Neutral Citation Number: **[2021] EWHC 3382 (Ch)**

Case No: BL-2021-000228

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

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

Date: 13th DECEMBER 2021

Before:

DEPUTY MASTER FRANCIS

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Between:

(1) CAVADORE LIMITED **(2) MAGENTA BLACK TRADING LIMITED**	**Claimants**
- and –	
(1) MOHAMMED JAWA **(2) MODERN FOOD COMPANY LIMITED**	**Defendants**

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Barnaby Hope (on 29 November 2021) and **Max Cole** (on 3 December 2021) (instructed by **DMH Stallard LLP**) for the **Claimants**
Denise McFarland (instructed by **LK Law LLP**) for the **Defendants**

Hearing dates: 29 November, 3 December 2021

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APPROVED JUDGMENT

Deputy Master Francis

1. I have before me three related applications brought by the claimants, Cavadore Limited ("Cavadore") and Magenta Black Trading Limited ("Magenta Black"), seeking further time for compliance with an unless order made by Deputy Master Arkush on 26 August 2021 (although only drawn up in a perfected order on 20 September 2021), and, if necessary, relief from sanctions for failure to comply with that unless order. The applications raise questions as to the exercise of the court's power to permit amendments to an application notice, and the treatment of applications which, as issued, were in-time applications for extensions of time but which, absent amendment, are now superseded by lapse of time and are moribund; am I to apply the *Denton* criteria in ultimate determination of the applications, or the less stringent test which applies to in-time applications?

2. The applications have been argued with considerable force and skill, on behalf of the claimants by Mr Barnaby Hope, in writing and at the first hearing on 29 November 2021, and at the adjourned hearing on 3 December by Mr Max Cole; and on behalf of the defendants throughout by Ms Denise McFarland.

Background

3. Cavadore and Magenta Black are companies registered in the Republic of Cyprus, with which Marios Georgallides and his wife Kalliopy Georgallides are closely associated. Cavadore is stated to be the ultimate beneficial owner of the business that operated and managed the Japanese restaurant Nozomi in Knightsbridge, and claims to have established an international reputation and goodwill in the name "Nozomi"; it has registered the word "Nozomi" and its distinctive logo as trade marks in the United Kingdom and, it is alleged, other countries around the world. Magenta Black is entitled to exploit the intellectual property rights relating to Nozomi under the terms of a licence granted by Cavadore.

4. Mohammed Jawa, the first defendant, is a national of the Kingdom of Saudi Arabia ("KSA"). Modern Food Company Limited ("MFC"), the second defendant, a private company operating under the laws of KSA. Mr Jawa was formerly a shareholder in, and director and CEO of MFC, but is said to have ceased any association with MFC since July 2020.

5. The present claim concerns five franchise agreements entered into by Magenta Black with Mr Jawa and MFC in the period between 2012 and 2016 for restaurants to be opened in Riyadh and Jeddah, as well as Kuwait City and Dubai, operating under the Nozomi brand and in accordance with the Nozomi system. Those agreements have since been terminated but Magenta Black claims damages from the defendants for breaches of those agreements and consequent on the defendants' alleged repudiation of the agreements. Furthermore Cavadore and Magenta Black both seek injunctive relief and damages for the wrongful interference with, and misappropriation of their intellectual property rights in Nozomi. The value of the claims is stated to be at least £23 million.

6. The claims are disputed but it is unnecessary for present purposes to consider their merits in any detail; I have seen nothing to suggest they are not ones which are properly arguable.

7. This is in fact the third claim brought in this jurisdiction by the claimants against the defendants based on the same allegations. The first claim, BL-2018-001468, was commenced in the Business and Property Courts in June 2018. On 4 July 2018 Master Price granted permission for service of the claim on the defendants out of the jurisdiction in KSA, and subsequently granted the claimants default judgment on 10 October 2018. The defendants thereafter brought an application to set aside the default judgment on grounds the claim form had not been validly served in accordance with the laws of KSA, which succeeded before Deputy Master Bowles on 12 December 2019; and, as time for service of the claim form had by then expired, the first claim was struck out. The claimants were ordered to pay the defendants' costs of the claim, with an interim sum of £90,000 ordered on account on such costs on 21 January 2020 and the defendants subsequently obtaining a default costs certificate on 13 May 2020 for £210,036.61. To date the claimants have not paid a penny to those costs.

8. The second claim, BL-2020-000106, was issued on 17 January 2020 seeking only injunctive relief. That claim was never served after the defendants' English solicitors, Lipman Karas LLP, declined to accept service in this jurisdiction and so simply fell away.

9. As a result of non-payment of the costs order in the first claim, the defendants presented a winding up petition against Cavadore on 28 August 2020 in the Republic of Cyprus. That petition is yet to be determined, having been adjourned on a number of occasions. I understand that Cavadore relies by way of answer to the petition on the contention that it is entitled to set off against the costs order the sums which it expects to recover in its substantive claim against the defendants.

10. The present claim was issued on 11 February 2021. On 10 March 2021 the claimants applied without notice for permission for service of the claim on the defendants out of the jurisdiction in KSA, and for an order permitting service by alternative means including by e-mail on Lipman Karas. The application came before Deputy Master Teverson on 1 April 2021 who granted permission for service out and for service by alternative means by serving the claim on Lipman Karas by first class post. However, his order was conditional upon an undertaking which he required the claimants to give to pay the costs of the first claim, which he had been informed by their counsel, Mr Hope, was due and outstanding in a sum of £90,000, the amount of the interim costs order.

11. Mr Hope had been unaware at the hearing of the default costs certificate obtained in the first claim, but was advised of this by his solicitors shortly after the hearing. As a result, before the master's order was perfected he wrote to Deputy Master Teverson on 6 April 2021 to inform him of the full amount of the outstanding costs, and to request that the requirement for the claimants to undertake to pay this larger sum as a condition of the grant of permission be removed on the grounds that the claimants did not have the means to do so, and their claim would otherwise be stifled. On 22 April 2021 Mr Georgallides made a witness statement in support of the request that the condition be removed or varied, stating *inter alia* that the claimants "did not have the ready cash" to meet the costs order, and submitting that the court should instead leave it for the defendants to apply for a stay of the claim following service until the earlier costs order was satisfied, at which point the court would be in a better position to determine whether it was just to impose such requirement having regard to its assessment of the strength of any defence to the claim. At a further hearing on 27 April 2021 Deputy Master Teverson was persuaded to

remove the condition, no doubt on the strength of those submissions, and the order for permission for service out and for service by alternative means, now in unconditional terms, was drawn and sealed accordingly.

12. On 18 June 2021 the defendants applied to set aside or vary the 27 April 2021 order on the grounds (i) the claimants had failed to give full and frank disclosure, (ii) there was no good reason to have given permission for service by alternative means and (iii) the court should in any event reinstate the condition for payment of the unsatisfied costs order. The application was supported by a lengthy statement from Mr Andrew Ford, a solicitor at Lipman Karas, of the same date, in which a number of complaints were set out as to the manner in which the claimants had pursued its application for service out and alternative service without notice to the defendants, and as to the failure to provide full and frank disclosure on various matters including the amount of the unsatisfied costs of the first claim.

13. The defendants' application came before Deputy Master Arkush on 26 August 2021. He expressed some concerns at the outset of the hearing about the manner in which the claimants had proceeded, in pursuing its application on a without notice basis and in failing to set out the costs position in evidence up front, and indicated that he would need to be persuaded why he should not order a stay until the costs of the first claim had been paid; he further indicated that he was minded tentatively to set aside the order for alternative service on the basis that the only ground relied on to justify such order, that of the prospective 12 month delay in effective service through official channels in KSA, was inadequate. In the light of those indications, counsel for the claimants requested some time to take instructions, and if so instructed to enter discussions with counsel for the defendant, Ms McFarland.

14. The master acceded to that request, and later that day counsel returned with agreed terms to dispose of the application on the basis that (i) the existing permissions for service out and alternative service would be set aside, and new permission granted for service out in KSA by official channels, with time for service extended to enable that to take place, and (ii) the claimants were to pay the outstanding costs of the first claim together with the assessed costs of the defendants' application by 25 September 2021, in default of which the claim would be struck out 14 days thereafter. The master then proceeded with a summary assessment of the defendants' costs of their application which he allowed in a sum of £55,000. In the *ex tempore* judgment which he gave on that assessment, the master noted the defendants' "strenuous objections to the way the claimants have gone about matters" and Ms McFarland's description of their conduct as "risk-taking", one which he stated he was inclined to agree.

The unless order as drawn and the applications which followed

15. As it was subsequently drawn up and perfected, Deputy Master Arkush's order ("the Arkush Order") provided as follows:-

> *4. On or before 25 September 2021, the Claimants shall pay to the Defendants' solicitors the outstanding costs order in the amount of £236,871.64 together with the sum of £55,000, (the latter being the sum ordered pursuant to paragraph 5 below).*

5. The Claimants shall pay the costs of and relating to the Defendants' said application, which costs have been summarily assessed in the sum of £55,000.

6. These proceedings and all further steps herein shall be stayed until the Claimants have paid (in full and cleared funds) the total sums identified in paragraph 4 above.

7. That in the event the Claimants fail to pay the costs identified at paragraph 4 above, the claim shall be struck out on 9 October 2021 without further order.

16. 25 September 2021 was a Saturday. On the previous day, DMH Stallard sent an e-mail to Lipman Karas (now trading under the style LK Law) at 10.10am stating as follows:-

We understand that funds from our client (pursuant to Deputy Master Arkush's Order dated 20 September 2021) are currently en route to us.

We are conscious, however, that the deadline fast approaches. In the event that these funds do not clear in time, are you agreeable to an extension of the deadline until Monday 27 September 2021?

17. In response, at 1.24pm LK Law stated that they were seeking instructions but as it was the weekend in KSA it was unlikely that they would obtain them before close of business.

18. As a result, DMH Stallard issued the first application notice which is before me in the afternoon of 24 September 2021. This sought an extension of time for payment of the costs under paragraph 4 of the Arkush Order until 27 September for reasons set out in box 10 to the application notice, which stated as follows:-

The Claimants seek permission to extend time to pay the £291,871.64 until 27 September 2021. This is due to logistical banking delays in receiving the funds from Cyprus from where they are being transferred

19. On 27 September 2021 DMH Stallard sent a further e-mail to LK Law at 9.41am in the following terms:-

We are instructed that the funds can be with you today as indicated on Friday. Please now confirm whether your clients will consent to our Application seeking an extension for payment today

20. However later that same day DMH Stallard issued a second application notice, described as an amended application, bearing the date 24 September 2021, now seeking an extension of time until 8 October 2021. The reasons set out for that in box 10 were now stated as follows:-

The Claimants seek permission to extend time to pay the £291,871.64 until 8 October 2021. This is due to logistical banking delays in receiving the funds from Cyprus from where they are being transferred. <u>The banking facility required to enable the Claimants to make the payment has been approved. There is a technical difficulty with the security required by the lender, which the Claimants understand will be resolved imminently, enabling payment prior to 9 October 2021 when the claim would be struck out pursuant to paragraph 7 of the Order of Deputy Master Arkush</u>

[underlining as contained in the amended application notice]

21. In a letter sent to DMH Stallard on 28 September 2021 LK Law requested further information on the alleged facility and the technical difficulties referred to and questioned the inconsistencies between the explanations provided for the delay in the first and second application notices. On the same day, LK Law wrote to the court expressing its concerns at the deficiencies in the applications, and requested that they should be dealt with at a hearing rather than on paper. In response to a direction by Deputy Master McQuail, Mr Ford of that firm then prepared a third witness statement dated 5 October 2021 setting out, once again in great detail, the defendants' objections to the applications, including the paucity of information provided and the inconsistencies in the explanations for the delay between the applications.

22. In light of the defendants' opposition, and after some delay on the part of the claimants in the provision of counsel's dates to avoid, the applications were listed for hearing with a time estimate of 90 minutes on 29 November 2021. In the meantime the date of 9 October 2021, to which the claimants were seeking an extension of time to make payment, and on which it had been provided by the Arkush Order that the claim would stand struck out, had been and gone, without any payment being made or tendered, or any further explanation provided by the claimants or their solicitors for the delay.

23. It was only on 23 November 2021 that the claimants then issued a third application notice, now seeking (i) permission to re-amend the first application notice (or amend the second application notice) by extending the requested extension until 22 December 2021, or alternatively (ii) relief from sanctions arising from failure to comply with paragraph 4 of the Arkush Order. The application was accompanied by draft re-amended application notice in which it was now stated in box 10 as follows:-

> *The Claimants seek permission to extend time to pay the £291,871.64 until ~~9 October 2021~~ 22 December 2021. ~~This is due to logistical banking delays in receiving the funds from Cyprus from where they are being transferred~~. The banking facility required to enable the Claimants to make the payment has been approved. There is a technical difficulty with the security required by the lender, which ~~the Claimants understand will be resolved imminently~~ is in the process of being resolved, ~~enabling payment prior to 29 November 2021 when this application is listed for hear~~ing*
>
> [strike-through and red colouring as contained in the re-amended application notice]

24. The third application notice was accompanied by a third witness statement of Marios Georgallides in which the following facts (*inter alia*) were revealed for the first time:-

    a) the funds required to pay the costs order were being raised by the remortgaging of Mr and Mrs Georgallides' residence at 22 Highfields Grove Road, London N6, which was owned by Mrs Georgallides;

    b) Mrs Georgallides had received an offer for finance from B2B Bridging LLP in a sum of £950,000 on 16 September 2021;

c) before the loan was ready to complete, the lender had informed Mrs Georgallides that it could not proceed because there were two bankruptcy restrictions against the title to the property; these related to previous petitions which had been dismissed, but the restrictions had been left on the title;

d) DMH Stallard had been instructed to seek the removal of these restrictions; their removal was confirmed by HM Land Registry on 26 October 2021 when it issued an updated official copy of the registered title to the property;

e) however, this now revealed the existence of a new bankruptcy restriction noted against the property, relating to a bankruptcy petition presented against Mrs Georgallides on 5 October 2021 for a debt of £9596.23 claimed by Highfields Grove Management Ltd; they were unaware of this debt "despite a statutory demand apparently having been served on 9 August 2021";

f) DMH Stallard had thereafter arranged for the debt to be paid off and the petition withdrawn, but despite a consent order being drawn up to that end on 4 November 2021, the dismissal of the petition was only confirmed at the date of its first hearing on 22 November 2021 in the County Court at Central London;

g) following the dismissal of the petition, the lender was now in a position at last to progress the loan, and it was expected that it would be completed so as to enable payment by no later than 22 December 2021.

25. In the light of the information now provided in this witness statement, it can be seen quite clearly that the explanation for the requested extension in the first application notice was wrong and misleading. The monies were never coming from Cyprus, and the delay in their transfer was due to much more than "logistical banking delays".

26. At first sight, it might appear that the proposed amendments set out in the second application notice, whilst presenting what was still and incomplete and confusing picture, at least to some extent corrected the misleading explanation contained in the original application. However, I have been referred to a letter from B2B Bridging LLP to Mrs Georgallides dated 20 September 2021, which was not exhibited to Mr Georgallides' third witness statement, but has subsequently been exhibited to Mr Ford's fourth witness statement (to which I refer below). In that letter, B2B state as follows:-

> *However, due to the pandemic and consequent back log of cases with the Land Registry and to perfect the increase of our second charge up to £950,000, taking into account the existing charge, we expect the Land Registry to require up to 6 – 8 weeks to deal with this matter.*
>
> *As soon as we can perfect the increase to our charge by late October or early November, we will be ready to advance funds which will be released to the borrower within two working days*

In the light of that, it is difficult to see how it could have reasonably have been asserted in the second application notice that the "technical difficulty with the security" was one which "the Claimants understand will be resolved imminently, enabling payment prior to 9 October 2021 …"

27. Pausing for a minute, I should note that the claimants would be in a much stronger position if they had been open and transparent in September and October 2021 as to the source of funding for the intended payment, the hurdles which needed to be overcome to enable the financing to be completed and the likely timescale for this. It is surprising that no attempt has been made by the solicitors who prepared the first and second applications to explain, and apologise for, the misleading and incomplete information provided therein.

28. The third application notice and Mr Georgallides' accompanying statement were only served on LK Law on 24 November 2021, three business days before the listed hearing of the applications on 29 November 2021. The defendants objected strongly to the late production and service of this application and evidence, which significantly altered the nature of the relief and the substance of the grounds for granting it. At the commencement of the hearing on 29 November 2021 Ms McFarland urged me to disregard it and to deal with the first and second application notices as the only matters properly before the court which, without more, were moribund and should be dismissed, leaving the third application to be determined separately as a free standing application for relief from sanctions alone at a further hearing some time in the future. I declined to adopt that course because I considered as a matter of case management that all three applications should be heard and dealt with together as soon as possible. However, conscious that the defendants had not had proper opportunity to respond to the third application, I adjourned the hearing until 3 December 2021 with directions for the defendants to file and serve any further evidence on which they wished to rely in opposition to the third application by 10am on 2 December 2021.

29. Mr Ford took up that invitation by preparing and serving a fourth witness statement on that date, containing the same detailed critique of the claimants' evidence and conduct that has characterized his previous statements. At times in those statements he trespasses into comment and submissions, which would be better left to counsel's written or oral argument, but this is symptomatic of the high stakes which this satellite litigation carries for both sides to this dispute, where the fate of a claim for £23 million or more hangs in the balance.

The competing analyses

30. On behalf of the claimants, Mr Hope and Mr Cole present a beguilingly simple analysis of the position:-

    a) the first application notice and the second application notice (as an amendment of the first) were in-time applications for extensions of time to comply with paragraph 4 of the Arkush Order; as such, they did not fall to be determined as if applications for relief from sanctions by reference to *Denton* principles, even though the time for compliance had expired before the applications could be heard and determined: see *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661 at paragraph 26; *Everwarm Ltd v BN Rendering Ltd* [2019] EWHC 2078 (TCC); [2019] 4 WLR 107 at paragraph 37;

    b) furthermore, the sanction for non-compliance with paragraph 4 of the Arkush Order did not take effect whilst the in-time application(s) remained to be heard and determined, or at any rate did not take effect absolutely; instead its effect was

suspended pending such determination, or was subject to retrospective disapplication if the extension was granted (see *Everwarm* at paragraph 16);

c) in the meantime, the claimants were entitled to apply to the court to amend the application notice to seek a longer extension of time based on new or changed circumstances, as they now seek to do;

d) the court should apply the Overriding Objective in determining whether or not to grant permission to amend the application;

e) if such permission is granted, the amended application for an extension of time to 22 December 2021 should be treated and determined as an in-time application, as the original application would have been.

31. Ms McFarland for the defendants takes issue with this analysis. She contends that the claimants are seeking to get in through the backdoor as an in-time application what is in reality an application for relief from sanctions which should be properly be determined on the principles applicable thereto. She contends that the original in-time application for an extension of time, as comprised in the first and second applications, is irretrievably moribund and cannot be reinvigorated through the proposed amendment, brought as it is after the guillotine date when the strike out took effect and after the expiry of the period of the extension as it had originally been sought.

32. It seems to me that the effect of bringing an in-time application for an extension of time is that the sanction which would otherwise have taken effect is suspended pending determination of the application. I note the alternative formulation in *Everwarm* at paragraph 16 that the sanction takes effect but is then subject to retrospective disapplication if the extension is granted, but this in my view is a matter of semantics without any practical difference.

33. I further consider that this is so even if the application only comes on for hearing after the period of the extension as it was originally sought has itself expired, where the delay in the listing of the application for hearing is no fault of the applicant. Where the respondent to the application has refused any request for an extension of time, thus necessitating the application, it may be difficult for it to complain that in the meantime, pending the determination of the application, the applicant has not been able or willing to comply with the original order within the extended period which it had originally sought by its application; where compliance will entail considerable expense, the applicant may quite fairly say that it was unreasonable for it to have to incur such expense whilst the respondent continued to oppose any extension and it was unclear whether the court would grant the same.

34. Thus far, therefore, I am with the claimants in their argument. However the analysis breaks down when applied to the facts of this case. The claimants frankly acknowledged that they were unable to proceed with the application as it was originally brought, unless permission was granted for it to be amended in accordance with the third application notice. That is because the basis upon which the application had originally been brought in the first application notice was unsustainable, and even as purportedly amended by the second application notice, the stated grounds for the application were confused, inaccurate and did not fully or adequately reflect the actual position in relation to funding

arrangements which were sought to be put into place upon which the claimants depended in order to comply with paragraph 4 of the Arkush order.

35. In my judgment, therefore, the claimants must first satisfy the court that permission to amend the original application (as contained in the first or second application notices) in accordance with the third application should be granted in the proper exercise of the court's discretion. If such permission is not granted, the original in-time application must fall away, leaving the claimants to pursue their third application notice as a stand-alone application for relief from sanctions.

Should permission be granted to amend the original application?

36. As set out in the White Book 2021 at paragraph 23.6.3, the power under r.17.1 of the Civil Procedure Rules to permit amendments to statements of case does not apply to application notices as these are not statements of case as defined in r. 2.3 (1). However the court has a general power within r. 3.1 (2) (m) to permit such an amendment for the purpose of managing the case and furthering the overriding objective.

37. There is little authority on the amendment of application notices. That is no doubt because the need rarely arises; in most cases a party can simply issue a fresh free-standing application. However the need did arise in *Agents Mutual Ltd v Moginnie James Ltd* [EWHC] 3384 (Ch), a case where Roth J had ordered that certain aspects of a claim be transferred to the Competition Appeal Tribunal, and that the claimant should bring any application for summary judgment on the balance of the claim in the Chancery Division by 16 August 2016 with the remainder of that claim then stayed. Having issued their summary judgment application in time on one specific ground which had been mooted before Roth J when he made his original order, the claimants subsequently sought permission at the hearing to amend the application to rely on two different and wholly new grounds. Master Matthews considered that he had power to permit an amendment of the application under r. 3.1 (2) (m), which should be exercised in accordance with the Overriding Objective. However, he declined to permit the proposed amendments because they had not been averted to when Roth J made his original order and it was unclear what he would have done had they been, and because they were raised very late in the day, such that it would be necessary to adjourn the hearing to accommodate them.

38. In this case I have come to a clear conclusion that I should not permit the original application notice to be re-amended as sought by the third application notice. My reasons are as follows:-

    a) the application has been brought late in the day, when it could and should have been brought much earlier; I consider that the claimants should have sought permission to re-amend the application notice as soon as they became aware of the likely delay in procuring the removal of the existing bankruptcy restrictions, and at any rate when they learnt of the new bankruptcy restriction entered in respect of the petition which had been presented in early October;

    b) the application as originally brought was misleading and the information provided sparse and inadequate, and as explained above the position was hardly rectified when the application was first purportedly amended by the second application notice; where an applicant subsequently seeks to amend the application to put it on a proper and

accurate footing properly supported by evidence it behoves that applicant to provide some explanation for the inadequacies in the application as originally brought; as already noted, none has been provided here;

c) the proposed amendments significantly alter the nature and substance of the application; it is, in reality, now brought on a very different basis from that originally set out; I do not find persuasive or realistic Mr Hope's attempts in his written argument to brush off the extent of the changes to the substance of the application in acknowledging simply that "reasons stated in support of the original … application were not explained satisfactorily" and "the nomenclature used was not ideal"; the changes to my mind are much more fundamental;

d) ultimately, it does not seem to me to accord with the Overriding Objective, in ensuring cases are dealt with expeditiously and fairly, and in enforcing compliance with rules and orders of the court, to permit a party by amendment to salvage at the last minute an application which as brought was misleading, inconsistent and inadequately set out and explained, all the more so where the party seeking such indulgence is doing so in order to take advantage of the less stringent regime which applies to in-time applications for extensions of time, and with a view to avoiding the more rigorous *Denton* criteria.

Relief from sanctions

39. It follows from my refusal to permit the re-amendment of the original application notice that that in-time application is moribund and falls away. The claimants must instead pursue the application contained in their third application notice for relief from sanctions, satisfying me by reference to the *Denton* criteria that such relief should properly be granted.

40. I have been referred by Ms McFarland in her thorough and very helpful skeleton arguments to a welter of first instance and Court of Appeal decisions in which the *Denton* criteria have been considered and applied. I have read those decisions, but I shall not lengthen this judgment by setting them all out. Ultimately the task I have to undertake is one which is specific and highly sensitive to the facts of this case, so other decisions provide me only with guidance in weighing up the various countervailing factors to which I should have regard.

41. It is accepted by the claimants that the failure to comply with paragraph 4 of the Arkush Order is a serious and substantial breach. The claimants plead in mitigation that it arose due to unknown and unforeseen matters affecting Mrs Georgallides' ability to obtain the loan, but the letter of 20 September 2021 to which I have referred above indicates that, even at that stage she knew or should have known that the loan would be unlikely to be completed until early November 2021, regardless of what was subsequently discovered about the new bankruptcy restriction. In any event, as observed by Coulson LJ in *Diriye v Bojaj* [2020] EWCA Civ 1400 at paragraph 46, there is no room at this first stage of the Denton test to apply fine gradations as to the gravity of the breach; serious is serious.

42. The claimants also accept, realistically, that there is no good reason for the breach. I would add that, notwithstanding the difficulties which Mrs Georgallides has encountered in completing the funding arrangements, the claimants have brought the present situation

upon themselves by their failure to be open and transparent at the outset as to the likely delay in completing those arrangements.

43. I have therefore to consider, on the third stage of the *Denton* test, all the circumstances of the case in order to deal with the application justly, including the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and courts orders.

44. There are a number of powerful factors which militate against the grant of relief:-

    a) the bulk of the costs which were the subject of paragraph 4 of the Arkush Order are ones which are unsatisfied from the first claim and have been outstanding for a considerable period of time;

    b) the gravity of the claimants' previous default in paying such costs, coupled with their decision to pursue a further claim whilst those costs remained unsatisfied, was recognised by the parties and the court in imposing in agreed terms the strike out sanction in paragraph 6 of the Arkush Order in the event of further default in their payment;

    c) unless orders should mean what they say; litigants cannot lightly breach the requirements of an unless order and expect to be relieved the consequences thereof: see e.g. *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB) per Andrews J at paragraph 46;

    d) in originally seeking extensions of time for compliance in their first and second application notices, the claimants presented accounts of the reasons for such extension which were misleading, confused and incomplete, as already set out above;

    e) the claimants thereafter delayed until 22 November 2021 before attempting to rectify the position and seeking relief; true it is that it was only on that date that Mrs Georgallides finally obtained the dismissal of the bankruptcy petition and so was in a position to progress the financing arrangements, but that did not prevent the claimants from providing a proper explanation to the defendants and the court of the position some weeks prior to that as part of a properly considered application for permission to re-amend the original application notice or seek relief.

45. Against that, there are pressing factors which are prayed in aid of the grant of relief:-

    a) if relief is refused, the claimants face the loss of a very valuable claim for estimated sums of at least £23 million; the claim appears on its face properly arguable and is one which is properly brought in this jurisdiction; the substantive defences to the claim are yet to be pleaded, but there is nothing to suggest that the claims are defective or face any obvious weakness;

    b) it is no real answer to say that the claimants can simply bring another claim seeking the same relief, as Ms McFarland suggests in her supplemental skeleton argument; the claimants are rightly concerned that any such further claim would be met by the argument that it constitutes an abuse of process: see the cases digested at paragraph

3.4.8 of the White Book 2021; when asked whether the defendants could confirm that they would not take such a point, Ms McFarland understandably declined to do so;

c) whilst the defendants have been kept out of their costs not just for the period since 25 September 2021, but for many months previously following the issue of the default costs certificate in May 2020, the prejudice which they may have suffered from that will be mitigated by their entitlement to interest at the judgment rate on those costs; no evidence is put forward on the defendants' behalf in this regard of any particular financial or other loss to which they have been subject by reason of the delay for which the entitlement to statutory interest is not adequate compensation;

d) despite the misleading and inadequate way in which the funding position was set out in the first and second application notices, it does appear from Mr Georgallides' third statement that Mrs Georgallides has made concerted efforts since September 2021 to obtain and progress the financing arrangements which will yield more than adequate funds to enable the defendants at last to be paid their outstanding costs in full.

46. I have anxiously considered all the factors which weigh in the balance on either side. The decision is not an easy one. However, I have concluded that relief ought to be granted. I am impressed in particular by the fact that the prejudice to the claimants arising from the loss of their claim, if relief is refused, would be disproportionate to the default for which they are responsible, serious though that is. In contrast I consider that any prejudice to the defendants from the grant of relief will be adequately met by the payment of judgment interest on the unsatisfied costs to which the defendants are entitled, together with an order that the claimants pay the defendants' costs of all three applications. I am perturbed by the manner in which the claimants have pursued the applications to extend time for compliance with paragraph 4 of the Arkush Order, but ultimately satisfied that Mrs Georgallides has made genuine and concerted efforts to progress the funding arrangements and the claimants should be given a final opportunity for those efforts to be brought to fruition for the defendants' benefit.

Disposal

47. Accordingly, I grant relief from sanctions and will extend time for compliance with paragraph 4 of the Arkush Order until 22 December 2021.

48. In view of the urgency in completing the funding arrangements before that time, I am handing down this judgment by e-mail at 2.30pm on Monday 13 December 2021. I have invited the parties to submit an agreed minute of order giving effect to this judgment, leaving outstanding to be dealt with by way of written submissions (to be served sequentially) only the question (i) as to the basis on which the costs I have ordered the claimants must pay should be assessed, and (ii) the amount to be allowed upon such assessment.