Neutral Citation Number: [2019] EWHC 547 (Comm)

Case No: CL-2010-000196

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2019

Before :

MR JUSTICE JACOBS

- -

Between :

(1) ANOUSHEH BOSTANI **(2) MICHAEL DREYER** **(3) CLAUDE MANN** **(**In their capacity as trustees of the Alfred E. Mann Living Trust)	**Claimants**
- and -	
(1) ROLAND 'ROEL' PIEPER **(2) QUANTUM HOLDINGS LIMITED**	**Defendants**

- -
- -

Fenner Moeran QC and Tim Matthewson (instructed by **Mishcon De Reya LLP**) for the **Claimants**
Stephen Midwinter QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **First Defendant**

Hearing dates: Friday 1st March 2019.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACOBS

MR JUSTICE JACOBS:

A: The application and the factual background

1. In these proceedings, the Claimants apply to lift a stay of proceedings agreed in March 2011 by way of a consent order in the form of a Tomlin Order, which scheduled terms of settlement between Mr. Alfred E. Mann ("Mr. Mann") and the Defendants. Mr. Mann died in 2016. The present Claimants are the Trustees of Mr. Mann's trust, and have been substituted as claimants in place of Mr. Mann in these proceedings. They apply to enter judgment against the Defendants pursuant to the terms of that Tomlin Order.

2. The underlying claim in the proceedings arises out of a debt owed by the First Defendant ("Mr Pieper") under a guarantee. Mr. Mann was, during his lifetime, the sole trustee of The Alfred E. Mann Living Trust ("the Trust"), a trust organised under the laws of California. In November 2008 the Trust entered into a funding agreement with a Luxembourg company called ETIRC Aviation S.a.r.l ("ETIRC"). In effect the Trust agreed to lend $10,000,000 to Eclipse Aviation Corporation ("Eclipse"), and to also lend a further $10,000,000 to ETIRC, which it would in turn lend to Eclipse. ETIRC agreed to repay the Trust the second $10,000,000 by way of issuing an unconditional $10,000,000 promissory note ("the Promissory Note").

3. Mr Pieper was chairman of ETIRC, and as part of the funding agreement he agreed to give a personal guarantee in favour of the Trust for ETIRC's obligations under the Promissory Note ("the Guarantee"). ETIRC defaulted on the Promissory Note on 28th February 2009 and Mr Pieper defaulted under the Guarantee. Once Mr Pieper had defaulted under the Guarantee, on 19th May 2009, the Trust issued proceedings before the Supreme Court of New York, claiming the $10,000,000 plus interest, totalling $10,206,027.39.

4. Mr Pieper defended the claim on jurisdiction grounds, but the Trust successfully obtained judgment on 29th June 2009 in the full sum claimed plus interest ("the New York Judgment"). Mr Pieper tried to appeal the New York Judgment, but his appeal failed and it is now final and Mr Pieper cannot have further recourse to appellate courts.

5. With the New York Judgment having been granted the Trust sought to enforce it against Mr Pieper. On 4th November 2010, the Trust issued the current action before the English court seeking to enforce the New York Judgment. At that time the claim was for $10,206,027.39 plus interest at a per diem rate of $2,796.17. The pleaded claim was for the judgment debt due on the New York Judgment.

6. Mr Pieper filed his defence on 7 January 2011 and sought to defend the English claim on various bases. The Trust's position is, and was, that there was no defence to the claim. In the meantime, on 4th November 2010 the Trust sought, and on 8th November 2010 obtained, an *ex parte* worldwide freezing order from Christopher Clarke J ("the 2010 WFO"). The 2010 WFO was continued, subject to certain minor amendments, at the return date before Beatson J on 22nd November 2010.

The Tomlin Order

7. Mr Pieper applied to discharge the 2010 WFO. The Claimant applied for summary judgment. The two cross-applications were listed to come before the Court on 11th February 2011, but the parties entered into settlement negotiations, the result of which was a compromise agreement. That compromise agreement was then embodied in the Tomlin Order which David Steel J approved and made on 23rd March 2011.

8. The body of the Tomlin Order contains various recitals, including that the Claimant and the Defendants had agreed terms of settlement. It then provides that:

> BY CONSENT
>
> IT IS ORDERED that all further proceedings in this matter be stayed upon the terms set out in this Order and Schedules 1 and 2 hereto, except for the purposes of enforcing those terms.
>
> AND IS FURTHER ORDERED that any party may be permitted to apply to the court to enforce the terms upon which this matter has been stayed without the need to bring a new claim.
>
> AND IT IS RECORDED that the parties have agreed that any claim for breach of contract arising from an alleged breach of the terms set out in the Schedules to this Order may, unless the Court orders otherwise, be dealt with by way of an application to the Court without the need to start a new claim.

9. Paragraph 1 of the body of the order then provides that the Claimant is given permission "to amend the Claim Form and Particulars of Claim in this Action in the form annexed to this Order and initialled by the Judge". The original Claim Form contained a claim for payment of the amount due under the New York Judgment. The amended claim added an additional claim which is not material for present purposes. Paragraph 2 joined the Second Defendant, Quantum Holding Ltd ("Quantum") to the proceedings and waived service.

10. Paragraph 3 of the order provided that:

> All further proceedings in this Claim shall be stayed except for the purpose of carrying into effect the terms set out in Schedule 2.

11. Paragraph 4 of the order provided for the WFO to remain in force, except that it would cease to be a worldwide order when the Claimant was paid $5m under the compromise. There is no dispute that this did not happen. Paragraph 6 of the order provided for the vacation of the WFO upon the Defendants having fully complied with the compromise schedule. Again, there is no dispute that this did not happen.

12. The terms of settlement are then found in Schedule 2 to the Tomlin Order. The important terms are as follows.

13. Paragraph 1 provided for the Defendants (i.e. both Mr. Pieper and Quantum) to make payments totalling $11m to the Claimant between 10 June 2011 and 7 December 2012:

    i) $2 million by 4pm on 10 June 2011;

    ii) $1 million by 4pm on 5 August 2011;

    iii) $2 million by 4pm on 9 December 2011;

    iv) $2 million by 4pm on 9 March 2012;

    v) $2 million by 4pm on 8 June 2012; and

    vi) $2 million by 4pm on 7 December 2012.

14. Paragraph 3 then provided for what happens if there is a default by the Defendants in making those payments:

> If the Defendants fail to make any of these payments on the dates set out in paragraph 1 above the Claimant shall be entitled to enter judgment
>
> (i) against the First Defendant in the full amount of the Claimant's claim against him as set out in the Amended Claim Form and Amended Particulars of Claim herein together with interest thereon at the rate of US$2796.17 from the 4 November 2010 up to the date when judgment is entered against him LESS any sums which shall have previously be [sic] paid to the Claimant pursuant to this Schedule 2; and
> (ii) against the Second Defendant in the same amount as set out in sub-para (i)
>
> and both Defendants shall be deemed to have consented to the entry of that judgment.

Subsequent events and the parties' arguments

15. Mr Pieper made the first two payments due under the Tomlin Order, i.e. the $2m due by 10 June 2011, and the $1m due by 5 August 2011. Then he stopped. Since then he has not made any of the payments due under the Tomlin Order. The Claimants contend that the Defendants are in breach of paragraph 1 of Schedule 2 to the Tomlin Order, and that they are entitled to enter judgment against them for the full sum originally claimed, plus interest, less the $3m already paid. The total is currently US$17,423,232.57 including interest.

16. The First Defendant resisted this claim on three separate grounds.

17. First, he contend that an oral agreement was reached in the course of meetings in February and March 2012 between Mr. Mann and Mr. Pieper. The agreement was that:

    a) Mr. Pieper would work to assist Mr. Mann in the development of business opportunities;

b) Mr. Pieper would at Mr. Mann's request enter into agreements to share with the Trust the proceeds of certain realisable assets that Mr. Pieper held, and that the WFO would remain in place but be varied so as to allow the sale of those assets; and

c) No further action would be taken in relation to the Tomlin Order or the payment obligations in it.

18. Secondly (although at the forefront of the submissions of Mr. Midwinter QC for the First Defendant) he contend that the Claimants' claim to enforce the settlement agreement scheduled to the Tomlin Order is time-barred.

19. Thirdly, they contend that the application should be rejected because it constitutes an abuse of process on the grounds of delay.

20. The Claimants contend that there is no substance in any of these arguments. First, they say that there is no satisfactory evidence upon which the court could possibly conclude that there was any agreement that no further action would be taken in relation to the Tomlin Order. The documentary record is, they say, flatly inconsistent with any such contention. They rely heavily upon written agreements reached in May 2012 and May 2013 which, they contend, preclude the argument currently advanced.

21. Secondly, they say that the claim is not time-barred for a number of different reasons described below.

22. Thirdly, they contend that there has been no material delay, and none which would qualify as an abuse. Although there has been a significant gap between the time when the settlement instalments should have been paid, and the application to enter judgment, the Defendants have always known that the Claimants were still pursuing them for monies owed, and that there has been no material variation of the WFO or Tomlin Order. Proceedings have been active in particular in France. The present proceedings have been reactivated, together with other proceedings, because the Claimants have discovered the existence of previously unknown assets.

B: The alleged oral agreement

23. The present application is an application to give effect to a settlement agreement scheduled to a Tomlin Order, by entering judgment in consequence of breaches of that agreement. There is no dispute that the sums due in respect of the 3rd – 6th instalments were not paid. The Claimants therefore have (subject to the question of limitation) a prima facie entitlement to the judgment which they seek; i.e. to a judgment which would give effect to the Court's order.

24. However, the First Defendant contends that the court should decline to give effect to that prima facie entitlement because of the oral agreement relied upon by Mr. Pieper. A threshold question arises as to the standard which the court should apply in considering the argument as to the alleged oral agreement. Should it determine the matter on the balance of probabilities, based on the documentary and other evidence submitted? Should it adjourn the matter so that there can be oral evidence and cross-

examination of witnesses? Should it take an approach, analogous with CPR Part 24, of asking whether the First Defendant's argument has "no real prospect of succeeding"?

25. It seems to me that there is much to be said for the view that this is an application to enforce an order of the court, and that the court should simply form a view on the existing evidence as a whole as to whether it is appropriate to enforce its existing order; or, conversely, whether it should decline to do so because of the issues raised by the First Defendant. In circumstances where the Claimants can show a prima facie entitlement to the judgment sought, the evidential burden if not the legal burden would be on the Defendants to provide the court with satisfactory evidence that would persuade the court to take a different view; i.e. to decide either not to enforce, or to decide that the matter is not capable of being fairly resolved on the documents or existing evidence alone and requires cross-examination of witnesses. In practical terms, however, I consider that in the context of the present case, the test to be applied is whether or not a further evidential hearing is required because the First Defendant has a real prospect both of proving the oral agreement on which it relies, and also of showing that this would be an answer to the Claimants' claim. For the reasons which follow, I consider that the answer to both questions is "no". In short this is because: (i) there is no documentary evidence to support the assertion of an agreement in February/ March 2012 that no further action would be taken in relation to the Tomlin Order or the payment obligations in it; (ii) the documentary evidence is inconsistent with that contention; and (iii) in any event, the argument is precluded by the express terms of written agreements made in May 2012 and May 2013.

26. The history of the parties' dealings, relevant for present purposes, and my conclusions as to what the documentary record shows are as follows.

27. On 14 March 2012, Mr. Mann (who is now deceased) wrote to Mr. Pieper by email. The email was copied to Mr. B. Ted Howes who was Mr. Mann's attorney and who then worked for the US firm McDermott Will & Emery ("MWE"). The email reads:

> Roel, my attorney asked about our meeting. I described our discussions and sent him your emails. He is understandably very sceptical but understands that I am prepared to work with you. He wants to prepare or at least review any documentation.
>
> He needs the details of the 3 companies and will want some way to protect my position. Can we have an agreement on the proposed sharing backed up by the stock positions held in escrow? He is saying that we need those agreements in place before I release your severance money. That seems to make sense and would not harm you. But it would put pressure on you to complete our agreement on that part of the arrangements.

28. It is clear from this email that there had been discussions between the parties with a view to the provision of certain assets to Mr. Mann in relation to the outstanding amounts owed, but nothing had been agreed at this stage. There is no reference to any agreement that no further action would be taken in relation to the Tomlin Order or the payment obligations in it. Mr. Pieper's response on the same day refers to what his

"proposals" are, but contains no suggestion that there had been any concluded agreement.

29. The email traffic continued over the next few days, with a more detailed proposal from Mr. Pieper but no suggestion of a concluded agreement and on 17 March 2012, Mr. Howes wrote to Mr. Pieper, copied to Mr. Mann and his partner Mark Mihanovic, as follows:

> My partner, Mark Mihanovic, will be taking the lead on structuring and documenting any deal. I have copied Mark above. You should copy both him and me on all emails related to this subject.
> Mr. Mann will not waive any aspects of the Freezing Order until and unless we can first finalize and execute the deal. While Mr. Mann is out of the country for the next week, Mark and I are available to discuss terms and move this along in his absence … We take it from your emails that you have not retained an attorney for the negotiation of this deal, but if you do, please send his/her information to us.

30. Accordingly, what was happening at this stage was a negotiation towards a deal of some kind, but no suggestion from either side that anything binding or even concluded had been reached. There were then some further exchanges, and Mr. Howes again reminded Mr. Pieper on 19 March 2012 that Mr. Mann "will not waive any of his rights under the Freezing Order until and unless a satisfactory deal can be worked out and executed". Further correspondence took place in late April and early May, with Mr. Mihanovic expressing discontent at Mr. Pieper's failure to provide certain information and material which Mr. Mihanovic had requested.

31. One of the matters which had been under discussion in that correspondence was a variation of the WFO so as to allow payment of £116,874 by Quantum to Mr Pieper towards his ordinary business or living expenses. Agreement on this specific point was reached and was formally recorded in a letter from MWE dated 18 May 2012 countersigned by Mr Pieper. This stated:

> As you know, we represent Mr. Alfred E. Mann. We refer to the Order of the Honourable Mr Justice Christopher Clarke on 8 November 2010 and continued by the Honourable Mr Justice Beatson on 22 November 2010 ("the Freezing Order") and to the Order of Mr Justice David Steel dated 23 March 2011 ("the Consent Order") in the above proceedings.
>
> Pursuant to paragraph 11 (3) of the Freezing Order, this letter records the terms upon which Mr. Mann agrees to a one-off variation of the Freezing Order in relation to certain assets that are subject thereto
> …
>
> 3. You will be permitted to deal with and/or dispose of the Released Sum in your ordinary and proper course of business and/or towards your living without breaching the terms of the Freezing Order and/or Consent Order
>
> 4. You hereby agree and confirm that, save as explicitly set out herein:
>
> (a) The Freezing Order and Consent Order shall remain in full force;

> (b) Mr Mann retains and reserves all rights whether past, present or future arising under or relating to the Freezing Order and/or Consent Order; and
>
> (c) That no release, waiver, concession or forbearance under the Freezing Order or Consent Order shall be effective whether arising prior to, on or after the date of this variation.

32. This letter was countersigned by Mr. Pieper. In my judgment, the letter is important, and irreconcilable with the First Defendant's case as to the oral agreement, for three related reasons.

33. First, the agreement between the parties was documented in clear terms, with the involvement of Mr. Mann's lawyers. Were any agreement to have been reached as alleged by the First Defendant, one would have expected it to have been documented formally and in writing, counter-signed by Mr Pieper. The absence of such a document in relation to the alleged March 2012 Agreement is therefore telling.

34. Secondly, the agreement of 18 May 2012 expressly provided that the Freezing Order and the Tomlin Order remained in full force. This necessarily means, contrary to the submissions of Mr. Midwinter and the evidence of Mr. Pieper, that there can have been no oral agreement that "no further action would be taken in relation to the Tomlin Order or the payment obligations in it". Such an oral agreement would directly contradict a written agreement that the Tomlin Order remained in full force. The alleged oral agreement is also inconsistent with the reservation of "all rights, whether past, present or future, arising under or relating to the Freezing Order and/or Consent Order".

35. Thirdly, the final sub-paragraph provides that "no release, waiver, concession or forbearance under the Freezing Order or Consent Order shall be effective whether arising prior to, on or after the date of this variation". I agree with Mr. Moeran QC that the effect of this clause is to preclude reliance on the alleged prior oral agreement relied upon. The critical part of the oral agreement alleged is that "no further action would be taken in relation to the Tomlin Order or the payment obligations in it". Such an agreement would clearly fall within the words "release, waiver, concession or forbearance under the … Consent Order."

36. On 29 May 2013, the parties signed another letter. This concerned the possible sale of some French properties. Again, it was a limited variation of the WFO. The letter was written on Mr. Mann's headed notepaper, but adopted much the same language as the May 2012 agreement. It was again countersigned by Mr. Pieper. In material part, it again provided:

> 4. You hereby agree and confirm that, save as explicitly set out herein:
>
> (a) The Freezing Order and Consent Order shall remain in full force;
>
> (b) I [i.e. Mr. Mann] retain and reserve all rights whether past, present or future arising under or relating to the Freezing Order and/or Consent Order; and

> (c) That no release, waiver, concession or forbearance under the Freezing Order or Consent Order shall be effective whether arising prior to, on or after the date of this variation.

37. This letter is important, and destructive of the First Defendant's case, for the same reasons as the May 2012 letter.

38. It therefore seems to me that the First Defendant's case can be dismissed by reference to the clear correspondence, and that any further hearing is unnecessary.

39. Mr. Midwinter submitted that the correspondence, and the written agreements reached in May 2012 and May 2013, could and should be read as being consistent with Mr. Pieper's case, and there was nothing in the documents which contradicted it. The essence of the argument was as follows. There was an agreement that there would be no further action in relation to the Tomlin Order. There was also agreement that assets would be transferred to Mr. Mann at the latter's request, with the precise nature of the assets being subject to further negotiation and agreement. Negotiation for the transfer of assets could be seen in the correspondence, and an agreement in relation to some assets in the May 2013 agreement itself. Mr. Pieper also agreed to work to assist Mr. Mann in the development of business opportunities. The agreement reached was that the Tomlin Order and the WFO would remain in place in order to underpin the negotiations for the transfer of the assets and the obligation of Mr. Mann to work in the development of business opportunities. If Mr. Pieper had failed to carry out his part of the March 2012 agreement – by failing to work on business opportunities, or failing to transfer assets requested by Mr. Mann – then the Tomlin Order could be enforced. But here there was no breach of the agreement by Mr. Pieper of his obligations created by the March 2012 agreement: he did transfer some assets, and he did work to assist Mr. Mann. Therefore the agreed suspension of the Tomlin Order remained fully effective. In summary therefore, the Tomlin Order did remain in place, but only as supportive of the March 2012 oral agreement. It was only if there was a breach of that oral agreement that there could be any question of enforcement of the Tomlin Order. In this way, the Tomlin Order did remain in full force, but only in relation to the March 2012 agreement.

40. I do not accept this argument. There is nothing in the correspondence which evidences any agreement to what amounts, on this case, to a very significant limitation or narrowing of the Tomlin Order. I also consider that the submission cannot stand with the clear terms of the May 2012 and May 2013 agreements, both of which were concluded after the March 2012 oral agreement relied upon. The May 2012 agreement begins by referring to the WFO and the Tomlin Order, and then sets out a limited variation of the WFO; i.e. so as to allow the payment of certain funds to Mr. Pieper. But there is no other variation. On the contrary, there is explicit agreement that both the WFO and the Tomlin Order remain "in full force". The words "in full force" mean precisely that: there is no narrowing of the scope or impact or terms of the Tomlin Order. This is not therefore consistent with Mr. Pieper's argument, as summarised above, that the Tomlin Order was now referable only to and supportive of the alleged oral agreement of March 2012, and could only be enforced in the event of a breach of that agreement. Similarly, Clause 4 (b) provides for a reservation of all rights, whether past present or future, by Mr. Mann. "All rights" again means precisely that: there is no limitation in the rights which have been reserved. Finally, in Clause 4 (c), there is express agreement that no previous release, waiver, concession or forbearance shall

be effective. This provision necessarily applies to the alleged oral agreement relied upon. The same conclusions apply to the May 2013 agreement which was in materially similar terms.

41. In reaching my conclusions on this issue hitherto, I have not found it necessary to refer to the evidence which the Claimants have obtained from both Mrs. Mann and Mr B. Ted Howes. That evidence does, however, serve to confirm the conclusion to be derived from the correspondence, that there was no agreement as Mr Pieper claims. That conclusion is also supported by correspondence subsequent to the May 2013 agreement. Thus, on 22 December 2014, Mr. Mann wrote:

> Roel, the award by the French court stands and is further subject to the agreement in 2013 regarding sale of certain properties. That arrangement still stands.
>
> In the event your efforts with China end up with some value to MannKind and me I will then consider further revision of the Court order as part of the compensation to you. However, unless there is value created in a deal directly between China and MannKind there is to be no agreement for change in the obligations for assets as currently established. In the event of an agreement for China we will then discuss what would be an appropriate change but not before.

C: The limitation issues

The parties' submissions as to limitation

42. On behalf of the Claimants, Mr. Moeran submitted that no question of the application of any limitation period arose in this case.

43. First, the Limitation Act operates on the basis of when proceedings are issued. In this case, the proceedings were issued long ago, and the Tomlin Order is enforced by means of an application in these proceedings. Therefore no limitation period could apply. Rather than issuing proceedings, a party to a Tomlin Order who wishes to enforce its terms needs to apply to the court to give judicial force to the relevant provisions.

44. Mr. Moeran emphasised that the Claimants were not making a new claim. They were seeking judgment on the existing claim as set out in the amended Particulars of Claim which were referred to in the Tomlin Order dated 23 March 2011. Thus, no new action was being issued or needed to be issued: see *The Bargain Pages Ltd. v Midland Independent Newspapers Ltd.* [2003] EWHC 1887 and *Starlight Shipping Company v Allianz Marine & Aviation and others* [2011] EWHC 3381. The present application was therefore all about enforcement of the original proceedings. No amendment was required, and there was no enlargement of the claim. All that was being sought was the carrying into effect of Clause 3 of Schedule 2 to the Tomlin Order; namely the entry of judgment in respect of the amounts owed under the New York Judgment in consequence of Mr. Pieper's failure to make payments pursuant to Clause 1. No claim was being made for breach of Clause 1 itself, or indeed for breach of any of the other terms of the settlement agreement contained in Schedule 2.

45. Accordingly, there was no new cause of action for the purposes of section 35 (3) of the Limitation Act. No pleadings required to be amended. No fresh action was required or indeed could sensibly be started in order to seek the entry of judgment within the present proceedings. Indeed, the settlement agreement contained an express provision which entitled the Claimants to enter judgment, and this must refer to judgment within the present proceedings.

46. Secondly, by way of analogy to the entry of judgment under an unless order, the sanction is already provided for and the Court is just making good on that sanction without any discretion being exercised. At worst, however, even if the Court retained some sort of discretion with respect to the application, including to apply the Limitation Act by way of analogy, it would not be appropriate to do so here. The last breach occurred on 7 December 2012, and this was (just) less than 6 years before the application to enter judgment was made to the court on 4 December 2018. The relevant date for assessing limitation, if relevant, was the date when the application was made to enforce Clause 3 of Schedule 2.

47. Thirdly and in any event, however, there was a clear acknowledgment of the debts owed under the settlement agreement in the signed agreement dated 29 May 2013, in which Mr. Pieper agreed that the "the Freezing Order and Consent Order shall remain in full force". The effect of that acknowledgment was that the limitation period would re-start on 29 May 2013 so that the present application is well within time.

48. For Mr. Pieper, Mr. Midwinter put limitation at the forefront of his argument. He submitted that the Limitation Act must be applicable, because otherwise a claim arising from a breach of the settlement agreement would never become time-barred, and might be potentially enforced 50 years from now. It was procedurally convenient for the settlement agreement to provide that there could be an application within the existing proceedings rather than by commencing a new claim. But this did not mean that the Limitation Act was disapplied.

49. He submitted that, as a matter of substance, a new claim was being made. The application was a new claim for breach of the settlement agreement, which was said to give rise to a right to resurrect the original action. There was currently no such pleaded claim, and the Claimants must therefore apply for permission to amend their Particulars of Claim to allege a breach of the settlement agreement pursuant to CPR r17.1(2) and 17.3. These were new facts not covered by the original claim. An amendment was not permissible because more than 6 years have expired since the date when the settlement agreement was breached. The final breach occurred in December 2012, and this meant that it was too late for the court now to grant permission to amend, since the time-bar was to be applied as at the date when the application to amend was determined rather than the date when it was made: see *Welsh Development Agency v Redpath Dorman Long Ltd.* [1994] 1 WLR 1409. Furthermore, the relevant question, in the context of an amendment to raise a new claim is whether or not the limitation defence is arguable. If so, the relevant claim needed to be pursued in a separate action.

50. The need for amendment in a case such as the present could be tested by asking what would happen if there was a significant factual dispute as to whether there had been a breach of the relevant contract. That might be a relatively simple issue in the present case, where breach was admitted. But there may be settlement agreements or other

contracts (e.g. for the supply of widgets of a particular specification) where the dispute would be more complex, and where the parties' respective cases would need to be set out in amended pleadings.

51. In summary, Mr. Midwinter submitted that in order to obtain the relief sought, the Claimants needed to amend their Particulars of Claim to plead a breach of the settlement agreement and could not do so because a relevant limitation period has, or has arguably, expired. The same result could be achieved by reference to the express provision in the recital to the Tomlin Order that the Claimants may raise the breach of the settlement agreement by way of application rather than new claim "unless the Court otherwise orders". In the present case, the Court should otherwise order so as to avoid the Claimants circumventing the need to bring a claim within the limitation period.

52. In relation to the Claimants' argument that the claim was in any event within time because the application was made on 4 December 2018, which was less than 6 years after the final breach (6 December 2012), Mr. Midwinter's primary point was (see above) that limitation needed to be considered by reference to the date when the amendment application was determined, not when it was made. He also submitted, however, that the cause of action under Clause 3 was complete when any payment was not made. Here, there was a complete cause of action under Clause 3 as and when payment was not made in December 2011 or shortly thereafter.

53. As to the argument as to acknowledgment, Mr. Midwinter submitted that there was no acknowledgment of a debt. The reason for this was because of his primary submission as to the limited effect of the May 2013 agreement; namely that whilst the Tomlin Order did remain in full force, but only in relation to the alleged March 2012 oral agreement, and only operative if there was a breach of that agreement. Accordingly, the May 2013 agreement was only, to that extent, an agreement that Mr. Mann's rights would not be prejudiced, but it did not contain an acknowledgment.

Analysis and conclusions on limitation

54. The initial question is whether the enforcement of obligations contained in a settlement agreement scheduled to a Tomlin Order is subject to the six year time period for "actions founded on simple contract" in s.5 of the Limitation Act 1980. There is no decisive authority on this point, but Sir Andrew Morritt VC in *The Bargain Pages* clearly considered that the Limitation Act was potentially applicable, although in the event he considered that the relevant obligation was a continuing obligation and therefore the remedy was not barred by limitation: see paragraph [22]. I consider that Sir Andrew Morritt was correct to regard the Limitation Act as potentially applicable to a settlement scheduled to a Tomlin Order. Such a settlement remains a 'simple contract' for the purposes of limitation. The court's approach to the construction of that contract or the assessment of any damages claimed would be in accordance with usual contractual principles. I see no reason why the Limitation Act should not also be applicable. It is true that when an order is sought for the enforcement of terms contained in a Tomlin Order, that can be described as the enforcement of the court's own orders: see *Starlight* paragraph [29 (i)]. In that sense, it could be said that proceedings to enforce the terms scheduled to a Tomlin Order is something different to an action "founded on a simple contract". However, the substance of such an application is to enforce contractual rights, and it would be

surprising if the consequence of scheduling those rights to a Tomlin Order was to insulate a claim for breach of contract from the statute of limitation.

55. If, in the present case, the Claimants had sought the enforcement of the obligation to pay the third instalment (originally due on 9 December 2011), it is difficult to see why they should be entitled to do so outside the 6-year limitation period. Indeed, the logic of the Claimants' argument is that there would never be a limitation bar to the enforcement of such a claim; so that it could be enforced some 10 or 50 years later, subject only to the possible exercise of the court's discretion not to enforce its own orders. This would be a very surprising conclusion.

56. In the light of these conclusions, it seems to me that the entitlement given to the Claimants, under Clause 3 of the settlement agreement, to enter judgment in consequence of a breach of contract is also subject to a 6 year limitation period. That entitlement is simply the consequence of breach, and I can see no reason why the limitation period should not apply to the exercise of that right arising in consequence of breach. To that extent, I agree with Mr. Midwinter's submissions on limitation.

57. However, in my judgment Mr. Midwinter's argument then breaks down. There is nothing in the authorities which suggests that the enforcement of the obligations in the agreement scheduled to a Tomlin Order requires either the commencement of fresh proceedings, or the amendment of existing pleadings. On the contrary, the basic idea of a Tomlin Order is that a party can move easily to the enforcement of those obligations, because that party is asking the court to enforce its own orders. In *Starlight* at [34] Burton J said:

> "There is no doubt that this action continues in existence and to have effect notwithstanding the stay. The steps now taken to enforce the Tomlin Orders are not in any way enlarging the original action, but are taken in pursuance of it, and permitted by the Orders, as I have concluded".

58. This is the clear effect of the present Tomlin Order. Its express terms provide that any party can apply to the court to enforce the terms of settlement "without the need to bring a new claim". This is what the Claimants are doing by virtue of the present application. The additional paragraph in the body of the order ("AND IT IS RECORDED THAT … without the need to start a new claim") seems to me to be directed at making clear that matters such as an enquiry into damages can be dealt with by way of an application in the existing proceedings, and therefore to resolve any potential issue along the lines of that considered in paragraphs [24] – [30] of *Starlight.* This additional paragraph does serve to confirm, however, that an application is all that is required, and I see no reason in the context of the present case, which involves the simple enforcement of the terms of settlement, to "order otherwise".

59. Thus, the Claimants are simply inviting the Court to implement Clause 3 of the settlement agreement, which expressly entitles them to enter judgment in "the full amount of the Claimant's claim against [Mr. Pieper] as set out in the Amended Claim Form and Amended Particulars of Claim", and to which Mr. Pieper's deemed consent was expressly given. There is no enlargement of the original action, which was for the full amount of the New York Judgment. There is no new claim which is being advanced: the judgment which is now sought is for the sum claimed in the proceedings in which a settlement agreement was made, scheduled to a Tomlin Order,

and then breached. In these circumstances, I do not consider that the Limitation Act s. 35 (3) or CPR r. 17 (4) has any application at all.

60. I therefore reject Mr. Midwinter's submission which was to the effect that whenever a party sought enforcement of the terms scheduled to a Tomlin Order by reason of a breach of those terms, a party is bringing a new claim which should in principle be pleaded; but that the point is never usually taken because, unless limitation arises, it is a point which goes nowhere. The true position is that the enforcement of a Tomlin Order does not require a fresh action, or fresh pleadings or anything of that kind, because the court is simply being asked to enforce an existing order in an action which remains extant, but where proceedings have been stayed. It may be that if there were a case of some complexity as to whether or not there was a breach, the court might require the parties to set out their respective cases in writing. But this is not the same as requiring amendments of the pleadings. And in any event, there is no dispute that, in the present case, the relevant payments were not made.

61. The question which then arises is whether, given that I consider that the Limitation Act is potentially applicable, the present application to enforce the terms of the Tomlin Order is nevertheless time-barred. It seems to me that this must depend upon whether the application to enforce Clause 3 of the settlement agreement was made within time. In order to enforce Clause 3, the Claimants were not required to issue new proceedings. Indeed, I agree with Mr. Moeran's submission that it would be difficult to see how it would be appropriate to issue new proceedings in order to ask for judgment within the existing proceedings. Nor were the Claimants required to amend their pleadings, or to seek leave to do so. As I have said, no new claim was being advanced, and the Claimants were simply asking for judgment on an existing claim where proceedings were commenced well within time. Given that the initiating process for enforcement of the terms scheduled to a Tomlin Order is simply the making of an application, I consider that the relevant date for determining the time-bar issue is the date when the application was made.

62. In the present case, the application was made on 4 December 2018. That application was in my view in time, because the right under Clause 3 arose if the Defendants failed to make "any of the payments on the dates set out in paragraph 1". It is true that a right under Clause 3 arose when there was a failure to pay on 9 December 2011 or shortly thereafter, and that the present application was made more than 6 years after this right arose. However, further rights arose on each of the subsequent days when payments were not made, including 7 December 2012 when the final payment should have been made. The application to enforce was made within 6 years of the date when the right under Clause 3 in respect of that final default arose.

63. In the light of that conclusion, I can deal briefly with the argument on acknowledgment. Clause 4 of the May 2013 written agreement states that the "Consent Order" remains in full force. By that time, Mr. Pieper had failed to pay the 3rd – 6th instalments, the due dates for which had passed. The obligation to pay those instalments, which were debts, form part of the "Consent Order" which remained "in full force". The only sensible construction of that provision is that Mr. Pieper was acknowledging that those debts remained due and owing.

64. I have already rejected the First Defendant's argument that the May 2013 agreement was of limited effect. But even if that argument were to be accepted, I see no reason

why the May 2013 agreement did not contain an acknowledgment. The premise of that argument is that the Tomlin Order did remain in force, at least for the limited purposes of giving effect to the alleged March 2012 oral agreement. Even on that basis, the May 2013 agreement contained an acknowledgment that the relevant debts remained due and owing.

65. Accordingly, for this additional reason, namely acknowledgment, the present application is not time-barred.

D: Abuse of process

66. The First Defendant submits that the application should be dismissed as constituting an abuse of process. He referred to the decision of Barling J. in *Wearn v HNH International Holdings Ltd.* [2014] EWHC 3542 (Ch), paragraphs [65] – [72]. In summary, delay by itself does not constitute an abuse of process, and it is necessary for there to be some additional factor. This can include, for example, the fact that a claimant is 'warehousing' proceedings to pursue at his own convenience, or appears to have lost interest in the pursuing the litigation to judgment, or that the delay has caused prejudice to the defendant or that delay could prejudice a fair trial of the action. The duty on a claimant to pursue a claim expeditiously was all the more important when the claimant had already received a significant benefit at the expense of the defendant from the action, for example an interlocutory injunction to the defendant's disadvantage.

67. In the present case, the First Defendant submitted that the Claimants had done nothing to prosecute the action between the date of initial breach of the settlement agreement in late December 2011/ early January 2012 and late 2018. In the meantime, Mr. Pieper had worked without pay to assist Mr. Mann in his business ventures and was subject to the WFO. The underlying debt was accruing interest at an astonishing rate, so that the judgment sum is now over US$ 17 million. There was no indication that Mr. Mann had any intention of pursuing a claim for breach of the settlement agreement during his lifetime, or that the Claimants had any such intention until December 2018. Mr. Mann had died in the meantime, meaning that he could not give corroborative evidence to support Mr. Pieper's account.

68. I agree with the Claimants' submissions, however, that there is nothing on the facts of the present case which amounts to an abuse of process. The starting point is to recognise that this is a case where the original underlying claim was pursued to judgment in the New York proceedings, and was then pursued close to judgment in the subsequent English proceedings, when it was then settled by a compromise agreement contained in the Tomlin Order. That compromise agreement was then breached by the Defendants, as indeed is admitted by the First Defendant. In May 2012 and May 2013, Mr. Pieper entered into agreements which recognised the continuing force of both the WFO and the Tomlin Order. There was, as I have already concluded, no oral agreement which was made in March 2012 which negated the effect the WFO and Tomlin Order.

69. Any work that Mr. Pieper may have carried out to assist Mr. Mann's business ventures was therefore carried out against the background where Mr. Pieper had agreed initially to the terms of a Tomlin Order, and then subsequently confirmed his agreement that both the Tomlin Order and WFO should remain in place. Similarly,

Mr. Pieper knew that for so long as the Defendants failed to pay the sums which they had agreed to pay, interest would be accruing on the debt. The Defendants have not made any further payments towards their indebtedness since 2011. Moreover, I have rejected the argument that there was an oral agreement in March 2012 which limited the effect of the Tomlin Order, and no case has been advanced that subsequent to that time, and in particular subsequent to May 2013, there was any agreement that the indebtedness would in any way be forgiven or suspended. This is therefore a case where the Claimants have established that they have been owed significant sums for a long time, and the Defendants have wrongfully failed to pay them. In my view, these facts alone are sufficient to dispose of any argument that it is now an abuse of process for the Claimants to pursue their entitlement to the monies owed.

70. However, there are further facts that are also relevant. In the 22 December 2014 email (quoted above), Mr. Pieper was told that unless value was created in any Chinese deal, there would be "no agreement for change in the obligations for assets as currently established". This was reiterated in the email correspondence later that day, including from Mr. Howes. The context of the email traffic on that day was litigation in France, which Mr. Pieper wanted to end because "we are wasting time and money". Mr. Mann was not willing to end that litigation in 2014, and the evidence before me is that there has been continuing litigation in France, with various hearings and submissions from 2014 to the present time. Accordingly, notwithstanding inaction in the English proceedings, there have been continuing efforts in France to recover monies in satisfaction of those owed by the Defendants.

71. There has also to my mind been a satisfactory explanation of the absence of steps taken in the English proceedings. Within around 6 months from the time of the correspondence in December 2014, Mr. Mann's health began to fail and he was no longer able to maintain his former intensive work schedule. He was admitted to hospital in late 2015 and died in February 2016. His trustees then needed to get to grips with the large number of business ventures with which he had been involved, and were administering various parts of his estate. The trustees turned their attention to the French litigation in 2016. At that time the only assets of value, owned by Mr. Pieper and of which the Trust was aware, were the subject of steps to enforce in France and the Netherlands. The Trust had by that time spent a considerable amount of time and money on pursuing Mr. Pieper with limited recoveries. It is therefore not surprising that steps were not actively being taken in the English proceedings.

72. In around September 2017, investigations into Mr. Pieper's assets were recommenced, and (after obtaining litigation funding) the Trust obtained what they considered to be good evidence that Mr. Pieper is the beneficial owner of a large number of previously undisclosed entities and assets. The decision was then taken to take further action against Mr. Pieper in order to recover the sums owed to it.

73. In summary, this is a case in which the Claimants have already established that the Defendants owe significant amounts of money; there has never been any agreement by the Claimants to waive their rights of recovery; there have been continuing attempts to obtain recovery, in particular the French litigation which has been continuing; and where the discovery of undisclosed assets (which of course should have been disclosed pursuant to the terms of the WFO) has led to reignition of the English proceedings and indeed proceedings elsewhere. I see no reason at all to

conclude that there has been any abuse of process or any other reason to prevent the pursuit of the present application.

74. I shall therefore accede to the application to lift the stay and enter judgment. I shall hear counsel as to the appropriate further orders in the light of this judgment.