Neutral Citation Number: [2020] EWHC 1203 (Comm)

Case No: CL-2017-000753

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

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

Date: 14/05/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

KMG INTERNATIONAL NV

(a company incorporated under the laws of the Netherlands)

Claimant

- and -

(1) MELANIE ANNE CHEN

(2) CHIPPER MANAGEMENT LIMITED

(a company incorporated under the laws of the British Virgin Islands)

Defendants

- -
- -

Alain Choo-Choy QC (instructed by **PCB Litigation LLP**) for the **Claimant**
Jonathan Crow QC, Graeme Halkerston and **Jamie Holmes** (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing date: 6 May 2020

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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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THE HONOURABLE MRS JUSTICE MOULDER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 14th May 2020.

MRS JUSTICE MOULDER :

1. This is the judgment on the application of the defendants dated 15 April 2020 to strike out the report (or parts thereof) of Professor Veder dated 31 March 2020 (the "Veder report") and the claimant's application dated 20 April 2020 (the "Amendment Application") for permission to amend the Re-Amended Particulars of Claim and (in effect) for permission to adduce the Dutch law evidence pertaining to those amendments.

2. In support of the claimant's application the claimant filed the Sixteenth Witness Statement of Mr Nicholas Ractliff, partner in PCB Litigation LLP, acting for the claimant, dated 20 April 2020.

3. By reason of the current circumstances of Covid 19, the hearing of the applications was held remotely by video link but both parties were represented by leading counsel and I had the benefit of both written and oral submissions.

Background

4. The outline facts in this claim are set out in the judgment of this court dated 9 May 2018 [2018] EWHC 1078 (Comm) (the "Forum judgment") in relation to the defendants' application to stay the proceedings on the basis that England was not the most appropriate forum.

5. In brief the proceedings relate to the alleged unlawful dissipation of assets, namely the transfer of shares in Novero GmbH and Novero Dabendorf (together "Novero") which was owned by a Dutch company, Novero Investments BV ("NIBV") out of the DP Group, a group of companies ultimately owned by DP Holding SA ("DP Holding") and formerly owned by Dinu Patriciu. The transfer is alleged to have happened in 2015 or in the alternative September 2014. The claimant, KMG International NV ("KMG"), is a creditor of the ultimate holding company of NIBV, DP Holding by virtue of an arbitration award obtained on 30 April 2016. Novero was ultimately sold to Laird plc ("Laird").

6. The claimant brings a claim in tort under Dutch law, in particular Article 6:162 of the Dutch Civil Code. The first defendant, Melanie Anne Chen ("MC") is alleged to have been a quasi or de facto director of NIBV. The second defendant ("CML") is a company incorporated in the BVI. CML was also originally alleged to have been a "de facto or formal" director of NIBV, but it is now common ground that CML was only the formal director of NIBV from 25 June 2015 onwards. MC was a director of CML and owned and controlled CML.

7. The defendants deny liability. The defendants allege that Novero was transferred out of the DP Group in return, amongst other things, for the cancellation of €7 million of loans made by MC's father.

8. The claimant advances an alternative case in unlawful means conspiracy under English law which is currently stayed.

Chronology

9. It is material on these applications to note the following in the chronology of these proceedings.

10. On 18 and 19 April 2018 (the "April hearing") I heard the defendants' application to stay the proceedings on the basis that England was not the most appropriate forum (the "Forum Application"). In light of the arguments on these applications, it is necessary to set out briefly the nature of the issues which were before the court at the April hearing and the analysis of the court. It is also relevant to note at this point, in light of the arguments raised below, that the representation for the claimant at the April hearing was the same as appeared before me at this hearing.

11. As is clear from the Forum judgment, the issue of Dutch law and the extent of the dispute between the experts was a significant factor for the court to consider in determining the Forum Application. At paragraphs [26] – [31] of the judgment the court summarised the legal principles including this citation from Lord Mance in *VTB Capital plc v Nutritek International Corpn and others* [2013] UKSC 5 at [46]

> "46 The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum…" [Emphasis added in judgment]"

As recorded at [38] of the judgment, counsel for the defendants submitted there are "difficult Dutch law issues on which there is divergent expert evidence and therefore better dealt with by the Dutch courts".

12. The court at the April hearing had before it reports from three experts of which the relevant ones were the reports of Mr van Maanen (instructed by the defendants) and Professor Veder (instructed by the claimant). The experts were agreed that liability to creditors under Article 6:162 is only imposed on a director where his actions justify "serious reproach". However there was a significant difference in the basis of liability in this case.

13. Mr van Maanen doubted whether KMG could show that the defendants were quasi directors of NIBV as a matter of fact but concluded that this could amount to a breach of the duty of proper social conduct where exceptional circumstances apply. In his report (cited at [46] of the judgment) he stated that:

> "such exceptional circumstances could exist, in my view, if KMG can demonstrate that the transfer of Novero GmbH by NIBV in June 2015 was detrimental to the interests of KMG and actually intended by directors of NIBV at the time of the transaction to cause prejudice to KMG as creditor of the ultimate parent DPH SA." [emphasis added]

14. The court identified three issues of Dutch law (at [47]-[49] of the judgment):

    i) whether the defendants as a matter of fact were quasi directors;

    ii) whether as a matter of Dutch law, the defendants had breached the standard of liability;

    iii) whether there was sufficient proximity between the defendants and KMG as creditor of the ultimate parent company.

15. In relation to the second issue the court said at [48]:

> "…If KMG can establish as a matter of fact that the transfer of Novero was intended by the defendants to cause prejudice to KMG as creditor of DPH, it appears on the basis of Mr van Maanen's report that the standard of "serious reproach" will have been met." [emphasis added]

16. In relation to the third issue the court said at [49]:

> "…Again, applying Mr van Maanen's report, if the facts are established, it will amount to what he referred to as "exceptional circumstances" so as to establish liability."

17. Having identified the issues of Dutch law, the court concluded:

> "50. Although therefore in other circumstances, the issue of what amounts to "serious reproach" may be a difficult one as a matter of Dutch law, it would not appear to be an issue giving rise to any difficulty on the alleged facts of this case. Further although Mr van Maanen states that the Dutch case law requires a sufficient level of proximity between the company and the party making the tort claim against the director, it would appear from his report that, this element is satisfied, if KMG can establish the case on the facts as it alleges, based on a deliberate intention to prejudice KMG." [emphasis added]

18. The court then considered the approach of the other expert, Professor Veder, who was of the view that any liability on MC under Article 6:162 would be as an ordinary person and not a director. However the court noted (at [54]) that:

> "54. Thus, although in Professor Veder's opinion, liability would attach not as a quasi director but as an ordinary person, on the alleged facts, liability still arises under the same provision of the Dutch Civil Code, article 6:162. Whilst the test of what constitutes a wrongful act appears at first sight to be an unfamiliar concept for the English courts to apply, it appears from Professor Veder's report that on the facts of this case (assuming they were established) there would be no issue as to whether the norm had been breached." [emphasis added]

19. It is clear therefore from the judgment that the consideration of the relevance and significance of the Dutch law issues was based on an analysis of the differences between the experts and a conclusion that on the case advanced by the claimant of an intentional act by the defendants, this would not require the court to determine controversial issues of Dutch law. This was set out in the judgment:

> "[56]…On the case advanced by KMG, the question of whether the conduct fell below the requisite standard does not appear to give rise to any difficulty as a matter of Dutch law. Proximity for the reasons stated above would also not appear on the basis of evidence of the experts to give rise to any difficulty as a matter of legal principle, on the facts of this case."

> "[57] An English court is used to having to deal with conflicts between experts on issues of foreign law and in the particular circumstances of this case, it would appear to make no difference to the outcome, that is the imposition of liability on the defendants, whether Mr van Maanen or Professor Veder is correct as to the nature of the liability, if KMG can establish its factual case that the defendants acted with the intention to prejudice KMG. In the circumstances therefore I do not accept the defendants' submission that this involves issues in a developing and controversial area of law. Liability will be driven by the factual enquiry and can be determined by the English court without having to resolve controversial issues of Dutch law." [emphasis added]

20. The court then considered the other factors which were relevant to determining whether the English courts were the appropriate forum: the location of the parties, the location of the witnesses, the location of documents, the English law claim, confidentiality issues in The Netherlands, other proceedings in The Netherlands. In its conclusion (at [89] to [97]) the court considered these other factors and then dealt with the issue of Dutch law as follows (at [95]):

> "…Looking carefully at the legal issues which will have to be determined in this case as set out in the expert reports discussed above, it seems to me that the English court could apply the facts as it finds them to the Dutch legal principles of liability under the relevant provisions of the Dutch Civil Code. As set out above, the issues of Dutch law which arise in this case on the facts as alleged by KMG, are, in my view, not likely to lead to difficult questions of liability under Dutch law. The case advanced by KMG is in essence a deliberate transfer of assets out of NIBV orchestrated by Ms Chen (and others) with the intention and effect of putting those assets out of the reach of KMG as a creditor of DPH. Accordingly, it is unlikely in my view that were such facts to be established, the English court would have any difficulty applying the Dutch law principles to determine whether a tort had been committed as a matter of Dutch law. Whatever questions may arise in theory on the scope of liability in tort under Dutch law, the facts of this case

> are very unlikely in my view, to stray into the developing and controversial areas of Dutch law." [emphasis added]

21. The court then concluded as follows:

> "96. Whilst therefore I am bound to say that the Dutch courts would have an advantage over the English courts in applying Dutch law, the issue which I have to determine is whether in all the circumstances, Ms Chen has established that the Dutch courts are the forum where the case may be tried more suitably for the interests of all parties and the ends of justice.
>
> 97. The burden of proof rests on Ms Chen to persuade the court to exercise its discretion to stay the proceedings. In my view, for all the reasons discussed above, Ms Chen has not established that in the circumstances of this case, England is not an appropriate forum for the trial and further that the Dutch courts are clearly or distinctly more appropriate than the English courts. Accordingly, Ms Chen's application for a stay must fail."

22. The claimant thus successfully resisted the defendants' application for a stay. Permission was also granted for the particulars of claim to be amended.

23. Permission to adduce evidence of Dutch law at the trial of this matter was given at a case management conference on 19 December 2018 by order of Lionel Persey QC, sitting as a Deputy High Court Judge (the "CMC Order"). Permission was given for a single expert report to be served by each party. The scope of the expert evidence was agreed between the parties and the CMC Order reflected that agreement. Permission for expert evidence on liability under Dutch law was set out in Appendix 2 to the CMC Order as follows:

> "1. As to the scope of personal liability in tort under Article 6:162 of the Dutch civil code as it is applies to allegations against a defendant who took steps with the intention of harming specifically the claimant by reducing the assets available to a parent company, which is an actual or potential creditor of the claimant, by reducing the assets of an indirect Dutch subsidiary of that parent company, and in particular:
>
> a. What are the requirements for such liability against a defendant who was a formally appointed or de facto director of the indirect Dutch subsidiary?
>
> b. What are the requirements for such liability against a party that is not a formally appointed or de facto director of the indirect Dutch subsidiary?
>
> c. What is the test for whether someone is a de facto director?

> d. Does the principle of "derivative loss" affect the scope of liability for either of the above claims, and if so, how does it apply?" [emphasis added]

24. The timetable for the expert evidence in the CMC Order which provided for the Veder report to be served by **7** February 2020 was subsequently varied by a consent order dated 18 March 2020 pursuant to which the time for service of the Veder report was extended to 31 March 2020. That order also provided for the meeting of the experts to take place by **7** May 2020, for the joint memorandum to be served by 21 May 2020 and any supplemental report by 29 May 2020.

25. The trial of this matter is due to start on 6 July 2020.

Claimant's application to amend

26. Certain of the proposed amendments, the subject of this application, have now been agreed between the parties. The amendments which are in dispute are contained in paragraphs 1, 24, 32A and 32B.1 of the draft Re-Re-amended Particulars of Claim ("RAPOC"). In essence they relate to an alternative basis of liability under Article 6:162 of the Dutch civil code which is based not on an intention of specifically harming the claimant but on "knowledge".

27. The relevant part of paragraph 1 setting out the claimant's case on the unlawful dissipation and with the proposed amendment underlined, reads:

> "…The said dissipation, particulars of which appear in paragraphs 16 to 18 below, was unlawfully procured and/or undertaken by the Defendants in order to prevent KMG, alternatively knowing that it would prevent KMG, from obtaining satisfaction of, or from successfully enforcing, the said award from or against DPH. By reason of such dissipation, the Defendants have incurred liability to KMG in tort, under Dutch law, alternatively English law, as set out in paragraphs 27 to 35 below."

28. Paragraph 24 is proposed to be amended as follows (with the proposed amendment underlined):

> "24. The Novero Dissipation (including the 2014 Transaction if, as alleged by the Defendants, NIBV was transferred out of the DP Group in September 2014) was orchestrated and/or facilitated by MC and/or AP and/or CML and/or NIBV in order to enrich themselves personally at the expense of DPH and thus KMG and/or to remove the Novero asset from the formal DPH structure and to transfer it to related parties in order to protect the asset and cash generated as a result of its future sale to Laird Plc from the creditors of DPH (the parent to which the net profits of any sale would ultimately flow), including KMG in particular. The ultimate aim, alternatively the known consequence, was to prevent KMG from being able to collect under the indemnity obligations or

> the Award. The Defendants' knowledge in this connection (and as elsewhere referred to herein) is evidenced by or to be inferred from (i) MC's involvement in the transactions between KMG and DPH that gave rise to DPH's indemnity obligations to KMG, (ii) MC's close and personal relationship with Mr Patriciu who was a criminal defendant in the Romanian proceedings described in paragraph 23A above, (iii) MC's close relationship with AP, (iv) MC's senior role within the DP Group as aforesaid, (v) MC's knowledge of KMG's claim against DPH pursuant to the aforesaid indemnity obligations, or (as at the date of the 2014 Transaction) appreciation of at least a real risk of such liability in the event that the Romanian Court of Appeal reversed the first instance decision in favour of TRG, (vi) the fact (as must have been known to MC) that prior to the 2014 Transaction KMG had already made clear its intention to claim against DPH on its indemnity obligations in respect of any liability connected with the Romanian proceedings by filing an actual request for arbitration on 3 July 2014 for the legal fees it had incurred in connection with the Romanian proceedings, and (vii) MC's realisation as a result of her discussions with Laird plc (as set out in paragraph 16A above) that a very substantial offer for the Novero business was going to be forthcoming from Laird plc which would result in a substantial surplus for DPH (and enable DPH to pay substantial creditors such as KMG) unless the Novero business was transferred out of the ownership of the DP Group before Laird plc acquired the Novero business."

Thus in paragraph 24 in the alternative to the "ultimate aim" being to prevent KMG from collecting on the arbitration award, the claimant now seeks to assert that it was "the known consequence" and it sets out the detailed factual matters on which it relies including MC's relationship with AP and that prior to the alleged transfer in 2014, KMG had already made clear its intention to claim against DPH on its indemnity obligations.

29. In paragraph 31 of the RAPOC the claimant sets out the Dutch law provisions for a claim in tort under Article 6:612. Paragraph 31 sets out the basis of a claim against a director where a "severe reproach" can be made. Paragraph 31A sets out the basis of a claim against a person who is not a director (or a de facto director) but who commits a wrongful act. Paragraph 31B asserts liability against a person who is a de facto director on the basis of either paragraph 31 or 31A. Paragraph 32 then sets out the factual basis for the claim. The claimant seeks to amend paragraph 32A to read (with the proposed amendment underlined):

> "As to paragraphs 31 and 31B above, MC and CML were at all material times (de facto or formal) directors of NIBV respectively and they orchestrated, facilitated and/or procured the Novero Dissipation (as set out at paragraph 25 above including, in MC's case, the 2014 Transaction if NIBV was transferred out of the DP Group in September 2014) in order to

achieve the objective and/or with the knowledge pleaded at paragraph 24 above. A severe reproach can be made against each of MC, (if necessary on KMG's alternative case set at paragraph 31B above, and the following conduct is in any event sufficient to establish liability on the part of MC as a de facto director on the basis set out at paragraph 31A above) and CML because:

32.1. MC and CML as de facto and formal directors of NIBV, alternatively MC as a former director and senior employee of DPH at the time of the 2014 Transaction and until 30 September 2015, knew that the Novero Dissipation (including, in MC's case, the 2014 Transaction if NIBV was transferred out of the DP Group in September 2014) would prevent DPH from satisfying at least part of its debt due to KMG pursuant to the Award, or, in the case of the 2014 Transaction, likely to be due;

32.2. KMG infers from the way the Novero Dissipation was structured (as pleaded in paragraphs 16 and 16A above) and the timing of the Novero Dissipation (as pleaded in paragraphs 23 and 23A above) that MC and AP intended (and CML intended them) to profit personally from the Novero Dissipation to the detriment of DPH and thus KMG and to frustrate KMG's ability to collect its debt from DPH.; and

32.3. There was no lawful justification for the transfer of Novero from NIBV to Oscul (or, in the case of the 2014 Transaction, for the transfer of NIBV to the Oscul Settlement), or the subsequent transfers of Novero prior to its acquisition by Laird."

30. Paragraph 32B is proposed to be amended to read (with the proposed amendment underlined):

"32B. Further or alternatively, having regard to the matters pleaded in paragraph 31A above:

32B.1 By reason of MC's involvement in the Novero Dissipation (including MC's involvement in the 2014 Transaction) as set out above, MC intended to prejudice KMG and/or knew (as set out in paragraph 24 above) that KMG would be prejudiced in its capacity as anticipated creditor and then actual creditor of DPH, by using, among other things, NIBV, Oscul, Donares and Geranium to prevent KMG from obtaining payment in respect of the Award (or the future debt which was reasonably in prospect in September 2014) and to benefit personally, as to which paragraph 32.2 above is repeated. Therefore, MC's conduct was calculated and intended to prejudice KMG, alternatively was known (as set out in

> paragraph 24 above) to be prejudicial to KMG, and MC thus committed a wrongful act against KMG; and
>
> 32B.2 MC's conduct has caused loss to KMG as set out at paragraph 26 above."

31. Again the proposed amendments refer to a transfer out being made with "knowledge" as an alternative to intention and to MC's involvement being either an intention to prejudice KMG "and/or" with knowledge that KMG would be prejudiced.

32. In oral submissions at the hearing of these applications counsel for the claimant accepted that the proposed draft order for expert evidence was wider than the proposed pleaded case and proposed that the pleading be further amended to encompass not only knowledge that KMG "would" be prejudiced but also that it "might" be prejudiced.

Relevant legal principles

33. The legal principles that the court should apply on an application to amend the pleadings were largely common ground between the parties.

34. It was submitted for the claimant that this was not a "very late amendment" as the term has become understood, meaning an application made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost and that lateness is a relative concept: *Vilca v Xstrata Limited* [2017] EWHC 2096(QB) Stuart-Smith J at [26]:

> "As will be seen below, the term a "very late amendment" has subsequently become almost a term of art, meaning an application made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. I shall adopt that meaning. Elsewhere it has been said that lateness is a relative concept. I agree, and would add that the natural elasticity of language and its use in the authorities shows that an amendment may be regarded as "late" either because it could have been brought forward earlier or because it is brought forward at a time that is liable to disrupt the efficient conduct of the proceedings or both. The infinite variety of circumstances in which amendments may be brought forward means that there is a broad spectrum of potential impacts if an amendment is allowed, which is not dependent solely on chronological timing, and which may fall anywhere between the negligible and the devastating. In this broader post-CPR approach to amendments, the Court is not limited to considering the effect on the parties and whether any potential prejudice may be satisfactorily compensated in costs, though there is no reason why those may not be relevant considerations in appropriate cases. The Court will also have regard to the impact on the administration of justice in terms of potential disruption to the case in which the amendment is brought

> forward and in terms of the wider interests of the Court, other litigation and other litigants."

35. Counsel for the claimant also submitted that a failure to advance a good reason for the lateness was only one factor to take into account: *Vilca* at [29]:

> "29. I respectfully agree with and endorse these summaries of principle, which are similar. Where differences of emphasis or inclusion exist they may be seen to be referable to the facts of the particular case as set out elsewhere in the respective judgments. The only possible note of discord is that I would not agree that there *must* be a good explanation for delay, as stated by Coulson J at [19(c)]. Coulson J cited *Brown v Innovatorone PLC* [2011] EWHC 3221 (Comm) in support of the proposition. In *Brown* Hamblen J referred to the explanation for why an amendment is made late as being likely to be one of the factors that is relevant to be taken into account in striking a fair balance; he did not suggest that the presence of an explanation was an essential prerequisite to the allowing of an amendment. Henderson J in *Wani v RBS* [2015] EWHC 1181 (Ch) adopted and endorsed the approach of Hamblen J in *Brown*. I do not read his judgment (or any other authority to which I have been referred) as laying down a more draconian rule that the absence of good explanation is fatal to the granting of an amendment. I adopt the approach that the presence or absence of an explanation which justifies the delay is one of the factors to be considered in deciding where to strike a fair balance." [emphasis added]

36. Counsel for the defendants referred to the recent summary of the law by the Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 at [41]:

> "The principles relating to the grant of permission to amend are set out in *Swain- Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal." [emphasis added]

37. I note however that the summary in *Nesbit* was merely a summary in relation to an issue which did not fall for determination and the facts before the court were that an amendment was sought after trial. It is therefore helpful to set out in full the principles identified by Carr J in *Quah Su-Ling* at [38] and referred to by the Court of Appeal in *Nesbit*:

> "38. Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties

> can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

Submissions

38. The claimant adopted a divergent approach to its Amendment Application. In the Sixteenth Witness Statement of Mr Ractliff the claimant asserted that the existing pleaded case:

> "has never been confined to an allegation that the defendants, by their conduct, specifically intended to harm KMG" [emphasis added] .

39. This approach was pursued in the written skeleton filed by counsel for the claimant in advance of the hearing of the Amendment Application. It was submitted for the claimant that:

i) The existing pleading in paragraph 31.1.2 for severe reproach refers to taking into account all the circumstances including knowledge of directors and in paragraph 31A that the "wrongful act" is with the intention to prejudice another or to enrich himself to the detriment of another;

ii) There are factual references in the pleadings to an intention to benefit themselves;

iii) The claimant "has never advanced a case that was solely and exclusively dependent on the Ds' intention being to harm KMG specifically" (para 19 of skeleton);

iv) "Nothing was said in oral argument [for the April hearing] or in the [Forum] judgment that should […] prevent KMG from being able to refer to the entirety of its pleaded case (whether factual or Dutch law)" (para 31 of skeleton).

40. It was further submitted for the claimant in its written submissions that:

i) the proposed amendments have a prospect of success and are not fanciful-that they are supported by the Veder report;

ii) the timing of the Amendment Application was dictated by the need to consider the letter from the defendants' solicitors of 8 April 2020 and the ensuing correspondence;

iii) allowing the amendment does not put the parties on unequal footing or interfere with trial preparation; the defendants will get the costs of amending their defence; there is time for Mr van Maanen to address the matter in an

amended report; no additional factual evidence is required as the relevant issues have already been addressed in witness evidence.

41. However in oral submissions at the hearing of the Amendment Application a very different approach was adopted by counsel for the claimant:

    i) It was accepted by counsel that "formal statements" had been made in earlier proceedings that the case was dealing with an intention to harm and in particular it was accepted that the "focus" at the April hearing was intention and that this was the "primary case". It was therefore "accepted" that if KMG is to be permitted to run the alternative case, it must plead its case "clearly" and it was necessary for KMG to address the merits of the application to amend.

    ii) It was submitted that it was only when further disclosure was received from the defendants in January/February 2020 in relation to the loans made by MC's father and the negotiations with Laird, that the importance of "knowledge" became apparent**;**

    iii) In relation to the Forum Application, it was submitted that there was only an injustice to the defendants if the court could conclude that "if presented with a fuller case" it would have made a difference to the outcome of the Forum Application and that would be impermissible speculation;

    iv) in the absence of any injustice, there was no "special rule" that a party could not obtain permission to amend its pleadings by reason of the fact that it might impact on the forum challenge.

42. It was submitted for the defendants (who were given no notice of the change of the basis for the Amendment Application to be adopted by counsel for the claimant in oral submissions) that:

    i) The claim now advanced is

        a) inconsistent with the claim presented to the court for the purpose of winning the argument on forum; and

        b) to allow such an amendment would visit a gross injustice on the defendants;

    ii) The arguments on Dutch law are precisely the kind of difficult and unresolved issues of foreign law which the English court is reluctant to decide;

    iii) There is no explanation for the late application and not sufficient time for these issues to be resolved within the timetable for trial.

<u>Inconsistent with the forum claim</u>

43. It was submitted for the claimant in written submissions that it "has <u>never advanced</u> a case that was <u>solely and exclusively</u> dependent on the Ds' intention being to harm KMG specifically" [emphasis added].

44. Helpfully, as well as being the judge on the Forum Application, the court has not only the Forum judgment but also the relevant transcripts of the April hearing. The clearest statements as to the claimant's factual case are to be found in the reply submissions. Counsel for the claimant said:

> "Paragraph 24, as we saw a moment ago, is the paragraph where we pleaded that the purpose of the dissipation was to enrich themselves at the expense of DPH and KMG and that the ultimate aim was to prevent KMG from being able to collect under the indemnity obligations for the award. So the idea that the plea in paragraph 32(a) is somehow a plea of essentially non-intentional dissipation is nonsensical. It is a very clear plea. It is one of the bases of a claim in tort under 6.162 of intentional dissipation." [emphasis added]
>
> "…[counsel for the defendants] said, was, well, there are difficult Dutch law issues and, in particular, whether the conduct has to be serious reproach or not and, if so, what the standard actually means. I am not going to repeat what I said this morning. We know what the standard means, it is common ground between both experts. There is an issue as to whether serious reproach applies unless the individual is either a formal or a quasi director. But we do not depend on that because we know that both experts agree that when there is intentional dissipation intended to prejudice the creditor, the requirement of serious reproach is met."

45. It was submitted for the claimant (in its skeleton for the Amendment Application) that in its submissions in reply, counsel for the claimant was merely responding to concerns raised by the defendants as to whether the pleaded case extended to negligence. Whilst that might be said in relation to the reply submissions it cannot be said of the main submissions which had already put the nature of the claimant's case then advanced beyond doubt. Counsel for the claimant submitted:

> "The relevance of identifying clearly and precisely the extent of the difference is this. As your Ladyship knows, our factual case, as part of our claim in tort or as a matter of Dutch law, or our case in conspiracy as a matter of English law, is fundamentally based on the factual proposition that Ms. Chen deliberately, and in conspiracy with Ms. Patriciu, embarked upon the dissipation of the Novero asset out of the DP Group, in order to prejudice KMG. That is our factual case. Your Ladyship will recall it is very clearly stated in paragraph 1 of the Particulars of Claim and it is developed later in the pleading.
>
> If that case is correct and the court is dealing with a case of deliberate dissipation to prejudice KMG, then the difference that exists between the expert (to the extent that I have just identified) is a difference of no consequence: because even on Mr. Van Maanen's more restrictive legal test i.e. his suggestion

> that the requirement of serious reproach also applies in the case of quasi directors, and that is an assuming and of course the other side also deny, they deny that they, that Ms. Chen was a quasi director.
>
> But if we are right in our factual case -- and that is the foundation of both sets of claims under both systems of law -- then the difference I have just identified in relation to the issue of serious reproach is neither here nor there. And that, in my respectful submission, is an important factor to bear in mind in terms of the relative significance of this aspect of Dutch law in the overall scheme of the case. On the other hand, if we do not manage to establish this fundamental factual basis for the claim, then obviously the claims will not be made out. In fact, in that event, the claims will not be made out, they will not be made out as a matter of sense, but they will not be made out either as a matter of Dutch law or as a matter of English law. So, that is serious reproach and the real extent of the difference and the significance of the difference in terms of the issues and the forum consideration." [emphasis added]

46. It was also submitted in the written submissions for this hearing (claimant's skeleton para 33) that there was:

> "nothing in the terms of the judgment of Moulder J which suggest that the circumstances that would require consideration when assessing the Ds' potential liability under Article 6:162 of the Dutch Civil Code were limited to an allegation that the Ds specifically intended to harm KMG"

47. I have already quoted above extracts from the submissions which were made before me which were clearly confined solely and exclusively to a factual basis of specific intention to harm. In my view the judgment reflects the way that the case was put in relation to the Dutch law issues and I note no objection was taken at the time to the judgment in this regard.

48. The factual basis of the case advanced by the claimant is apparent from various paragraphs of the judgment: see for example [48] [49] [54] (set out above) and at [55]:

> "55. I note at this point that counsel for the defendants submitted that the claim asserted by KMG could be founded on a negligent act and she referred to paragraph 31.1.2 of the draft amended particulars of claim. In my view, this paragraph merely sets out the law as to what can constitute "severe reproach" and does not constitute KMG's case, which, as referred to above, is clearly stated to be on the basis of a deliberate and intentional act to transfer the assets and prejudice KMG." [emphasis added]

49. It is clear in my view that the entire consideration of the Dutch law issues for the purpose of the Forum Application was on the basis that the claimant's case was one of intention to harm and that this was not merely (as now submitted orally) its "primary" case or its "focus" but the only basis of its case. I therefore reject the claimant's submission that it has "never advanced" a case that was solely and exclusively dependent on the defendants' intention to harm KMG specifically. It is clear beyond any doubt that the claim which is now advanced is inconsistent with the claim as it was presented to the court for the purpose of winning the argument on forum.

"Injustice" by reason of the Forum Application

50. The issue which then arises is whether, in the light of the Forum Application, the defendants are correct in their submission that to allow the Amendment Application would visit an injustice on the defendants.

51. Counsel for the claimant submitted that certain assumptions are made at the time of any application for a stay on forum grounds which may prove subsequently to be wrong such as the location of witnesses or the complexity of the foreign law issues. This cannot result in a bar on subsequent amendments to the pleaded case.

52. It was submitted for the claimant that the Forum judgment does not indicate that the "precise scope of KMG's case" formed a major part of the decision and (paragraph 34 of the claimant's skeleton) that "it would not be appropriate to speculate" that "if more emphasis had been put on the defendants' intention to benefit/enrich themselves/their associates and/or knowledge of likely harm to KMG" the court would have made a different decision. It was further submitted for the claimant that there is no authority to suggest that this is a relevant consideration on an application to amend.

53. I accept that there is no general principle that a party is precluded from obtaining permission to amend by reason only that the application for an amendment to pleadings is subsequent to a successful application to resist a stay on the basis of *forum non conveniens*.

54. However in the exercise of the court's discretion in furtherance of the overriding objective as to whether the Amendment Application should be allowed, the court has to look at all the circumstances. In my view the Forum Application is part of the circumstances of this case.

55. On the case which was advanced orally for permission to amend, it was stated by counsel for the claimant that the Amendment Application arose as a result of disclosure in January/February 2020 of documents in relation to the loans by MC's father and the negotiations with Laird.

56. As noted above, this was not a matter which was relied upon or even referred to in the witness statement filed in support of the claimant's application (nor was it referred to in counsel's skeleton).

57. In the course of his oral submissions, when challenged as to the absence of evidence on this issue, counsel for the claimant suggested that the claimant could provide a further witness statement to support his statements to the court. It seems to me that no

good reason was advanced as to why such a course would be appropriate: there was no reason given as to why the claimant could not have advanced this explanation in its evidence prior to the hearing in the usual way and in accordance with the rules, thus allowing the defendants an opportunity to respond with their own evidence in the usual way. It was not therefore proportionate or just for further witness evidence to be allowed at this juncture in order to bolster the basis on which the Amendment Application is now advanced.

58. Thus it is the position of the claimant in its evidence before this court that the existing pleaded case:

> "has never been confined to an allegation that the defendants, by their conduct, specifically intended to harm KMG". [emphasis added]

59. At paragraph 16 of his witness statement, after referring to paragraphs 16, 24 and 32 of the Particulars of Claim (set out above), Mr Ractliff said:

> "It is clear from those paragraphs that KMG has never advanced a case that was solely and exclusively dependent on the Defendants' intention being to harm KMG specifically. KMG's existing pleaded case has throughout put in issue the Defendants' intention to enrich themselves and/or their associates and the Defendants' knowledge of the harm that was likely to be caused to KMG as a result of their conduct – as well as the relevance of such facts (in so far as proved at trial) as a matter of Dutch law." [emphasis added]

60. The claimant's evidence is therefore that the issue of knowledge has been in issue "throughout". Accordingly the court proceeds on the basis that the claim based on knowledge which has led to the Amendment Application is not something which has arisen after the Forum judgment but has always been contemplated.

61. Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the court seeks to further the overriding objective that matters should be dealt with fairly. If (notwithstanding the fact that an application to amend has now been made), the claimant in its pleaded case (as now stated in the evidence) has "throughout put in issue" the case based on knowledge, and had thus always intended that the alternative case based on knowledge would be pursued, but chose at the Forum hearing to advance a case based on specific intention, and persuade the court (as recorded in the Forum judgment at [56] and [57]) that the issues of Dutch law were confined to the question based on specific intention and thus not overly complex or disputed, that is a matter which does constitute potential prejudice and unfairness to the defendants in that, had the full scope of the pleaded case been advanced, this might have resulted in a different outcome on the question of appropriate forum based as it was (at least in part) on the conclusion that the Dutch issues of law were not likely to give rise to difficult questions of liability under Dutch law. In my view the issue is not whether the court would have made a different decision on the Forum Application. I accept that this court at this hearing of the Amendment Application should not attempt to remake the Forum judgment on a different factual basis. However if it is the case that, had the full pleaded case been

advanced, it might have led to a different outcome on the Forum Application that is a matter of potential prejudice and unfairness to the defendants which the court should now take into account in determining whether to exercise its discretion to permit that alternative case now to be advanced. The unfairness lies not in the impact on the ultimate consideration of the Dutch law issues by the English court at the trial (which is unknown and unquantifiable) but the fact that the English court might have made a different decision on forum.

62. The relevance of the way that the case was advanced on the Forum Application is also relevant in considering the issue of "lateness" and the potential prejudice to the defendants in having to defend the alternative case which for the past two years they had been led to believe was not being advanced.

63. In this context the court also takes into account the following additional matters in relation to the timing of the Amendment Application issued on 20 April 2020:

    i) in their Defence in July 2018 the defendants said that the transfer occurred in September 2014 and that loans from MC's father to DP were written off in consideration for the transfer to the Oscul Settlement.

    ii) In its response to the Second RFI in December 2018 in response to a request (in substance) for the claimant to set out its case on knowledge, the claimant replied "not needed";

    iii) As recently as 20 December 2019 counsel for the claimant told the court that there was no intention to amend;

    iv) The claimant issued its letter of instruction to Professor Veder on 10 March 2020 which asked Professor Veder to consider the alternative case based on knowledge;

    v) The claimant agreed to a consent order of 18 March 2020 referring to the expert evidence but made no mention of any application to amend.

64. In its skeleton the claimant relied on the letter from the solicitors for the defendants on 8 April 2020 in which the defendants objected to the content of the Veder report. In my view, even if it were the position that it was only the disclosure in January/February 2020 which prompted the claimant to seek to make the Amendment Application, the explanation (in the skeleton) that the letter in April 2020 from the defendants' representatives was the reason for the timing of the Amendment Application does not appear to provide an adequate explanation for making the Amendment Application only on 20 April 2020 having regard to the matters referred to above from which I infer that the issue of knowledge should have been to the fore well before the correspondence in April 2020.

The consequences in terms of consequential work to be done

65. It was submitted for the claimant that even if the court was not satisfied that there was a good explanation for the timing of the Amendment Application, the amendment should be allowed because it could be dealt with by the parties within the existing

timeframe to trial and because it would cause injustice to the claimant if the amendments were not permitted.

66. For the defendants it was submitted that it was not realistic to expect the defendants to instruct their expert on new issues of Dutch law, for a report to be issued and for the experts then to meet and prepare a joint memorandum.

67. The Amendment Application was made just over two months before the trial commences and although it does not seek to introduce a new cause of action, it does rely on an alternative basis for establishing liability under Article 6:162. It is accepted for the defendants that the current pleaded case based on an intention to cause specific harm has as a necessary ingredient the concept of knowledge. Accordingly the factual evidence already addresses the issue of knowledge. However it was submitted that expert evidence will be required from Mr van Maanen in response to the Veder report on the issue of knowledge. Then there will need to be the meeting of the experts, the production of a joint memorandum and potentially a further response.

68. In my view it is not realistic to expect the defendants' expert to respond to the alternative case in the time available. The draft order provides that Mr van Maanen would have to respond by 15 May 2020 (only a week after the hearing) and that the meeting would take place by 22 May 2020 with a joint memorandum by 29 May 2020 and any supplemental report by 5 June 2020. This timetable seems to me to be wholly unrealistic and I note that although the trial starts on 6 July, the skeletons will be due approximately one week before that in order to allow for judicial prereading. Even if this precise timetable were adjusted, there is little if any leeway in what is proposed.

69. I do not accept the submission for the claimant that it can be said that the further evidence is "modest" because Mr van Maanen has already addressed the question of knowledge. I accept that in his current report Mr van Maanen is of the view that liability will not attach in the circumstances even if specific intention is established (paragraph 2.30 of his report) and he notes (at paragraph 2.21) that

> "… in Tuin Beheer, it said that causing foreseeable detriment to the (direct and sole) shareholder for the purpose of self-enrichment was insufficient ground to conclude that a specific norm protecting the shareholder against this loss had been breached. Intent to cause harm to that shareholder would satisfy the test" [emphasis added]

However I do not accept that his current report addresses the alternative case now advanced by the claimant. It seems to me that a case which is advanced on the basis of knowledge requires Mr van Maanen to revisit his report to address specifically the alternative case on liability as contrasted with a position where knowledge is merely a factual component of proving a specific intention.

70. It is in my view unfair and unjust to require the defendants' expert to produce a report to address the alternative case in the time remaining to trial. I accept that this is not a new cause of action but the legal analysis is clearly significantly complicated by the introduction of this alternative basis of liability even though it is under the same provision of the Dutch Civil Code. This is not a peripheral issue in this case but a

central plank of the claimant's case in these proceedings and the interests of justice demand that the defendants are entitled to have adequate time in which to respond.

Prejudice to the claimant

71. It was submitted that there would be injustice as the claimant would not be able to put its case on the basis of knowledge either in the English courts or in the Netherlands. It was submitted that this would result in a "windfall" to the defendants.

72. I have no evidence as to whether or not it would be permissible to bring a claim on this basis in the Netherlands and whether this alleged prejudice is therefore made out.

73. It is inevitable in my view that there may be prejudice if the claimant is not permitted to amend (and it fails to establish its case on intention) but the claimant has to show why it is in the interests of justice for permission to be given.

Conclusion on Amendment Application

74. This is a late amendment. In furtherance of the overriding objective the court has to strike a balance between the injustice to the applicant if the amendment is refused, and injustice to the opposing party. In my view the claimant has not discharged the burden on it of showing why in the circumstances of this case justice requires that it should be able to pursue it.

75. The claimant in my view on the evidence before the court has not provided a good explanation for the lateness of the Amendment Application. In my view, in all the circumstances of this case, for the reasons discussed above, the potential prejudice and injustice to the defendants outweighs any prejudice to the claimant.

76. For all these reasons the Amendment Application is refused.

Defendants' strike out application/claimant's application to expand the scope of the expert evidence.

77. In the light of the court's conclusion that the amendments should not be permitted, the claimant's application to expand the scope of the expert evidence is refused.

78. The court has then to consider the defendants' application to strike out the Veder report.

79. It is the defendants' case that the report considers and opines on a number of matters which do not form part of the claimant's case and for which the claimant does not have permission. In particular it is submitted that Professor Veder was instructed to consider whether a violation of Article 6:162 would be committed if a person acts "without specifically intending to harm any of the creditors of the company". As a result it is submitted for the defendants that the Veder report considers whether a claim could succeed if a defendant "could have" or "should have" realised that his actions would prejudice a creditor. Accordingly it is submitted that the whole report should be struck out and a replacement report served.

80. The defendants also submit that the court gave permission for a single expert report and the approach of the claimant is to rely both upon earlier reports of Professor

Veder and a report of Professor Tjeenk. It is submitted that the earlier reports were not prepared by reference to the issues defined by the court for trial and there are contradictions between the reports.

81. The court has a duty under CPR 35.1 to restrict evidence "to that which is reasonably required to resolve the proceedings".

82. CPR35.4 provides (so far as material):

> "(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –
>
> (a) the field in which expert evidence is required and the issues which the expert evidence will address; and
>
> (b) where practicable, the name of the proposed expert.
>
> (3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address." [emphasis added]

83. In this case the parties put forward a detailed appendix as to the issues which would be addressed by the experts. As set out above, on liability this was expressed as:

> "1. As to the scope of personal liability in tort under Article 6:162 of the Dutch civil code as it is applies to allegations against a defendant who took steps with the intention of harming specifically the claimant by reducing the assets available to a parent company, which is an actual or potential creditor of the claimant, by reducing the assets of an indirect Dutch subsidiary of that parent company…"

84. The way the issues were set out in Appendix 2 therefore (contrary to the claimant's submissions) does restrict the scope of the expert evidence and for good reason, that is to restrict the evidence to that which is reasonably required to resolve the proceedings. In the light of the refusal of the Amendment Application, in my view no additional expert evidence is required in relation to the position under Dutch law. The fact that Article 6:162 is a fact sensitive enquiry does not mean that expert advice is required in relation to a basis which does not reflect the case advanced by the claimant (having regard to the court's refusal to allow the proposed amendments).

85. The defendants seek an order that KMG be required to serve a replacement report or to strike out the objectionable parts. In my view it will not assist the court to have an expert report in its current form since the extent to which the conclusions are affected by the factual assumption that is dependent on knowledge rather than specific intention is in my view difficult to excise from the report and there is a risk that the court will be left with a report which is unclear on the key issues. It also cannot refer to the report of a third party for whom permission has not been granted.

86. A revised report must therefore be served which reflects this judgment.