No: CL-2014-00472

[2015] EWHC 3888 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 20 November 2015

BEFORE:

MR JUSTICE POPPLEWELL

- - - - - -

BETWEEN:

(1) THOMAS IAN SINCLAIR
(2) SOKOL HOLDINGS INC

Claimants

- and -

(1) DORSEY & WHITNEY (EUROPE_ LLP
(2) WRAGGE LAWRENCE GRAHAM & CO LLP
(3) JEAN-PIERRE DOUGLAS-HENRY

Defendant

- - - - - -

MR PHILIP SHEPHERD QC (instructed by Capital Law LLP) appeared on behalf of the Claimants
MR MATTHEW PARKER (instructed by Dorsey & Whitney (Europe) LLP) appeared on behalf of the First Defendant
MR BEN PATTEN QC (instructed by Clyde & Co LLP) appeared on behalf of the Second and Third Defendants

- - - - - -

Judgment
(As Approved)

- - - - - -

Digital Transcript of Wordwave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 0207 404 1400; Fax No: 020 7404 1424
Web: www.DTIGlobal.com; Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

No of Folios: 84
No of Words: 6,018

Friday, 20 November 2015

MR JUSTICE POPPLEWELL:

1. On 30 September 2015, Flaux J made an order that all the claims in this action be struck out and judgment be entered for the defendants by reason of the claimants' failure to comply with an unless order that they provide security for costs. The claimants now apply to set aside the order by way of relief from sanctions pursuant to CPR 3.9, which, as is well-known, provides as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need -
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders…"

2. The first claimant, Mr Sinclair, is a New Zealand national resident in Bahrain. The second claimant, Sokol, is a company registered in Delaware of which Mr Sinclair is a director and shareholder. The first defendant, to which I will refer as "Dorsey London", is a limited liability partnership under New York law and operates as a firm of lawyers which is authorised to conduct business as solicitors in London. The third defendant, Mr Douglas-Henry, worked for Dorsey London between January 2007 and January 2008. Dorsey London is affiliated to Dorsey & Whitney LLP, which is a law firm comprising a limited liability partnership under Minnesota law, which also has an office (or did at the material time) in Denver Colorado.

3. The second defendant is another firm of solicitors which is, to put it loosely, the successor to two different firms, Wragge & Co and Lawrence Graham LLP, the latter being the firm to which Mr Douglas-Henry moved in January 2008 and for whom he worked as a partner until November 2009.

4. The claim as originally formulated in the Particulars of Claim, which remains the claim for the time being, is for professional negligence in a number of different respects, against Mr Douglas-Henry, and the two firms for which he successively worked. It includes a claim that both firms over-charged the claimants for work done. One central aspect of the claim in negligence is an allegation that the defendants failed to advise the claimants that a freezing order which had been granted by the English High Court on 21 August 2006 allowed Mr Sinclair on five days' notice to deal with shares in Max Petroleum Plc, an oil company founded by him, as a result of which he claims to have lost the opportunity to sell the shares prior to a price collapse resulting in an alleged loss of some £30 million.

5. The procedural history of this action is as follows. The Claim Form was issued on 30 May 2014. There had been no attempt to comply with the pre-action protocol. The Claim Form was served, without Particulars of Claim, on 29 September 2014. The Particulars of Claim were served on 27 October 2014. The first defendant's Defence, filed on 24 November 2014, took the point that the wrong defendant had been sued and that the retainer had been with Dorsey & Whitney LLP, the Minnesota limited liability partnership.

6. On 19 December 2014 the Defence was filed and served on behalf of the second and third defendants. They, too, pointed out that the wrong defendant had been sued and that the firm for whom Mr Douglas-Henry had been working at the relevant time was Lawrence Graham LLP. There should have been an application for a CMC in accordance with the rules by 26 December 2014, but no such application was made.

7. In January and February 2015, the defendants raised in correspondence requests that security for costs be provided. The claimants meanwhile suggested that a CMC should be fixed with an estimate of one to two days to deal with all matters, including applications to amend the Particulars of Claim and to substitute defendants.

8. On 17 April 2015, the first defendant issued an application for security for costs and on 1 May 2015, the second and third defendants issued an application for security for costs.

9. In evidence filed on 6 May 2015, Mr Sinclair said in his first witness statement that he was now in the final stages of securing third party funding and ATE insurance. That was an assertion which he repeated in his second witness statement on 10 June 2015. On 7 July 2015, his third witness statement said that a funding arrangement had then been entered into with Managed Legal Solutions Ltd ("MLS"); and he said that CFA arrangements with his solicitors, who were then Trowers & Hamlins LLP had been concluded.

10. The matter came before Flaux J on 10 July 2015 to deal amongst other things with the applications for security for costs and to consider directions in relation to the further conduct of the action. He made an order that security for costs be provided in favour of the first defendant in an amount of £100,000 in aggregate and in favour of the second and third defendants in an amount of an additional £50,000 in aggregate. Paragraphs 1, 2 and 4 of his order required that the security to be provided by paying those sums into the Court Funds Office or by providing security in some other form to the reasonable satisfaction of the first and second defendants. The order required security to be provided by 21 August 2015. That was a fairly generous time period, from 10 July to 21 August, within which to provide the security.

11. Flaux J also ordered, by paragraph 5 of his order, that the claimants were to provide the defendants with a copy of any ATE insurance policy as soon as reasonably practicable on obtaining it and in any event by 14 September 2015.

Paragraphs 13 and 14 of his order dealt with the costs of the defendants' applications: he ordered that the claimant should pay those costs, which he summarily assessed in the total amount of £65,000 to be paid by 7 August 2015.

12. The claimants did not pay those sums by 7 August 2015, nor did the claimants provide security for costs by 21 August 2015. On the last day of each deadline, the claimants issued an application for an extension of time within which to comply, seeking an extension up to 18 September 2015. In support of the application for an extension of time in relation to the £65,000 costs orders, Mr Sinclair said in his fifth witness statement that the ATE policy was in the final underwriting stages.

13. The applications for extensions of time came before Flaux J on 11 September 2015. Late on the afternoon of the previous day, 10 September 2015, Mr Sinclair served (or there was served on his behalf) a “fifth” witness statement (although I think in fact it was his seventh). In it he explained that the ATE policy was ready to be incepted as soon as it was formally accepted by his solicitor, and he therefore sought the extensions up to 18 September 2015. At the hearing, Mr Shepherd QC, who then appeared for the claimants, and appears for the claimants before me, opened by telling Flaux J that the position had changed somewhat from the position identified in Mr Sinclair's witness statement of the previous day. He told Flaux J that Mr Sinclair and Sokol had received offers of litigation funding through MLS and that they had obtained an ATE insurance policy but that there was a matter which was holding up the entire package which was that the ATE insurance, as well as the offer of funding, had to be signed by the solicitor who would be acting for the claimants; and that Trowers & Hamlins LLP, who had previously been acting for the claimants, were about to come off the record. The reason, he said, was that the amount of funding which had been provided was not considered by Trowers & Hamlins LLP to be sufficient to allow that firm to act. That was a somewhat surprising suggestion because Mr Sinclair had explained in his third witness statement as long previously as 7 July 2015, that the funding agreement with MLS was in place and that his solicitors (that is to say Trowers & Hamlins LLP) had satisfied themselves that the amount of funding would be sufficient for the conduct of the litigation.

14. Mr Shepherd went on to submit to Flaux J that Mr Sinclair appreciated that he had been in the last chance saloon for a while, and that he was probably nearer the door than he was last time. He asked that the claimants be given what he described as a "last chance" until the following Friday, that is to say 18 September 2015. Mr Shepherd submitted, "He knows that that will be the last chance. If your Lordship were to make an unless order, then I could not argue against it.

15. In the event, Flaux J decided that he would make an unless order, but he would give an additional period of time beyond that which was being asked for, namely a period of 14 days. He expressed the view that if it were 14 days, if they could not sort it out within 14 days they were never going to be able to,

and that therefore he was prepared to make an unless order for a 14 day extension. Paragraph 1 of his order provided that there was to be a final extension of time for complying with the previous orders for provision of security for costs to 4.30pm on Friday, 25 September. Paragraph 2 provided there was to be a final extension of time for complying with the previous orders in relation to payment of the £65,000 worth of costs, in that case to 4.30pm on Friday, 18 September, Paragraphs 3 and 4 of his order provided that in default of compliance, the claims should be struck out and judgment be entered in favour of the defendants without further order.

16. He also ordered that the claimant should pay the defendants' costs of those applications for extensions of time, which he summarily assessed in the total sum of £10,000, which he also ordered to be paid by 4.30pm on Friday, 25 September, although that was not the subject matter of an unless order.

17. On 25 September, 4.30 p.m. was the final deadline for the provision for security for costs. Prior to that, on 17 September 2015, the claimants had changed their solicitors and Capital Law LLP gave notice of change to come on the record. Also on that day, the claimants paid the total outstanding for costs of £75,000.

18. About 20 minutes before the 4.30 p.m. deadline on 25 September 2015, Capital Law LLP telephoned the first defendants, and the solicitors for the second and third defendants, requesting an extension of time for service of an ATE policy to act as the form in which security for costs was to be provided. The first defendants refused the request. Solicitors for the second and third defendants asked that the request should be put in writing so that they could take instructions. At 4.28 p.m. and 4.29 p.m. respectively, Capital Law sent letters by email to the first defendants and to the solicitors for the second and third defendants, attaching an ATE policy issued by ARAG. The covering letter asserted that the policy was sufficient to comply with the orders for provision of security for costs. It was not. The form of security required was payment into court or in some other form to the reasonable satisfaction of the defendants. There had been no attempt to seek the defendants' confirmation that they were satisfied with being provided with an ATE policy in that form and the ATE policy was not in fact in a reasonable form as an alternative to payment into court for many reasons which were explained by the defendants and their solicitors over the following days. It is now accepted on behalf of the claimants that the ATE policy in that form was not a reasonable alternative and that there was a failure to comply with the unless order on 25 September 2015.

19. On 28 September 2015, the first defendants sent a letter setting out a large number of objections to the form of the ATE policy which had been tendered, and on 29 September 2015 the solicitors for the second and third defendants sent a letter adopting those points and making a number of additional points. Both those letters made the anterior point that, as a result of the failure to comply with the order, the claim automatically stood as struck out in accordance with the terms of the unless order itself.

20. On 30 September 2015, the first defendants and the solicitors for the second and third defendants, wrote to the clerk to Flaux J explaining what had happened and asking for an order confirming the automatic effect of the failure to comply with the orders for provision of security, namely that the claim had been struck out. Flaux J made an order to that effect on the same day.

21. The claimants then set about trying to remedy the deficiencies in the ATE policy, as a form of security, which the defendants had pointed out. I will deal with those attempts later in this judgment, but suffice it to say at this stage that nothing that they put forward satisfied the defendants that it was appropriate that the order of Flaux J should be set aside. On 7 October 2015 the claimants issued their application notice for relief from sanctions.

22. The principles which fall to be applied are those which were set out in Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 WLR 3926, following and explaining Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2015] 1 WLR 795. In Michael Wilson & Partners v Sinclair [2015] EWCA Civ 774; [2015] 4 Costs LR 707, Richards LJ summarised those principles at paragraph 26 in the following terms:

> "As is now well known, the court in *Denton* said that a judge should address an application for relief from sanctions in three stages. To summarise paras 25 to 38 of the judgment of Lord Dyson MR and Vos LJ:
>
> i) The first stage is to determine whether the breach is significant or serious. If it is not, relief from sanction will usually be granted.
>
> ii) The second stage is to determine whether there is good reason for the breach.
>
> iii) As to the third stage, the judgment stated that the important misunderstanding of *Mitchell* was that, if there is a non-trivial (now serious or significant) breach and there is no good reason for the breach, the application for relief will automatically fail. That is not so. Rule 3.9(1) requires that in every case the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". That is the third stage. Further, the court in *Mitchell* described the two factors specifically mentioned in the rule, namely (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, practice directions and orders, as being of "paramount importance". This had encouraged the idea that other factors were of little weight. The judgment in *Denton* sought to remove that confusion by re-asserting

> that the two factors are of “particular importance” and should be given “particular weight” but stressing that 'it is always necessary to have regard to all the circumstances of the case'. The judgment expressed concern that a misunderstanding of *Mitchell* was leading to decisions which were manifestly unjust and disproportionate, whereas a more nuanced approach was required."

23. That case was concerned with an order that an appellant pay sums of money into court as a condition of pursing an appeal, failing which the appeal was to be stayed. Payment was made some 16 weeks later. Different considerations apply to cases where an order provides for a stay in the absence of provision of security from those which apply where the sanction for non-compliance is the striking out of a claim or defence or appeal under the terms of an unless order. At paragraph 36 of his judgment, Richards LJ expressed approval for a passage in the judgment of Leggatt J in Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA [2014] EWHC 398 (Comm); [2014] 1 WLR 3472, in which Leggatt J said this:

> "31. It does not follow, however, from the fact that the stay of proceedings imposed in this case is a “sanction” that all sanctions are equal and are to be treated as equivalent to one another for the purposes of CPR r 3.9. There is, in my view, a significant difference between an order which specifies the consequence that proceedings are to be stayed if security for costs is not provided by a specified date and an order that, unless security is provided by a specified date, the claim will be struck out. Such “unless” orders are of course commonly made when security for costs is not provided but not, at any rate in the Commercial Court, before the party ordered to provide the security has first failed to do so within a specified time.
>
> …
>
> 34. To apply the same approach to an application to lift a stay which takes effect when security is not provided on time as to an application for relief from the sanction of striking out the claim for failure to comply with an 'unless' order would collapse the important distinction between those two different kinds of order, with the different gradations of seriousness which they are generally understood to signify. … The essential difference is that a stay of proceedings if security is not provided is intended to be non-permanent, whereas an order that the claim be struck out is intended to bring the action permanently to an end absent any further order which avoids that result."

24. What Richards LJ said at paragraph 38 of Michael Wilson & Partners is also in

point:

> "In the ordinary course there is a clear distinction between the initial imposition of a sanction and the exercise to be conducted under rule 3.9 in considering whether to grant relief from sanction. I made that point, in relation to the sanction of strike-out, in my judgment in *Walsham Chalet Park (t/a The Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607; [2014] 1 Costs LO 157, at paragraph 44:
>
> "It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see *Mitchell*, paras 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out…""

25. Likewise, it seems to me that when a court is considering an application for relief from sanction where there has been a failure to comply with an unless order which has specified that a strike out is the sanction for failure to comply, the court must proceed on the basis that the sanction of strike out contained in the unless order was properly imposed as a proportionate sanction for failure to comply. It will, therefore, be a comparatively rare case in which the applicant can persuade the court, absent a material change of circumstances, that it would now be appropriate to grant relief from the sanction as being disproportionate.

26. I turn, therefore, to apply the three stage approach. The first stage is to enquire whether the breach is serious or significant. I have no doubt that in this case the breach ought properly to be categorised as very serious. The starting point is that breach of an unless order will almost always be treated as serious. It is a failure to comply with a court order in the knowledge that the court has already attached sufficient importance to the need to comply with it so as to impose the sanction of strike out as the proportionate consequence of non-compliance. Secondly, the requirement in this case that the claimants provide security for costs is an important one. The first claimant is resident in the United Arab Emirates, the second claimant is a Delaware corporation. Neither has at any stage, including on the present application, given a full and frank account in a witness statement of their assets. There are very real and justifiable concerns about their ability or willingness to meet a costs order in favour of the defendants if and when one is made.

27. Thirdly, there has been a protracted history in relation to seeking to procure the provision of security from these claimants. As I have indicated, the matter was first raised in correspondence in January and February 2015. The order which was made gave a generous period of time in requiring security to be provided by 21 August. There has been a failure to provide security which, for reasons which I shall explain, I regard as a failure which continues up to the present day, some eight weeks after the date to which a final extension was granted.

28. Moreover, the claimants did not, as in my view they should have done, raise with the defendants the possibility of relying on the ATE policy as a reasonable alternative to payment into court sufficiently in advance of the deadline to enable a sensible and constructive discussion to take place as to whether the terms of the policy could properly be treated as reasonably satisfactory to the defendants. Instead, they chose to serve and rely on an ATE policy minutes before the deadline without any prior discussion. In doing so, they took the risk that that would not be treated as a reasonable alternative to payment into court, as it is now recognised it is not. The points which were in fact taken by the defendants thereafter could readily have been foreseen as objections which the defendants were likely to take as to the form of the ATE policy.

29. Further, even now, some eight weeks after the extended deadline, the claimants are still not offering security which is satisfactory. What the claimants still wish to do, as the primary way of providing security, is to provide an ATE policy. The claimants have secured from insurers various amendments to the proposed policy terms, but what is currently offered does not meet all the reasonable objections. In particular, what is currently being offered by way of an ATE policy as security has, to my mind, the following deficiencies.

30. First, it still contains exclusions which exclude the costs of the claims which it is proposed to abandon, and the costs of the substitution of Dorsey & Whitney LLP for the first defendant. Secondly, the policy terms in their current form provide that, if payment of the premium, which is a sum of approximately £160,000, is not made within 21 days, then the policy will be cancelled *ab initio*.

31. Mr Meade, on behalf of the claimants explains in his witness statement of 8 October that the litigation funders, MLS, have agreed that, if relief from sanctions are granted, then that premium will be paid by MLS within three days thereafter and such agreement is evidenced by an email which is in the bundle. Mr Shepherd described that as an undertaking, but it is, of course, no such thing; it is simply an indication of the then intention of MLS. There is no guarantee that MLS would not change its mind and there is no undertaking.

32. There is a related point made by Mr Parker on behalf of the first defendants ,that offering to provide the ATE policy in this way is an inappropriate attempt by the claimants to have their cake and eat it (my expression not his) because,

he says, it is perfectly clear that the offer to provide security in the form of the ATE policy is conditional upon relief from sanction being granted and that, if the court were not minded to grant relief from sanction, no such ATE policy would be provided. That, Mr Parker submits, would not be appropriate because, if the defendants want to come to this court and throw themselves upon its mercy, they should be prepared to undertake unconditionally to provide the ATE policy, whether or not relief from sanctions is granted, so that at least the defendants have the security of knowing that whatever happens there will be some security for the costs which have been incurred to date. I see some force in that point.

33. Lastly, there is a point made by Mr Patten QC on behalf of the second and the third defendants that, even now, the ATE policy is a policy in favour of the claimants not in favour of the defendants. It confers no direct rights on the defendants which the defendants would be entitled to rely upon. Were the insurers to respond to the policy and pay such costs as the claimants are ordered to pay to the defendants, those costs would be payable not to the defendants, but to the claimants; and that provides no security to the defendants. It would only be if there were bound to be an insolvency, and there were the equivalent of the Third Party (Rights Against Insurers) Act in place in the relevant jurisdiction, that the defendants could ensure that in insolvency proceedings, they could take the full benefit of the entitlement under the policy without it having to be shared *pari passu* with other creditors. But there is no reason to think that, if insolvency proceedings were to take place against these claimants, they would take place in England or anywhere else which has the equivalent of the Third Party (Rights Against Insurers) Act.

34. For all those reasons, the form in which the ATE policy is even now being proffered would not be sufficient to fulfil the criterion of a provision of security in a reasonably satisfactory form.

35. Moreover, there has been, as a result of the continuing failure to provide security, a serious adverse impact on the progress of the claim. There has still been no CMC listed. Flaux J's order of 10 July 2015 ordered that it should be listed for the first available date after 1 November 2015 with an estimate of two days, but the delay in providing security and the applications in relation thereto, mean that that date has been missed and it is now unlikely that it will be possible to list the CMC before early next year if relief from sanctions were to be granted.

36. For all those reasons, the breach should be categorised as very serious.

37. Turning to the second stage which enquires: Is there good reason for the breach? The answer is unequivocally no. Mr Meade's witness statement in support of the application gives no detail as to what was happening in relation to the ATE policy, or when, so as enable the court to treat the delays as something which were beyond the reasonable control of the claimants. In paragraph 47 he refers cryptically to "third party processes", but perhaps most importantly, the whole tenor of the written statement treats the procurement of

the ATE policy as if it were something which came from a standing start on or after 17 September 2015 when there was a change in solicitors. That is a false premise on which to put forward the evidence. As is apparent from the passages I have already referred to in Mr Sinclair's earlier witness statements, the funding with MLS was said to have been in place, so far as Trowers & Hamlins LLP were concerned, as long ago as last July; and Mr Sinclair was repeatedly suggesting that the ATE policy was in the final stages of underwriting. If that were true, then there is no reason to suppose, and certainly none indicated in Mr Meade's evidence, that there should have been any difficulty, with reasonable diligence, promptly to effect the transfer to new solicitors complete the new ATE policy, which would not involve any re-underwriting but only satisfaction that the new firm of solicitors were appropriate in place of the old.

38. Moreover, as I have indicated, there has been no frank evidence from the claimants about assets which they might themselves have available to fund a payment into court as an alternative to the provision of an ATE policy. It is now said in Mr Meade's witness statement that they would be prepared, as a fall-back to the provision of an ATE policy, to provide security for costs in cash either by paying the excluded costs so as to deal with that deficiency in the ATE policy or, if the ATE policy were not regarded as acceptable, by payment of the full £150,000 into court. There has been an assertion of impecuniosity on the part of the claimants by Mr Shepherd, but in the absence of any frank evidence about their assets, such assertions of impecuniosity carry little weight. That is especially so since the claimants have found the cash to pay the £75,000 of the costs orders on 17 September 2015 and there is no evidence as to where that money came from.

39. The offer to pay in the alternative the £150,000 in cash came in Mr Meade's witness statement in a form which was, at best, ambiguous as to whether the money would come from the claimants' own funds or from MLS. Mr Shepherd said that the £150,000 was something which would come from MLS. Even were I to assume that that is so, there is no reason on the evidence before me to think that that would not equally have been the position prior to 25 September 2015, such that, had the claimants wished to do so, they could have procured that MLS would pay the £150,000 into court by the deadline on 25 September 2015.

40. I turn then to the third stage. I am required to pay particular attention to the two factors identified in CPR 3.9. First is the need for litigation to be conducted efficiently and at proportionate cost. In this case there has been repeated failure to provide security and the effect has been the delayed progress of the proceedings. Moreover, that aspect is only one and the last in the line of a number of aspects in which the claimants have conspicuously failed to conduct the litigation efficiently and at proportionate cost. There was no compliance with the pre-action protocol. There should have been steps taken to fix the first CMC early in 2015, but there has still been no CMC 18 months after the commencement of the action. As the claimants now accept, the first defendant has wrongly been sued and the claim should have been

brought in relation to Mr Douglas-Henry's conduct during that period against Dorsey & Whitney LLP.

41. On 9 July 2015, which was the day before the hearing on 10 July, the claimants served draft amended particulars of claim, abandoning three of the four bases of claim against the defendants and confining the claim, or seeking to confine the claim, to the claim in relation to the Max shares. But the application to make those amendments, and in particular the costs consequences, are yet to be determined. The security for costs aspects of the litigation have required three court hearings and a paper application to the judge, which is a disproportionate amount of time and cost and prejudicial to other court users.

42. So far as the other particular aspect which rule 3.9 requires to be given particular importance, that is to say the imperative in subparagraph (b) of enforcing compliance with rules, practice directions and orders, that is a consideration of particular weight in this case against the grant of relief from sanctions. There has been an unless order. There has been no proper excuse for failure to comply. It was accepted at the hearing on 11 September 2015 that this would be a last chance and there is a very powerful public interest in ensuring that parties recognise the importance of complying with unless orders.

43. In addition, all the factors I mentioned under the first heading which make this a very serious breach come into play again at the third stage. Of particular importance to my mind at the third stage, is the fact that Flaux J has already determined that the striking out of the claims is an appropriate and proportionate sanction for failure to comply with the provision of security for costs. He made that determination when considering whether to make, and in making, the unless order and in granting an additional period of 14 days. There is nothing to put this case in that rare category of cases where that value judgment should be revisited. There has been no material change in circumstances which has led to a failure to comply from what could reasonably have been contemplated and as being within Flaux J's expectation at the time that the order was made.

44. I also have in mind, although this is a point of more minor weight, that there was a delay which I regard as excessive in making this application to seek relief from sanctions. It was a week after Flaux J's order and almost two weeks after the deadline had expired.

45. Mr Shepherd has emphasised that what the court must do is consider all the circumstances of the case and seek to do justice. He submits that, if relief from sanctions is not granted in this case, then the claimants would lose a claim with a real prospect of success for an amount in excess of £30 million and that that is very severe prejudice. He says that that is disproportionate to the degree of fault and to the degree of prejudice which will be suffered by the claimants if the claim is not reinstated. The prejudice to the claimants in that way is indeed an important consideration, but it is not, in my view, sufficient

to warrant the grant of relief from sanctions applying the principles which I have identified. Indeed, to allow it to do so would turn the new approach which is required by Mitchell and Denton on its head.

46. Accordingly, the application will be dismissed.

- - - - - -