurisdiction would fail on three separate heads (merits, gateway and forum conveniens).

53. The question which remains is whether the Fifth Defendant should be permitted to make that challenge in circumstances where the acknowledgement of service was lodged some two years and four months late. In the usual course of events a party wishing to dispute the court's jurisdiction must make such an application, supported by evidence, within 28 days after filing an acknowledgment of service: CPR 11.4 as amended by CPR 58.7. However, the court does have the jurisdiction to grant a retrospective extension of time where appropriate, *Texan Management Ltd v Pacific Electric Wire and Cable Co Ltd* [2009] UKPC 46.

54. It was common ground between the parties that an application for retrospective extension (made out of time) falls to be decided in accordance with the principles of CPR 3.9 as clarified in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926.

55. In particular it was agreed that this question needs to be approached by reference to the three stage test set out by the Court of Appeal in *Denton*:

> *"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)]".*

56. So far as the first stage is concerned, it is common ground that the breach here was serious and significant. On any analysis the acknowledgement of service is very late.

57. As to the second stage, Lord Dyson and Vos LJ in *Denton* explained that it would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders, though the passages at [41] and [43] in the earlier case of *Mitchell v News Group Newspapers* [2014] 1 WLR 795 indicates the broad thrust of what are likely to be good and bad reasons. So matters beyond a party's control such as illness or accident may constitute a good reason, whereas reasons within their control such as overlooking a deadline will probably not suffice.

58. In this case the Fifth Defendant says that there is here an extremely good reason for the delay, namely that he simply did not know of the proceedings until October 2016; none of the postal or email addresses to which the proceedings were sent by way of service by alternative means were those of the Fifth Defendant and as a result they did not come to the Fifth Defendant's attention in time to acknowledge service within the time laid down in the order, or indeed for over two further years - and then only by chance.

59. The Fifth Defendant's case is that:

    k. The PO Box to which the documents were originally sent was one shared by a number of companies registered in the RAK FTZ, including the First Defendant. It was not an address for the Fifth Defendant. While post to that PO Box is handled by the RAK FTZ despatch team who would have been aware who the Fifth Defendant was, and appear to have passed the documents to someone in the RAK FTZ legal team, the documents did not find their way through the organisation to the Fifth Defendant. The general counsel to whom they did find their way seems to have "sat on them" until she left her post.
    l. The email addresses to which the documents were originally sent belonged to the First Defendant not the Fifth Defendant. As the Fifth Defendant has no connection to the First Defendant (other than being Chairman of the RAK FTZ in which the First Defendant is one of many registered companies), he has never had access to the email addresses used.

m. The pack of documents which included the Claim Form was only discovered by chance by Mr Al Chawa at the end of September 2016, when looking for the First Defendant's file for other reasons. He then brought the documents to the attention of the CEO of the RAK FTZ who in turn brought them to the attention of the Fifth Defendant in the first week of October 2016.
n. The Fifth Defendant did not sooner come to learn of the proceedings by reason of receipt of the default judgment or the order to attend for questioning about his assets, because again they were sent to addresses which were not the Fifth Defendant's and he did not see them. He denies that the email address is his and says that the address given by the owner of that account to DHL was also not his.

60. In essence the Fifth Defendant says that the fact that the proceedings did come to his attention at all is almost pure happenstance. It came about because he is the chairman of the RAK FTZ and that entity offered a postal service for companies doing business there. It was not directed to him in his role as chair and was not directed to an address for the RAK FTZ, but to an address for the First Defendant. He submits it would be wrong to lay the failure of the employees of RAK FTZ to bring the documents to his attention earlier to his account. The employees of RAK FTZ owed him personally no duty to forward mail to him; still less did they owe him a duty to forward misdirected mail to him. Mr Edey QC asked whether if the package had been handed to the Fifth Defendant's brother, who had then forgotten about it for a similar period of time, this could properly be counted as a default by the Fifth Defendant.

61. There is also a second period of time between the receipt of the documents and the lodging of the acknowledgement of service for which to account. The Fifth Defendant says that this comes into the equation at stage 3 of the *Denton* test and not at stage 2, on the basis that the default is the failure to acknowledge service in time, and stage 2 is directed to the explanation for that default.

62. As to this second period of delay the Fifth Defendant says this is explained in detail in Mr Abraham's statement. He submits that it is wrong to say that he should have acknowledged service at once; in the context of a hiatus of 2 years it was only prudent to investigate what had happened in the intervening period. It would, he says, have been foolhardy to acknowledge service if in the interim the proceedings had become dormant. In that context he says the period of delay is perfectly reasonable. It took until November to gain a full picture of what was going on, so that instructions could then sensibly be taken from the Fifth Defendant inter alia as to the question of whether or not he was a director or shareholder of the First Defendant.

63. Thereafter he says it was necessary to retain counsel, and form a view as to the appropriate way forward, plus allowance has to be made for the holiday period. The Fifth Defendant also prays in aid the fact that no prejudice is alleged, the fact that the proceedings in this action have not been fast-moving and not all the documents which he sought were available from the Court file.

64. The Claimant submits that there is no good reason for either period of delay and that both must be considered for the purposes of stage 2. As to the first period of delay, it contends that the explanation given by the Fifth Defendant (through Mr Al Chawa) clearly establishes that service of the Amended Claim Form was effected on the legal department of RAK FTZ, a body of which the Fifth Defendant is chairman, and the registered address of the First Defendant. It says there is no good excuse why the

legal counsel who apparently did find them did not pass them to the Fifth Defendant at once.

65. The Claimant suggests that there are two possibilities, neither of which avails the Fifth Defendant. Either (if the Fifth Defendant is right about when they came to his attention) this was a case of oversight/administrative inadvertence or inefficiency at its highest. The authorities are clear that does not provide a good reason. Administrative oversight was held insufficient by the Court of Appeal in *Secretary of State for Home Department v. Begum* [2016] EWCA Civ 122.

66. The second possibility is that the Fifth Defendant's account is untrue. Mr Parish in his witness statement suggested this to be the case; namely that the Fifth Defendant consciously ignored the proceedings, and only decided to act *"when things started to get more serious" to "avoid what was starting to look like a procedure that could have a most ugly outcome for him"* after he had failed to attend the court for questioning on 13 January 2017, with the result that the Claimant was seeking to have him committed for contempt.

67. On this latter point the Fifth Defendant responds that this is a conspiracy theory unsupported by facts and even makes no sense on the facts. It says that unless Mr Abraham of Baker McKenzie is to be disbelieved (for which there is no basis at all), he was instructed in early October 2016 - well before any missed hearing. Moreover, at that time, nothing was said by the Fifth Defendant about any Order to attend for questioning, which was only discovered after the hearing date.

68. On the later period of delay the Claimant disputes the submission that this falls into stage 3 rather than stage 2; the exercise being performed at stages 1 and 2 is to look at the seriousness of the breach (in delay terms the extent of the total delay) and the excuse for that. Therefore it is necessary to look at the entire period up to the lodging of the acknowledgement of service.

69. Nor does it accept that the delay in this period can be said to have a good excuse. In particular it points out that the Fifth Defendant accepts that he was provided with copies of documents in the first week of October 2016, but no application for an extension of time was applied for until 22 February 2017, over four months later and the explanation for that delay is insufficient in the context of an application for relief from sanctions.

70. Secondly it notes that while Mr Abraham suggests that it was not possible before 28 November 2016 for the Fifth Defendant to be "in a position to advise us that [he] was not, in fact, a shareholder or director of the First Defendant" and this appears to be based on a submission that it was necessary to understand the basis of claim before seeking instructions, the documents served in 2014 included the witness statement in support of permission to serve out, which made plain the basis of the claim. Once this was known it was a matter of a telephone call to establish the position.

71. The Claimant characterises Mr Abraham's evidence as being in many respects full of holes and uncertainties. It refers to a confusion about the documents provided to the Fifth Defendant and questions the supposed need to obtain a copy of the Exhibit to Mr Parish's Eighteenth Witness Statement. It also highlights an unexplained delay between follow up calls to Mr Jallad on 28 November 2016 and the first discussion

with the Fifth Defendant on 13 December 2016 and another between early January 2017 (when counsel was instructed) to 22 February 2017 when the application was issued.

72. So far as this issue is concerned I do not accept the Claimant's arguments insofar as they relate to the period up to October 2016. On the evidence before me it appears likely that the Fifth Defendant did indeed first learn of these proceedings in October 2016. As I have indicated above, the evidence that the Fifth Defendant ever had any role in the First Defendant so as to receive earlier information is very tenuous, based on multiple hearsay from unattributed sources. Against this is the Fifth Defendant's detailed statement supported by equally detailed and circumstantial statements by two legal professionals, as well as the "third party" support of the documents and the other Defendants' cases. In particular it is hard to explain why Baker McKenzie should have been instructed in October 2016 unless the Fifth Defendant's account of when he received the documents is true.

73. Nor do I accept that the delay prior to October 2016 must lie at the Fifth Defendant's door because he was the chair of the RAK FTZ. This case is not akin to the *Begum* case relied on by the Claimant, where inadvertence within a chain of command at the legal person who should have acted (there the Home Office) was in issue. Here there was a misaddressed document which came to the knowledge of people who knew to whom it should be passed, but who owed him no duty to do so. The analogy used by the Fifth Defendant of the leaving of documents with a brother is not perfect, in that the people in question probably did owe the Fifth Defendant obligations in his corporate role, but it is telling. This is a case where there might be a hope that the document would be passed on, but the people involved breached no duty to the Fifth Defendant by failing to do so, and their knowledge could not as a matter of law be attributed to him. The reason which caused the delay was one which was not within the Fifth Defendant's control. It would therefore in my judgment be contrary to principle to in effect fix him with knowledge which he did not in fact or in law have. So far, therefore, the Fifth Defendant had a good excuse for failing to act. This, of course, covers most of the period of delay.

74. However I cannot accept the Fifth Defendant's submissions as regards the period after October 2016. I consider that this period should be counted as part of the stage 2 process for the purposes of the *Denton* analysis. If the Fifth Defendant were correct, the only period relevant for the purposes of stage 2 would be the 22 days up to the date for service of the acknowledgement in 2014. That is plainly artificial. The seriousness and significance of the breach at stage 1 in this context falls to be judged by the total length of the delay until the default is sought to be remedied. That being the case, the excuse for that entire period must be considered at stage 2.

75. Nor can I accept that the period of nearly four months from the receipt of the documents until service of the acknowledgement was covered by a good reason. From this point the extent of delay was within the Fifth Defendant's control. The period for Acknowledgement of Service for defendants in the UAE is 22 days. Any period longer than this would require some cogent explanation. The Claimant is right to say that the service of an acknowledgement is not, per se, a step which requires legal input. While discovering what had happened in the proceedings might be prudent, it was not, as was submitted, imprudent not to make investigations before acknowledging service. The worst thing which the Fifth Defendant was able to

suggest might happen as a result of acting at once was that the Claimant's interest in the Fifth Defendant might be reignited. Given the position on jurisdiction and the position which at least appears to pertain on the merits, this hardly seems like a scenario which should prompt unusual caution, and hence (possibly) excuse delay.

76. Further, so far as jurisdiction and the merits are concerned, I am not persuaded that these essentials could not be sufficiently considered much faster than they were. It does appear that the Fifth Defendant had the witness statement of Mr Parish which set out the basis of the claim and the assertion of jurisdiction from October 2016. Instructions could have been taken on this in short order. Hamblen J's judgment in *Newland 1* of 6 February 2014 against the First Defendant, which underpins much of the jurisdictional challenge, would have been readily accessible via an online search. The points as to the defects in the application for permission to serve out could have been made without detailed instructions, being matters dependent on the CPR rules.

77. I therefore conclude that there was good reason for the first period of delay, but no good reason for the later period of delay. That being the case, the default position entering stage 3 is that there should be no relief from sanctions.

78. However the Court of Appeal in *Denton* also made clear that at the third stage the court must consider whether there are other "circumstances" which indicate against refusing the application. The rule states:

"…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."

79. It is clear that these identified factors are of particular importance and should be given particular weight at this third stage. But other relevant factors indicated by the authorities are: (1) whether the sanction imposed is proportionate to the breach in question; (2) whether the application for relief from sanctions was made promptly; and (3) whether the defaulting party has a poor record as to compliance with proper court procedures. The wording of the rule is quite clear that all the circumstances of the case can come into the equation.

80. As the Court of Appeal explained in *Denton* at para 34-35:

"34 Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

35 Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two

important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. …"

81. On this limb the Fifth Defendant says looking at all the circumstances of the case, it would be a gross injustice for the Fifth Defendant not to be permitted to challenge jurisdiction at this stage, with the consequence that he will remain subject to a judgment in default for over $7m obtained in proceedings about which he knew nothing until relatively recently; in relation to a claim that this Court otherwise has no jurisdiction over as against him; and where it is quite clear that the very serious allegations against him are without any foundation in fact or law.

82. In short, he says, the consequence would be wholly disproportionate to the breach, particularly where it has not been suggested that the Claimant has in any way been prejudiced by the delay or any part of it and the entire proceedings against the Fifth Defendant have proceeded on a wrong basis put forward by the Claimant.

83. Meanwhile on its side the Claimant says there are no other circumstances justifying relief from sanction in this case. It notes that proceedings to examine the Fifth Defendant are underway. It submits that the default here has been entirely caused by inefficiency and delay.

84. It contends that the fact that the Fifth Defendant contends that he has a good case on the merits to defend the claim is not significant. In support of this proposition it refers me to *Agadzhan Avanesov v Too Shymkentpivo* [2015] EWHC 394 (Comm); [2015] 1 All E.R. (Comm) 1260; [2015] 2 Costs L.O. 289, which it says is analogous to the present case. In that case despite a company having established a realistic defence, the court refused to set aside judgments totalling circa $11 million after concluding the delay in making the set aside application was the result of a conscious decision to ignore the proceedings and judgments until faced with the risk of enforcement. The considerations in CPR r.3.9 afforded good reason for refusing the application, which clearly had not been made promptly. The Claimant says in the present case there was also significant and unexplained delay and a similar result should follow.

85. In sum, the Claimant concedes that the refusal of relief in this case may cause some unfairness to the Fifth Defendant, but says that on a correct application of the principles there should be no relief from sanctions regardless of the resultant unfairness.

86. On the *Avanesov* case the Fifth Defendant disputed the argument that the cases were analogous. In particular he points out that in that case there was a conscious decision not to act, whereas here there was not, that there the position on the merits was much more nuanced than is the case in this action in that it was plain that there were numerous issues of disputed fact which could not be resolved until trial and that there was no question as to jurisdiction – that was a case about setting aside judgments where jurisdiction was not in issue.

87. One factor which I raised with both parties was the correct approach to take to "the interests of justice" in the sense of the merits of a particular case. The Fifth Defendant obviously places this factor very high and refers me to paragraphs 37 and 38 of *Denton* warning against an unduly draconian approach; whereas the Claimant, while conceding it is a factor, submits that it is far from being a trump card.

88. The authorities appear to demonstrate that it is at least a factor which needs handling with care. In *Denton* Jackson LJ argued (unsuccessfully) for an approach that the overriding aim of CPR3.9 was that the Court should deal justly with the application, giving factors (a) and (b) a seat at the table, but not the top seats. As the majority noted at [33-35] of the judgment the change in the drafting of the proposed rule 3.9 to remove an explicit reference to the interests of justice in a particular case indicates that factors (a) and (b) must be given top seats with other factors including the interests of justice in a particular case moving further down the list. However as Jackson LJ noted in that case, the shades of difference applied to the factors by the court did not result in any different result on the portfolio of cases which the appeal court was then considering.

89. Further the reasoning behind the elevation of factors (a) and (b) is worthy of note. At [22] of his implementation speech on March 22 2013 Lord Dyson M.R. said that:

> *"one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all court-users."*

90. It seems to me in the light of these authorities that the correct approach is to look first at the particular factors identified in the rule and then at any other relevant factors in the light of the overriding objective – which explicitly invokes the need to deal with cases justly and at a proportionate cost. Also that in so doing it is necessary to bear in mind the importance of the identified factors and the reason for their importance.

91. However, overall the object remains, as the preliminary part of the rule makes clear, to deal justly with the case (bearing well in mind not just the interests of the particular parties but also the wider interests of the justice system). This is reflected in Davis LJ's dictum in *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] 3 Costs LR 588:

"It is also to be emphasised that the courts in considering applications under CPR r 3.9 do not have and should not have as their sole objective a display of judicial musculature. The objective under CPR r 3.9 is to achieve a just result, having regard not simply to the interests of the parties but also to the wider interests of justice. As has been said by the Master of the Rolls (in his 18th lecture [in the Implementation Programme on the Application of the Amendments to the CPR (22 March 2013)]), enforcing compliance is not an end in itself. In the well-known words of Bowen LJ: 'The courts do not exist for the sake of discipline.' Such sentiments have not been entirely ousted by CPR r 3.9, …."

92. As to the first issue specifically highlighted by the Rule, the need for litigation to be conducted efficiently and at proportionate cost, this is not a factor which is particularly in focus in the present case. Very often relief against sanctions issues will crop up in circumstances where an important factor is the knock on effect on the litigation, in the form of adjournments or other manifest inconveniences. Thus in *Newland 1* Hamblen J refused relief in circumstances where the issue related to the provision of witness statements against a tight timetable to trial; and in the *Avanesov* case Popplewell J considered the prejudice in terms of time and costs wasted on enforcement caused by the delay as a significant factor pulling against relief from sanctions. In the other direction in *Chartwell* it was considered a significant factor that the breach had not affected the trial date or generated any significant extra cost. This is not therefore a case such as *Newland 1* where it can be said that the default has had any real effect on the justice system's ability to deal efficiently and at proportionate cost with the dispute; it is much more akin to *Chartwell*.

93. So far as the second issue is concerned - the need to enforce compliance with rules, practice directions and orders, this brings one back to the result of stages 1 and 2. I have concluded that there was a serious and significant breach, and that as to the latter part there was no good reason for it. But there was good reason for by far the greater part of it. Moreover, this is not a case of flouting the rules (contrast *Avanseov* paragraph 68(1) where Popplewell J noted the failure to lodge an acknowledgement as a deliberate decision not to engage in the proceedings, or *Durrant v Chief Constable of Avon and Somerset Constabulary* [2014] 2 All ER 757 where there was a history of non-compliance). On the contrary the second period of delay appears to be referable in part to too great a caution about engaging with proceedings at such a late stage, but also in part to a desire to ensure that the right steps were taken; and once an acknowledgment was served the application followed in due time, if not with notable expedition. Further, while there is a serious and significant breach and no good excuse, I do regard the unexcused breach in the particular circumstances of this case, which has effectively no (a) factors, as being towards the lower end of the scale.

94. Against this I must consider the proportionality of the sanction if relief is not granted. This is not a case such as *Avanesov,* where issues are arguable, but can be put no higher than that. In this case there is an unusually disproportionate sanction, in that for the reasons which I have already given, this is a case where the Fifth Defendant would quite plainly be entitled to have the service of the claim form and the claim form itself set aside as this court clearly has no jurisdiction on the basis relied upon against the Fifth Defendant in relation to the claim sought to be brought against him. To deprive the Defendant of the opportunity to challenge a baseless assertion of jurisdiction when there is no prejudice would in my view be disproportionate. Some further weight is given to this element by the fact that, moving beyond jurisdiction, a refusal of relief now would, as Mr Edey QC submitted, make an application to set aside the default judgment at the very least extremely difficult because that too would be advanced under the principles applicable to this application. Consequently the Fifth Defendant might find himself unable to set aside a judgment which this court had on a proper application of the rules no jurisdiction to pronounce and to which it appears likely there is a powerful defence.

95. In these circumstances it seems to me that a refusal to grant relief in this case would be exactly the sort of display of judicial musculature which Davis LJ deprecated in *Chartwell* and that it would be hard to square with the rule's wording, which makes clear that the consideration of all the circumstances takes place precisely "so as to enable it to deal justly with the application".

96. I therefore grant the Fifth Defendant's application seeking relief from sanctions and also grant the application challenging jurisdiction.