EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 26 of 2014

IN THE MATTER OF SECTION 184B OF THE BVI BUSINESS COMPANIES ACT 2004
AND IN THE MATTER OF CHINA ZENIX AUTO INTERNATIONAL LIMITED

BETWEEN:

(1) QVT FUND V LP
(2) QVT FUND IV LP
(3) QUINTESSENCE FUND LP

Claimants

-and-

(1) CHINA ZENIX AUTO INTERNATIONAL GROUP LIMITED
(2) RICHWISE INTERNATIONAL INVESTMENT GROUP LIMITED
(3) JIANHUI LAI
(4) RICHBURG HOLDINGS LIMITED

Defendants

Appearances:

Mr Alexander Heylin and Mr Timothy de Swardt of Kobre & Kim (BVI) LP for the 2nd to 4th Defendants

Mr Jonathan Addo and Ms Tamara Maduro of Harney Westwood & Riegels for the Claimants

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2016: November 9
December 2.
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JUDGMENT

Introduction

[1] **Davis-White QC J (Ag)**: This case arises out of a failure by the 2nd to 4th Defendants ("**Defs2/4**") to serve witness statements in time in accordance with the timetable laid down by a court order as extended by agreement. There are no less than three separate applications. The first in time is a Notice of Application dated 14 September 2016 by Defs 2/4 seeking relief from sanctions and an extension of time in which to serve the relevant witness statements (the "**1st Application**"). The last in time is a Notice of Application dated 3 November 2016 seeking leave to amend the Notice of Application dated 14 September 2016, by altering the period to which time is sought to be extended (the "**3rd Application**"). The intermediate Notice of Application is dated 10 October 2016 and is a Notice of Application by the Claimants seeking an application that the Defence of Defs2/4 be struck out for the failure to serve witness statements, or, in the alternative, that it be struck out unless witness statements are filed and served by 4pm on 13 October 2016 (the "**2nd Application**"). Witness statements were filed at 4:26pm on 7 October 2016 and exchanged on 14 October 2016.

[2] The chronology is as set out below:

Date	Event
21.01.16	Case management conference: Witness statements ordered to be exchanged on 02.06.16
26.05.16	Agreed extension to 14.06.16 (at request of Defs 2/4)
27.05.16	Listing confirmation: 6 day trial for week commencing 20.02.17
20.06.16	Agreed extension by Court Order to 30.08.16 (at request of 1st Defendant ("Def 1")).
12.07.16	Consent Order: signed witness statements to be exchanged by 4:30pm 30.08.16
16.08.16	By letter Maples & Calder terminate engagement from today's date. Imperative you take immediate steps to engage new BVI legal reps not least

	because of witness statement deadline of 30.08.16
18.08.16	Defs2/4 solicitors (Maples & Calder) apply to come off record
26.08.16	Extension to 02.09.16 sought by Claimants
30.08.16	Def1 agree extension; Sols for Defs2/4 (Maples & Calder) inform parties they no longer act and cannot take instructions but have passed request on
02.09.16	Def1 ask for short extension until next week but ask in light of fact Kobre & Kim to replace Maples & Calder whether sensible to postpone exchange to see the position.
08.09.16	Def1 ask further extension until 14.09.16
09.09.16	Claimants agree extension to 14.09.16 for Def1 only Expiry of time limit for service Defs2/4 witness statements
12.09.16	Kobre & Kim write to Harneys (lawyers for claimants) seeking agreement for 21 day extension. Claimant refuses.
13.09.16	Kobre & Kim engaged by Defs2/4
14.09.16	Def 2/4 new solicitors Kobre & Kim give notice of acting Claimants and Def1 exchange witness statements
	1st Application issued: extension of time and relief from sanctions. Listed 09.11.16
30.09.16	Affidavit pp Claimants on 1st application (K Crabbe-Adams)
07.10.16	16:27: Defs2/4 Witness statements filed 18:15: Email Kobre & Kim to Harneys & Conyers : confirm filing and ready to mutually exchange. Suggest early next week.
11.10.16	09:40 Harneys file 2nd Application (dated 10.10.16) 16:15 Harneys serve Kobre & Kim with 2nd Application, notice of hearing 2pm following day

The relevant procedural law and the facts regarding extensions of time

[3] The relevant procedural law is not in dispute.

[4] The dates for service of the witness statements set by the Court's order of 12 July 2016 or, if no such order was made (I have only seen a draft consent order signed by the parties), then the original order of 21 January 2016, were capable of being altered by agreement between the parties provided that that would not necessitate any key dates being altered (EC CPR 27.8(2)). Whether by order or agreement it is clear that the date for exchange of witness statements ("Exchange") was extended until 30 August 2016.

[5] The circumstances in which extensions of time for Exchange after 30 August 2016 came about are unclear. Given Maples & Calder's ("M&C's) ceasing to play any active role (there was a gap between that position and their formal removal from the record), it appears that the extension of the time to Exchange to 2 September 2016, sought by the Claimants, was only agreed to by the solicitors for Def1, Conyers Dill & Pearman ("Conyers").

[6] The extension for Exchange sought by the solicitors for Def1 on 2 September, to 9 September, again does not seem to have been agreed by Defs2/4. It was apparently agreed to by the Claimants but there is no written record in evidence of how and when this was agreed. The evidence for the Claimants (Affidavit of Ms Kimberley Crabbe Adams made on 30 September paragraph 8) misleadingly suggests that the request on 2 September also contained a "further" request for the Claimant's consent to postpone the exchange of <u>all</u> witness statements as it had come to the attention of Def1 that Kobre & Kim were to be engaged for Defs2/4 in place of M&C. In fact, the relevant e-mail sought an extension "until next week" to enable the finalisation of a specific witness statement, the maker being then travelling. The letter then went on to ask, in the light of the anticipated appointment of Kobre & Kim "whether it might be sensible to postpone exchange of all statements until the end of next week so as to enable the parties to

determine whether exchange can take place simultaneously?" This is hardly the "further" request described by Ms Crabbe Adams.

[7] The emails between Conyers and Harney Westwood & Riegels ("Harneys") show that Harneys agreed to a further extension until 14 September for Exchange as between the Claimants and Def1 but not as between the Claimants and Defs2/4. However, it is wholly unclear from the evidence whether such information was relayed to Defs2/4 by Harneys and if so how.

[8] Although the matter is not before me there appears therefore to be a serious question as to whether not only Defs2/4 but also the Claimants were in breach of the relevant time for Exchange as set by Court order (to the extent it was validly and in fact extended by agreement). I do not know whether, and of so when, the Claimants followed the sealed envelope procedure for filing their evidence as provided for by EC CPR 29.7 to avoid themselves being in breach.

[9] It is also worrying that it is unclear as to which date the last extension was granted to. In their Skeleton Argument the Claimants confidently assert that the agreed extension for Exchange as between Defendants 2/4 and the Claimant was only until 9 September. That this was the intention of Harneys seems to be borne out by the emails between Harneys and Conyers. However, even on this point the evidence of Ms Kimberley Crabbe-Adams is ambivalent: (see paragraph 18 of her 2nd affidavit made on 10 October 2016): "*the deadline by which the Respondents should have exchanged their witness statements was 9 September 2016 at best and 14 September at worst*." The 9 September deadline, she says, was one that Defs2/4 were aware of as is shown by Mr Arthur's evidence sworn in support of the 1st Application. However, that affidavit in fact mirrors the doubt implicit in Ms Crabbe-Adams' affidavit as he says that he knew the deadline was extended until 9 September but was not sure whether, as regards the Claimants/Defs2/4, it was extended to 14 September (see paragraph 7 of his Affidavit made on 14

September 2016). I am satisfied on balance that Harneys did not intend or purport to extend the time for Exchange as between them and Defs2/4 to 14 September. However, it is far from clear to me that Defs2/4 had agreed to extend the time for Exchange to 9 September. Again, this is because it is far from clear there was any communication by or on behalf of Defs2/4 to Harneys or the Claimants after the agreed extension to 30 August 2016.

[10] For the purposes of the hearing before me, the Claimants accepted, and indeed asserted, that the time for Exchange between the Claimant and Defs2/4 had been extended to 9 September and I proceed on that basis. Leaving aside the position of the Claimant, it follows that there was a failure by Defs2/4 to Exchange within the time provided for by the Court (as extended by agreement between the parties).

[11] In the case of service of witness statements the EC CPR lays down the well-known sanction that if a witness statement is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits (EC CPR 29.11(1)). Thus, the rule imposes a sanction.

[12] An applicant for an order varying the time within which something must be done should, generally, apply prior to expiry of the relevant period (EC CPR 27.8(3)) but the Court can extend time even if the application is made after the time for compliance is passed (EC CPR26.1(2)(k)). If a party applies to vary a date after it has passed then the party must apply for (a) an extension of time and (b) relief from any sanction to which the party has become subject under the Rules or any court order (EC CPR 27.8(4)).

[13] Relief from sanctions is provided for by EC CPR 26.8. The application must be made promptly (EC CPR 26.8(1)(a)). The Court may grant relief only if it is satisfied (EC CPR 26.8(2)) "*that:*

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) *the party in default has generally complied with all other relevant rules, practice directions, orders and directions*"

[14]] If each of those conditions are met then, in considering whether to grant relief, the Court must have regard to (EC CPR 26.8(3):

(a) the granting of relief or not would have on each party;

(b) The interests of the administration of justice;

(c) Whether the failure to comply has been or can be remedied within a reasonable time;

(d) Whether the failure to comply was due to the party's legal practitioner; and

(e) *Whether the trial date or any likely trial date can still be met if relief is granted*."

[15] I was referred to a number of relevant authorities. I have these well in mind. In ***Ferdinand Frampton v Ian Picard***[1] Barrow J.A. at paragraph [14] stressed the need to apply the EC CPR in connection with applications for extension of time, and that the court cannot simply overlook the rules because it thinks it fair or reasonable or appropriate or just to do so in a particular case. In ***Dominica Agricultural and Industrial Development Bank v Mavis Williams***[2], the Court stressed the new approach and shift in litigation culture heralded by the CPR and the need to follow the specific CPR rule and to recognise that the framework of decision making under the EC CPR is different to that of the English CPR. In

[1] Court of Appeal, (Civil appeal no. 15 of 2005).
[2] Court of Appeal, (DOMHCVAP 2005/0015).

Prudence Robinson v Sagicor General Insurance Inc.[3] the Court of Appeal stressed the need for the court dealing with an application for relief from sanctions and to extend the time for filing and exchanging witness statements or witness summaries, to satisfy itself that there was a good explanation for the delay and that bald assertions without adequate evidence were not good enough. Further, the need to consider each of the factors set out in EC CPR 26.8(3) was stressed. They are not to be applied on a broad brush approach or as being largely dependent on being able to deal with outstanding applications and setting down the matter for trial.

[16] There was however a marked difference between the parties as to the manner in which I should apply the EC CPR provisions. Much of the Skeleton argument of Defs2/4 was taken up with an analysis of the English position and the well-known case of *Denton v TH White Ltd*[4]. Although the respective rules and litigation cultures of the English courts and the BVI courts share a common desire to encourage compliance with the Rules and for the same sort of underlying reasons the manner in which a solution has been sought to the perceived underlying problem has been different in each jurisdiction. There is therefore very limited assistance that one can get from the analytical approach to the different English rules which the English courts have taken when applying the EC CPR. The latter have their own very different structure on this topic. I accept however that there may be some assistance in looking at specific factors to the extent that they are common to the two regimes, however even here care has to be taken because the manner in which a particular factor is interpreted and applied can differ depending on the significance of its role within the relevant analytical framework. Anticipating a point raised by Mr Addo and dealt with below, what suffices as a "good explanation" when it is a minimum requirement before the Court can go onto consider other factors, may not require the same standard of explanation as is

[3] Court of Appeal, (SLUHCVAP 2013/0009).
[4] [2014] EWCA Civ 906.

required for a "good reason" in the English context, which is simply one among a number of factors that have to be balanced by the Court.

Technical points taken by the Claimants

[17] The first point taken by the Claimants, on their own skeleton described as being "highly technical" is that the 1st Application Notice is defective because in seeking an extension of time it refers to "the wrong provision", EC CPR r26. I do not really understand this point. The application for an extension is made under EC CPR r.26 (see r26.1(2)(k)), further EC CPR r26.8 deals with applications concerning relief from sanctions. In any event, the substance of what is being asked for is perfectly clear and even if the reference to the Rule number were to be wrong, no-one has been or could be misled for an iota of a second as to what the application is seeking. It is this sort of "highly technical point" which the whole culture of the EC CPR is supposed to do away with. It is one without legal, or indeed any other, merit. It is unfortunate that it was ever raised.

[18] The next point taken by the Claimants, is that the Defs2/4 failed to file and serve their witness statements prior to the time to which an extension was sought in their 1st Application Notice (4pm on 7 October). Accordingly, it is said, the application is defective. The evidence was filed on 7 October shortly before 4:30pm and not exchanged until 14 October 2016. The asserted reason why the application is defective is said to be that Defs2/4 thereby "failed to comply with their own deadline and were required prior to 4pm on 7 October to obtain by consent a further extension of time or failing that obtain an extension from the court". In other words, there was a second failure to meet a relevant deadline. However, this reflects a complete misapprehension as to the legal position. The time for Exchange was not extended by the making of an application seeking its extension to 4pm on 7 October. There was no "further default" when the 4pm 7 October point was passed. The most that can be said is that the Notice of Application

would formally need to be amended but, in the circumstances the Court would normally not bother to insist upon this formal technicality and, even if it did, would accede to an oral application at the hearing before it. As it happens the 3rd Application Notice seeks an order precisely to do that (though it itself may be defective in that it deals only with the filing of the Witness Statements and does not address the late Exchange). For the avoidance of doubt, I formally treat the application before me as being to extend time for Exchange to close of business on 14 October 2016 and formally dispense with any requirement to amend the Notice of Application. Contrary to the submission of the Claimants in their Skeleton argument, the 1st Application is not "a nullity" and no further application for relief and to extend time is necessary. Again, this technically wrong point, does nothing to further the overriding objective. The suggestion that the Court should "draw its own conclusions" from the alleged failure can only be directed at suggesting (as the Claimants' skeleton argument later asserts) that Defs2/4 are persistently in non-compliance with the rules and have a casual disregard for the court's processes. This is not an inference that can be drawn from the fact that no further application to extend time and for relief from sanctions was launched.

[19] The next point taken by the Claimants was that evidence on the 1st Application was served late. In the light of the Claimants' own behaviour in relation to the 2nd Application (which I deal with below) this submission is, at the least, somewhat surprising. The key question was whether the Claimants were or were not seeking for the evidence to be excluded or for an adjournment. It was confirmed to me, very sensibly if I may say so, that all parties were content to continue with the hearing on the basis of all the evidence filed. The argument that the evidence for Defs2/4 should have been served with the application was based upon EC CPR 69B.5(6). That rule does however permit evidence to be served as soon as reasonably practicable where circumstances do not permit it to be filed and served with the application. Given the circumstances in which the application was launched so soon after Kobre & Kim were instructed and came on the record and

given the location of the makers of written evidence (the People's Republic of China) and language considerations (the "late" written evidence was made in Simplified Chinese and then translated in Hong Kong) I am prepared to assume that circumstances did not permit the evidence to be available at the time of issue. It was suggested that the evidence was provided outside the time allowed by the rules by deduction from EC CPR 69B.5(10). That rule lays down a timetable for evidence in answer and reply and to enable the timetable to operate; the Claimants submitted that one can work back from the hearing date and that fixes a final date for service which overrides the general rule of "as soon as reasonably practicable" in EC CPR 69B 5(6). Again, I decry this sort of rigid highly technical approach to the CPR. In my view EC CPR 69B.5(10) does not override EC CPR 69B 5.6. Further, the suggestion that a further application should have been issued and evidence filed justifying an extension of time for filing the main evidence on the substantive application before me is just the sort of technical, costly, inflexible and un-co-operative approach that the CPR and the overriding objective is directed at avoiding. In the case of filing of evidence close to a hearing, the main question is whether in the particular circumstances the hearing can go ahead with that evidence or whether it can only be dealt with fairly if there is an adjournment. If so the question will be whether an adjournment is appropriate or whether the hearing should go ahead and the evidence be excluded. Explanations as to why evidence was served when it was may be relevant to these questions and to costs but in most cases explanations on instructions will often suffice. Given that it was accepted the hearing should go ahead I did not demand explanations as to why evidence was served when it was and in the circumstances I am not prepared to draw inferences that the service of evidence on this application by the Claimants was either in breach of the rules, deliberately late or carelessly late in the sense of showing, as submitted by the Claimants in their skeleton argument: "sloppy and continued contempt" by Defs2/4 for the court's processes.

The explanations of D2/D4

[20] The explanation as to why the witness statements of Defs2/4 were not served by 9 September 2016 is as follows. As can be deduced from the chronology set out above, the failure was as a result of M&C terminating their retainer and ceasing to act and new BVI lawyers having to be engaged.

(1) As regards Defs2/4, responsibility for liaising with M&C on certain administrative matters, including billing and payment of their invoices, was delegated to one Cheung Ngai Lam ("Mr Cheung"), the Chief Finance Officer of Def1. Def3 is the Chairman of Def1. The payment of legal fees for Defs2/4 was a responsibility assumed by Def3. Mr Cheung would pass invoices from M&C to Mr Lai, the finance controller of Def1 to arrange settlement. Settlement was not made from the resources of Def1 but from those of Def3.

(2) Between 2014 until February 2016, M&C's invoices were settled from funds controlled by Def3 in Hong Kong. From that time there were insufficient funds available outside the People's Republic of China (the "PRC") to meet the invoices of M&C. By June 2016, the funds in the Hong Kong SAR were exhausted. The significance of this is that foreign exchange control measures within the PRC, and the tightening of the same after 2015, made it difficult to obtain necessary approval to permit funds to be remitted outside the PRC, including to the Hong Kong SAR. The consequence was that by July 2016 there were several invoices outstanding to M&C in the total amount of approximately US$241,178.22.

(3) On 28 June 2016, Mr Lai commenced steps, explained in more detail in his affirmation, to find out about and activate the process to enable funds to be remitted outside the PRC. On 4 July 2016, officials at the Foreign Exchange Bureau provided information that the approval process will take a relatively long time and it was impossible to predict when approval would be granted. Accordingly Mr Lai visited the relevant Foreign Exchange office in Zhangzhou on 11 July 2016 to find out if there was a way round the problem. It was suggested he should take advice from the bank. He visited a relevant bank on

18th July with a view to obtaining an overseas loan with a domestic guarantee and thereafter a number of other banks. The overseas loan route was not feasible because it required repayment with foreign funds, as to which there were none. He then approached the friends of Def3 with a view to raising overseas funds.

(4) Meanwhile, on 20 July 2016, Mr Cheung received a communication from M&C requesting that the arrears of just over US$241,000 be cleared by 29 July 2016 and that a further sum on account of some US$300,000 be provided by 12 August 2016. In the absence of these payments M&C would cease work and terminate their engagement. In the meantime they would cease all work until full payment was received.

(5) Given the then deadline of 30 August 2016 for Exchange, ongoing efforts were made to meet the requirements of M&C. On about 26 July, M&C were paid some US$131,367, essentially using overseas monies raised from friends of Def3, so the outstanding debt was then just under about US$110,000.

(6) The deadline of 29 July payment of all arrears was not capable of being met. On that day M&C gave notice that they would apply to court to be removed from the record and would terminate their engagement. They said this could only be avoided by payment in full of the remaining invoices and the payment on account by 3 August 2016. By 3 August 2016, Mr Lai was able to pay the remaining arrears of just over US$110,000 again using overseas monies raised essentially from friends of D3. However, Mr Lai was unable immediately to raise the further US$300,000 required as a payment on account. M&C agreed to extend the deadline for this payment initially to 12 August and later to 15 August. On 16 August M&C formally terminated their retainer. By 19 August Mr Lai has been able to raise about US$200,000. M&C were however unmoved from their resolve to cease acting and to continue with their application to be removed from the record. Mr Cheung points out his affirmation at the letter from M&C referred to the need urgently to appoint new BVI lawyers, which was a process that was then engaged on.

M&C did not apparently advise in terms that an application should be made for an extension of time to serve witness statements and although they remained on the record until Kobre & Kim filed a Notice of Acting on 14 September, they took no steps to request or apply for an extension of time for Exchange.

(7) Mr Cheung was authorised by Defs2/4 to find and engage new BVI lawyers. This took time because of conflicts of interest and the need to find a firm that had the ability to communicate in Chinese. Contact with Kobre & Kim was first made on or about 26 August. A retainer was paid on or about 7 September. Kobre & Kim were officially engaged on 13 September. The application and the change of the solicitors on the record were made on 14 September. The majority of documents from M&C only started to be received on 15 September.

(8) The failure to Exchange was therefore essentially because of difficulties in making timely payments to M&C, who as a result ceased work and later terminated their engagement.

[21] The original affidavit in support of the application by Defs2/4 was sworn by Mr Arthur of Kobre & Kim, Hong Kong. In that affidavit, he explained that there had been difficulties in the preparation of witness statements because there were no lawyers on the M&C team who spoke Mandarin. One of the reasons for selecting Kobre and Kim was that that firm could provide Mandarin speakers on their team acting for Defs2/4. I am satisfied on the evidence that Defs2/4 are not asserting that that the Mandarin language problems were of themselves a reason for the late Exchange, rather this is one of the reasons why Kobre & Kim were selected and why it took time to find replacement lawyers for M&C.

[22] I turn to the relevant requirements of EC CPR 26.8 I am satisfied that the application was made promptly. It was made within 5 days of the expiry of the deadline for Exchange of 9 September and the day that Kobre & Kim came on the record, having been formally engaged the day before.

The requirements of EC CPR 26.8(2)

[23] Mr Addo submitted that the default was "intentional" because, and I summarise his position, Defs2/4 shut their eyes to the inevitable from February and simply disregarded the rules. I am satisfied that the default was not intentional. From July Defs2/4 were doing what they could do to resolve the position with M&C. Even if they were careless before that, they did not intentionally fail to Exchange.

[24] The more difficult question, and the one on which most time was spent in submission, was whether there was a "good explanation" for the failure. Mr Heylin, on behalf of Defs2/4, candidly accepted that the explanation given was not the "best" explanation, but he submitted that it was nevertheless a "good" explanation within the meaning of EC CPR 26.8(2)(b). Mr Addo said that the explanation was not a "good" explanation. He says that, on the evidence, from February it should have been obvious that something needed to be done. There is no evidence that anything was really done to start addressing the position until far too late in June. The foreign exchange measures were, or should have been, well known to Defs2/4. The proceedings are very serious, involving serious allegations and claims for substantial sums of money. The individuals involved on the side of Defs2/4 are sophisticated businessmen. The dilatory way in which the matter was dealt with is simply unacceptable, and does not provide a "good" explanation as to why sums that ran out with the entirely foreseeable consequence that Defs2/4 would lose the services of their BVI lawyers because the latter had not been paid.

[25] After the hearing, Mr Addo prayed in aid English authority specifically on the meaning of the provision of a "good reason" (or its application) in the context of the principles applied by the English court in deciding the issue of whether relief from sanctions should be granted. I note that the examples of "good reason" given in

the *Mitchell* case,[5] although only examples, seem to envisage a very high standard of good reason, such as the serious illness or an accident suffered by the lawyer. However, the Court then went on to consider that there could be a spectrum of reasons from "very" good to ones that were weaker. In ***Newland Shipping & Forwarding Ltd v Toba Trading FZC***[6] the Court was faced with the question of an application for an extension of time. This arose from the loss of lawyers in circumstances where there was a dispute over fees. The court refused the same but on the basis that:

> " *Any difficulties that arose as a result of loss of representation were therefore foreseeable consequences of D1 not being prepared to pay fees which it was able to pay, but chose not to. That is not a good reason for default."*

[26] Mr Addo says that, as in the Newland Shipping case this was one where there was a lengthy build up to the withdrawal and it could have been planned for.

[27] In my view it is very much a fact dependent question as to whether an explanation is a "good explanation" within EC CPR 26.8(2). Furthermore, the quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A "good explanation" is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances. What may be required to be done (and which will therefore amount to a good explanation if done) where, for example, missing a deadline will necessarily involve losing a trial date may be much more than in other circumstances. Similarly, the attributes of the individuals involved may be relevant factors as to what will be required of them by way of conduct such that the circumstances in which they fail to serve witness statements on time may be said to amount to a "good explanation".

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[5] *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795.
[6] [2014] EWHC 210 (Comm)

[28] Unlike the *Newlands Shipping* case this was not one where the applicants for relief simply chose not to pay their solicitors knowing the consequences (in the *Newlands Shipping* case the solicitors were later re-instructed and the inference is that they were in fact paid the formerly disputed sums). I accept, as did Mr Heylin, that the explanation is not the "best" one nor even a "very" good one. However, in my view it just scrapes by as a "good explanation". The raising of money from friends and associates was clearly a matter of last resort and desperation and I do not consider that it is fair to say that when efforts were made funds were quickly raised and this course should have been taken much earlier and the failure to do so means that there is no good explanation. The court should always be wary of being too wise after the event.

[29] I should add that I am not impressed by the submission that the failure of Defs2/4 to ask the Claimants for extensions itself amounts to an absence of "good explanation" for the failure to Exchange by the deadline. It is clear that the Claimants would not have permitted an extension. The failure to ask for one can hardly therefore be seen as a causative of the missed deadline. Had they asked for an extension this would not, in my view, have changed the situation such as that there would then have been a "good" explanation for the default, had there not been one before that.

[29] That leaves the issue as to whether Defs2/4 have "generally" complied with relevant orders, Practice Directions etc. I have dealt with some alleged failings in this respect above and found they are not made out. Mr Addo relied on Defs2/4's need for extensions. However, if extensions were granted then there was no relevant breach. The only matter he was able to raise was the failure to serve a defence in time in the case of Def2. That matter was later dealt with on an agreed basis. In my view it does not demonstrate that Def2 (and certainly not Defs3/4) had not generally complied with relevant orders etc.

Discretion

[30] It is therefore necessary for me to turn to the factors set out in CPR 26.8.

(1) Effect on the parties: Obviously there is a serious effect on D2/4 if relief from sanctions and an extension is not granted. So far as the Claimants are concerned, there has been a rescheduling of the timetable to trial (without prejudice to this application) and the trial date is not lost. There may have been some additional costs incurred but if that is the case then it can be compensated for separately.

(2) The interests of the administration of justice: the interests of the administration of justice are on the one hand that parties can put forward their whole case and evidence before the court and on the other hand that timetables are kept to and that this is encouraged by the deterrence factor of the sanction applied in the rules, otherwise where there are breaches the court's resources can be wasted (by application such as these and/or by lost trial dates) and other litigants are affected. Here, the default does not appear to have caused loss of the trial date (though this is a separate factor anyway).

(3) Remedy of default: here the position has been remedied although it took a month, but given the change in solicitors that is not an unreasonable time.

(4) Responsibility: the fault appears to lie with D2/4 not its solicitors.

(5) Trial date: as mentioned the likely trial date will still be met and the parties have worked on in the meantime but without prejudice to the outcome of D2/4's application.

Disposition

[31] Having regard to the above factors in all the circumstances I am satisfied that it is appropriate to grant relief from the relevant sanction imposed and to extend time for D2/4 to file and exchange witness statements until 14 October 2016.

[32] It follows that the Second Application seeking an order striking out the defence of D2/4, alternatively an unless order, is dismissed.

[33] I will hear from the parties further on the form of any order and any consequential matters, including costs.

Malcolm Davis–White QC (Ag)
Commercial Court Judge