Neutral Citation Number: [2022] EWHC 1544 (Comm)

Case No: CL-2015-000029 and CL-2016-000041

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

MR JUSTICE FOXTON

- -

Between :

BANK OF AMERICA EUROPE DAC (formerly MERRILL LYNCH INTERNATIONAL BANK LIMITED)	**Claimant**
- and -	
CITTA METROPOLITANA DI MILANO	**Defendant**

And between:

MERRILL LYNCH INTERNATIONAL	**Claimant**
-and-	
CITTA METROPOLITANA DI MILANO	**Defendant**

- -

- -

Richard Handyside QC, Adam Sher and **Matthew Hoyle** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimants**
Craig Ulyatt (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing date: 9 June 2022.
Draft judgment to the parties: 13 June 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 20 June 2022 at 14:00 pm.

Mr Justice Foxton :

INTRODUCTION

1. This is an application by the Claimant in Claim No CL-2015-000029 (**BAE** and **the BAE Proceedings**) and the Claimant in Claim No CL-2016-000041 (**MLI** and **the MLI Proceedings**) to lift a stay of those proceedings (**the English Proceedings)** imposed automatically under CPR 15.11. If MLI's application succeeds, the Defendant (**Milano**) seeks an extension of time within which to acknowledge service of the MLI Proceedings, for the purposes of challenging the court's jurisdiction.

2. The proceedings are among a number of claims commenced in the Commercial Court and the Financial List arising from dealings between financial institutions and Italian local or regional authorities in relation to certain kinds of financial transactions.

3. In this case:

   i) MLI and Dexia SpA (**Dexia Crediop**) entered into an agreement with Milano in 2001 (**the 2001 Agreement**), by which they agreed to provide advice on credit ratings, and which also referred to the possibility of Milano appointing MLI and Dexia as co-arrangers for a Euro Medium-Term Note (**EMTN**) programme and as joint lead-managers and joint bookrunners of such a programme. The 2001 Agreement provided for Italian law and jurisdiction.

   ii) MLI and Dexia were in due course appointed as arrangers, joint lead-managers and joint bookrunners for the EMTN programme.

   iii) In 2002, Milano entered into two interest rate swap transactions with BAE on the terms of the ISDA Master Agreement 1992 form. On 13 November 2002, BAE and Milano entered into **the First Swap**. On 26 November 2002, they entered into **the Second Swap**. The First and Second Swaps provided for English law and jurisdiction. Similar transactions were entered into by Milano and Dexia (**the Dexia Transactions**), also on the terms of the ISDA Master Agreement 1992 form. The Second Swap was novated to Barclays Bank on 7 June 2005.

   iv) On 10 June 2015, Milano sent a letter (**the Letter of Complaint**) to BAE making various complaints about the First Swap and threatening to commence proceedings against BAE in Italy. In response, on 12 June 2015, BAE commenced the BAE Proceedings seeking declaratory relief which largely sought to give effect to protective representations made by Milano in the First and Second Swaps. BAE also responded to the Letter of Complaint by a letter from the Milan office of Freshfields Bruckhaus Deringer LLP (**Freshfields**). A mediation between Milano and BAE on 9 November 2015 was not fruitful.

   v) The BAE Proceedings were served on Milano on 1 December 2015.

   vi) On 7 December 2015, Dexia issued proceedings against Milano before the courts of England and Wales seeking declarations in terms of the protective representations in the ISDA Master Agreement.

vii) On 29 December 2015, Milano resolved to appoint lawyers to commence proceedings against BAE before the Italian courts in respect of claims for "extra-contractual" (which I understand to mean non-contractual) damages (**the 2015 Resolutions**).

viii) There were passages in the Letter of Complaint and the 2015 Resolutions which related to matters involving MLI, which led MLI to commence the MLI Proceedings on 22 January 2016. The MLI Proceedings were served on Milano on 4 February 2016.

ix) BAE and MLI served the English proceedings in Italy in reliance on CPR 6.33 which addressed "service of the claim form where the permission of the court is not required – out of the United Kingdom." In support of the contention that the English court had jurisdiction under Regulation (EU) No 1215/2012 of 12 December 2012 (**the Brussels Regulation Recast**) BAE relied upon the English jurisdiction agreement in the First and Second Swaps as giving the English court jurisdiction under Article 25; and MLI relied on Article 7(2), on the basis that it was seeking a negative declaration as to its liability in tort where the acts said to give rise to the damage or the damage itself had occurred in England (although there are parts of the claim form which seek a declaration as to the absence of liability in contract).

x) No Acknowledgements of Service (**AOS**) or defences were filed. Nor did BAE and MLI apply for judgment in default in respect of the declaratory relief which formed the subject of the proceedings they had commenced. I will return to the reasons why the parties took their respective courses below. However, the combined effect of the parties' decisions was that the English Proceedings became subject to an automatic stay under CPR 15.11 on 11 September and 4 October 2016 respectively (**the Automatic Stays**). By contrast, Dexia sought and obtained default judgment on 24 June 2016 in the terms of the declarations it had sought.

xi) Nor did Milano commence proceedings against any of BAE, MLI or Dexia in Italy (although on 30 December 2016, Milano once again authorised the commencement of proceedings against BAE in Italy, this time in terms which referred to bringing a claim for damages generally). Instead, Milano continued to make payments under the First Swap, without acknowledging the validity of that transactions or withdrawing its complaints.

xii) Milano says that it decided in 2017 not to commence proceedings against BAE, MLI and Dexia before the Italian courts, but in 2020 the legal landscape there was changed by favourable court decisions.

xiii) On 21 April 2021, Milano issued a summons in the Milan Civil Court seeking damages against MLI, BAE and Dexia in relation to the First and Second Swaps and the Dexia Transactions (**the Italian Proceedings**). For the first time, Milano's claims were formulated as alleged breaches of the 2001 Agreement.

xiv) In July 2021, the prosecutor of the Corte dei Conte (the Italian Court of Auditors) sent a document – the Invito – to 66 entities, including BAE, Dexia and a number

of former officials of Milano, inviting them to respond to various allegations relating to the First and Second Swap and the Dexia Transactions.

xv) This has led to BAE's and MLI's applications to lift the Automatic Stays and to Milano's counter-application for an extension of time to file an AOS in the MLI Proceedings if, contrary to its primary position, the stay of the MLI Proceedings is lifted.

THE APPLICATIONS TO LIFT THE AUTOMATIC STAYS

Introduction

4. CPR 15.11 provides:

> "(1) Where –
>
> (a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4;
>
> (b) no defendant has served or filed an admission or filed a defence or counterclaim; and
>
> (c) the claimant has not entered or applied for judgment under Part 12 (default judgment) or Part 24 (summary judgment)
>
> the claim shall be stayed.
>
> (2) Where a claim is stayed under this rule any party may apply for the stay to be lifted."

5. The clear purpose of CPR 15.11 is to avoid there being claims which continue in being but are not being progressed nor otherwise subject to judicial case management. It will be noted from the language in (1)(b) ("no defendant") that in a case with more than one defendant, the fact that one defendant does not file an admission or defence will not lead to the claim against that defendant being stayed in the absence of an application by the claimant for default or summary judgment, provided that at least one other defendant has filed an admission or defence. That is presumably because, in those circumstances, the case will come before the court, giving the court the opportunity to manage the case appropriately.

What test is to be applied when determining whether to grant an application under CPR 15.11(2)?

6. There is a dispute between the parties as to whether an application under CPR 15.11(2) is to be characterised as an application for relief against sanctions so as to engage the test in *Denton v TH White Ltd* [2014] EWCA Civ 906 (**the *Denton* test**), or whether a less onerous test falls to be applied. Support can be found for both positions.

BAE's and MLI's argument

7. In support of the view that the CPR 15.11 automatic stay is not a sanction and that an application under CPR 15.11(2) does not engage the *Denton* test, Mr Handyside QC relied upon the following:

   i) CPR 3.9 applies in terms only when a sanction is imposed "for a failure to comply with any rule, practice direction or court order." He argues that BAE and MLI did not breach "any rule, practice direction or court order" in failing to apply for summary or default judgment.

   ii) The view that an application under CPR 15.11(2) is not an application for relief against sanctions is supported by the observations of Cockerill J (expressed, it must be noted, in deliberately tentative terms) in *King v Stiefel* [2021] EWHC 1045 (Comm), [44]. When addressing the argument that a defendant who had issued an application for reverse summary judgment was nonetheless in breach of the rules in not serving a defence, she observed:

      > "To add to this, and to the same effect, there has been some consideration in the authorities of the question of whether CPR 15.11 is a sanction. If it were, it might tend to indicate that not filing a defence is a breach of the rules in and of itself, rather than simply giving the Claimant the initiative as regards applying for default judgment. Those authorities (in particular *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch), *Citicorp Trustee Co Ltd v Al-Sanea* [2017] EWHC 2845 (Comm), *John McLinden v Shiao Chen Lu* [2018] 4 WLUK 569 and *Bank of Beirut (UK) Limited v Sbayti* [2020] EWHC 557 (Comm)) tend to indicate that the discretion to lift the CPR 15.11 stay should not be approached as a relief from sanctions application and 'i*s not intended to place an especially heavy burden on the claimant to discharge before the court will agree to the stay being lifted*'."

   iii) The decision of Chief Master Marsh in *Football Association Premier League Limited* [2017] EWHC 152 (Ch), [10], from which the quotation at the end of [44] of *King v Stiefel* is taken. The defendant did not appear in that case.

   iv) The decisions in *Citicorp* and *McLinden* referred to by Cockerill J, in which Peter MacDonald Eggers QC and Butcher J respectively adopted Chief Master Marsh's approach, albeit in proceedings in which (once again) the defendant did not appear. However, Butcher J does appear to treat a claimant who becomes subject to a CPR 15.11 stay as having breached the rules (see the references at [9] to the fact that there had been no "application for default or summary judgment as required by the rules" and at [11] to "the Claimant's failure to comply with the six-month period").

   v) In the fourth case to which Cockerill J referred, *Bank of Beirut UK v Sbayti* [2020] EWHC 557 (Comm), HHJ Pelling QC assumed (without deciding) that the *Denton* test applied.

Milano's argument

8. In support of the contrary view, Mr Ulyatt referred me to the decision of Leggatt J in *New Zealand Cricket v Neo Sports* [2016] EWHC 3615 (Comm), [8]:

> "CPR 15.11(2) expressly provides that, where a claim is stayed under CPR 15.11, any party may apply for the stay to be lifted. Mr Mill accepts, correctly in my view, that the test applicable in such circumstances is the test which applies whenever a party seeks relief from sanctions."

(although, as will be apparent from that quotation, the point was conceded rather than argued).

9. He also relies on the terms of the Practice Direction to CPR 15, paragraph 3.4 of which provides that an application to lift the CPR 15.11 stay "should state the reason *for the applicant's delay in proceeding with or responding to the claim*." (emphasis added).

10. Finally, he relied on a line of authority addressing the automatic stay imposed under the transitional arrangements when the CPR were introduced. Paragraph 19 of Practice Direction 51 (**PD51**) provided:

> "(1) If any existing proceedings have not come before a judge, at a hearing or on paper, between 26 April 1999 and 25 April 2000, those proceedings shall be stayed.
>
> (2) Any party to those proceedings may apply for the stay to be lifted."

I will refer to the automatic stay imposed by paragraph 19 of PD51 as a Paragraph 19 stay.

11. In *Neo Investments v Cargill International SA* [2001] 2 Lloyd's Rep 33, [8], Aikens J noted that counsel for the party seeking to lift the Paragraph 19 stay (Mr Hamblen) had accepted that the stay had been imposed as a result of a failure to comply "with any rule, Practice Direction or court order", the breach in question being "that the case did not come before a Judge either at a hearing or on paper during the period April 26, 1999 to April 25, 2000." That decision, and others to similar effect, were approved by the Court of Appeal in *Audergon v La Baguette Ltd* [2002] CPR Rep 27, Jonathan Parker LJ observing at [102]:

> "There can be no doubt that, in ordinary parlance, the automatic stay imposed by paragraph (1) of the Practice Direction may aptly be described as a sanction. The question explored in argument, however, is whether it is a sanction 'imposed for a failure to comply with any rule, practice direction or court order" within the meaning of CPR r.3.9.' It seems to me that on the basis of the above authorities that question must be answered in the affirmative."

That decision was followed in *Flaxman-Binns v Lincolnshire County Court* [2004] 1 WLR 2232, [19] and *Woodhouse v Consignia Plc* [2002] 1 WLR 2558.

12. Mr Handyside QC sought to distinguish these cases on the basis that CPR 3.9 took a different form when they were decided. It is true that the then-current version of CPR 3.9 sought more comprehensively to identify the factors which might be relevant when considering an application for relief against sanctions. However, in the respect on which Mr Handyside QC particularly relies on the current CPR 3.9 – the reference to "relief from any sanction *imposed for a failure to comply with any rule, practice direction or court order*" – it was identical.

13. A second possible distinction is that in order to avoid the application of the "sanction" created by paragraph 19 of PD51, all that it was necessary for a claimant (or defendant) to do was to bring the case before the court, giving the court an opportunity to apply its own powers of case management under the new regime. By contrast CPR 15.11 expressly identifies two alternative courses open to a claimant seeking to avoid the imposition of an automatic stay under CPR 15.11, and those steps involve taking courses of action which would ordinarily be regarded as options rather than obligations on the part of a litigating party: entering judgment in default under CPR 12.3 ("the claimant may obtain judgment in default …") or applying for summary judgment under CPR 24 (which requires "an application for summary judgment"). That might suggest that some caution is required before applying the authorities on paragraph 19 of PD51 to CPR 15.11.

14. However, I do not accept that applications for default or summary judgment are the only means open to a claimant when the defendant has not filed an admission or defence of preventing the automatic stay coming into effect. In particular, it is open to a claimant who has good reasons for doing so to seek to proceed to a full trial on the merits in these circumstances, and the court's power to permit this course under its inherent jurisdiction has been confirmed in a number of first instance authorities including *Berliner Bank AG v Karageorgis* [1996] 1 Lloyd's Rep 426, *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [8] and *Eurasia Sports Ltd v Tsai* [2020] EWHC 81 (QB). In my view, it would also be open to a claimant in this position to apply to the court for a case management stay. That would differ from a CPR 15.11 stay not simply in being the result of a judicial determination rather than the effect of a provision of automatic effect, but because it would be open to the court to require the claimant to keep the court updated at periodic intervals. And, as I have observed, CPR 15.11 will not be engaged at all if another defendant has filed a defence, in which eventuality the case would remain subject to judicial case management in any event.

15. I accept, therefore, that the cases on paragraph 19 of PD51 provide strong support for Mr Ulyatt's argument.

Conclusion

16. The automatic stay of a claimant's claim following from its failure to ensure that the case remained subject to judicial management would, as a matter of ordinary language, be described as a "sanction". Such a claimant loses the unfettered right to pursue its claim, and must instead obtain the exercise of a court's discretion in its favour, which might be refused or granted on unfavourable terms. As Jonathan Parker LJ observed of the PD51 stay in *Audergon* in the passage quoted at [11] above, "there can be no doubt that, in ordinary parlance, the automatic stay … may aptly be described as a sanction".

17. Further support for this view is provided by the procedural antecedents of CPR 15.11. The first edition of *Civil Procedure* published in 1999 contained the following commentary after the new rule:

> "This rule imposes an automatic stay after 6 months if the defendant fails to file an admission, defence or counterclaim and the claimant has not sought default judgment or summary judgment. There was no equivalent rule in the RSC and the rule caters for the same situation previously covered by CCR O.9 r.10. However,

under CCR O.9 r.10 the relevant period was 12 months (now reduced to 6 months) and the action was automatically struck out (not stayed)".

18. Order 9 Rule 10 of the County Court Rules 1981 provided:

> "Where 12 months have expired from the date of service of a default summons and-
>
> (i) no admission, defence or counterclaim has been delivered and judgment has not been entered against the defendant, or
>
> (ii) an admission has been delivered but no judgment has been entered under rule 6(1) or, as the circumstances may require, no notice of acceptance or non-acceptance has been received by the proper officer,
>
> the action shall be struck out and no enlargement of the period of 12 months shall be granted under Order 13, rule 4".

The provision was introduced into the County Court Rules in 1952.

19. While it was the introduction of CPR 3.9 which led to the introduction of the vocabulary of "relief from sanctions" into the litigation lexicon, it would be difficult to characterise the automatic strike out under CCR Order 9 Rule 10 as anything other than a sanction. The absolute character of CCR Order 9 Rule 10 gave rise to a number of problems, which became particularly apparent when the jurisdiction of the County Court in personal injury cases was significantly enlarged by the High Court and County Courts Jurisdiction Order 1991 (*Heer v Tutton* [1995] 1 WLR 1336). That may well explain the decision to replace the automatic strike out (which the Woolf Report had originally proposed) with a stay which the parties could apply to lift. However, I am not persuaded that this change fundamentally altered the character of CPR 15.11 from that of CCR Order 9 Rule 10.

20. That leaves Jonathan Parker LJ's second question: "whether it is a sanction 'imposed for a failure to comply with any rule, practice direction or court order' within the meaning of CPR 3.9." The answer to that question is not as clear as it might be. But while legal philosophers have been happy to debate whether you can have a legal obligation without a sanction, the idea that the CPR might impose a sanction where there is no breach of an obligation is very counterintuitive. Further, it is clear from *Audergon* that, in this context at least, the court will look at the purpose, as well as the letter, of a rule, for the purpose of determining whether there has been a breach.

21. There are a number of clear judicial statements that if a claimant wishes to place a claim it has commenced "on hold," it must reach an agreement with the other party(ies) to that effect (and obtain court approval for that agreement, where required) or obtain a stay from the court. In *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32, [61], Arnold LJ observed that "a claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court" (and see also [78]). There is a statement to similar effect in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, 1477.

22. Those statements are consistent with the overriding objective, and in particular with ensuring that a case is dealt with "expeditiously and fairly" (CPR 1.1(2)(e)), the court's duty actively to manage cases so as to give effect to the overriding objective (CPR 1.4) and the parties' duty "to help the court further the overriding objective" (CPR 1.3). In my view, adopting the approach approved by the Court of Appeal in *Audergon*, the stay imposed when the conditions of CPR 15.11(1) are met will result from the failure of the parties to perform their obligation to help the court further the overriding objective by bringing the case before the court for case management, and therefore a breach of the CPR. If I am wrong in that conclusion, then the circumstances which engage CPR 15.11 are sufficiently close to a breach of a "rule, practice direction or court order" to justify the court applying the *Denton* test by analogy to applications (by a claimant or a defendant) to lift the stay.

23. However, I am doubtful whether the debate about the appropriate test will prove as significant in resolving the applications as the parties' submissions presuppose. The *Denton* test is sufficiently flexible to take account of those features of CPR 15.11 which distinguish it from the more conventional case where a rule or practice direction requires a party to take a particular step by a particular date and it fails to do so: the fact that it is a combination of the failure of *both* parties to take a particular step which brings the automatic stay into operation, and the difficult choice which a claimant who has brought proceedings in order to anticipate a claim which a defendant has intimated but not commenced may face if the defendant chooses not to engage in those proceedings. For that reason, the question of whether the *Denton* test applies under CPR 15.11(2) may well be one of those procedural points destined to live out its litigation life in a limbo of obiter observations.

Can BAE and MLI satisfy the *Denton* test?

24. As is well-known, the *Denton* test involves a three-stage enquiry:

    i) An assessment of the seriousness and significance of the breach.

    ii) Considering the reason why the default occurred.

    iii) Consideration of all of the circumstances of the case.

25. Where the parties have sought to deploy certain factors at more than one stage of the *Denton* test, I have considered the factors in what I have concluded is the most appropriate context.

The seriousness and significance of the breach

26. In support of its contention that the breach was serious and significant, Milano points to:

    i) the period of time which has elapsed since the imposition of the Automatic Stays and the application to lift them (over 5 years); and

    ii) the significance of that delay in circumstances in which, it is submitted, the purpose of CPR 15.11 is to ensure that a claimant "should apply for default judgment or summary judgment within six months of becoming eligible to do so",

and to avoid "inactive and effectively dormant cases lying unresolved (contrary to the requirement, as part of the Overriding Objective, for cases to be dealt with expeditiously)."

27. I accept that the period of time between the imposition of the automatic stay and the application for its removal will often be a relevant factor when assessing the seriousness and significance of the breach. However, in considering the position in this case, it is necessary to have regard to the particular context. In particular:

i) The English Proceedings were essentially defensive actions, commenced in circumstances in which Milano had intimated an intention to commence proceedings impugning the conduct of BAE and MLI in the Italian courts, and they were intended to ensure that the English court was first seised for the purposes of the Brussels Regulation Recast.

ii) When the English Proceedings were commenced, there was every reason to suppose that Milano did intend to commence proceedings in the Italian courts: see [3(iv)]. However, Milano took no steps to follow through on the allegations in the Letter of Complaint, nor did it stop paying the amounts falling due under the First Swap. That was significant in circumstances in which the allegation made in the Letter of Complaint related to the circumstances in which the First Swap had been entered into and the validity and efficacy of the First Swap.

iii) In the face of Milano's apparently ambivalent position – formulating its complaints and authorising the appointment of lawyers to litigate them, not withdrawing them, but not commencing proceedings, continuing to make payments and not engaging with the English Proceedings – BAE and MLI were placed in a difficult position. The essential choice they faced was whether to seek judgment in some form on their claims for declaratory relief (as Dexia did) or "wait and see," given what must have been seen to be a realistic prospect that Milano would not pursue the allegations in the Letter of Complaint.

iv) Each of those courses had its difficulties. Seeking judgment, particularly on the merits, ran the risk of triggering action from the currently quiescent Milano, raised the challenge of formulating the language of the final terms of the declarations in circumstances in which Milano had taken no further steps to articulate its claims, and might well have incurred unnecessary costs. So far as the MLI Proceedings were concerned, seeking a default judgment in that case was a good deal more complicated than simply asking the court to give effect to the contractual estoppels in the ISDA Master Agreement, and ran the risk of engaging the court's general concern about the ambit of declaratory relief in default judgment cases (*New Brunswick Railway Co Ltd v British and French Trust Co* [1939] 1 AC 1, 22 and *Goldcrest Distribution Ltd v McCole* [2016] EWHC 1571 (Ch), [43]). However, allowing the proceedings to become automatically stayed left them in limbo, removed them from judicial oversight and offered no obvious means of finally resolving them.

v) In these circumstances, I am satisfied that the course which BAE and MLI should have taken was to seek a case management stay from the court instead of allowing the automatic stay under CPR 15.11 to take effect. However, that decision having been taken, the lapse of time which followed was simply the inevitable

consequence of that procedural misjudgement, its duration determined by the amount of time which elapsed before Milano came "off the fence" (which it did when commencing the Italian Proceedings in April 2021). The position differs in certain respects, therefore, from that which applies where a litigating party is required to take a particular step by a particular date, and there is an ongoing failure to do so, and in which the period for which the breach endures results from a continuing failure to comply.

28. In addition, it is significant in this context that BAE's and MLI's failure to bring the case before the court before the CPR 15.11 stay kicked in has not impacted on a trial or hearing date, or interfered with any directions given by the court, or with Milano's conduct of litigation in which it had taken a conscious decision not to engage (see [56]-[57] below).

29. In these circumstances, while I accept that the breach by BAE and MLI cannot be described as trivial, I am satisfied that the seriousness of the breach cannot be measured by the 5-year duration of the Automatic Stays alone. It is, in short, a significant and serious breach, but not one of the most serious or significant kind.

30. In support of its contention that the breach is serious and significant, Milano has also relied on what it says was BAE's and MLI's motivation in allowing the Automatic Stays to come into effect. In my view, that issue is best considered under the second head of the *Denton* test (particularly as I have found that the *Denton* enquiry does not end at the first stage, even without the need to consider that issue).

The reason for the breach

31. There is no dispute that BAE and MLI took a deliberate decision not to apply for any form of judgment or for a case management stay, but to allow the CPR 15.11 stay to take effect. Milano submits that this conduct was not only deliberate, but an abusive attempt to "warehouse" the English Proceedings. It is clear that there are circumstances in which it will be abusive to commence and/or maintain in existence litigation which the claimant has no intention of bringing to a conclusion at that time (*Grovit v Doctor* [1997] 1 WLR 640). The problem has often been encountered in cases in which a claimant wishes to avoid a defence arising under the Limitation Act 1980 but then takes no steps to prosecute the claim, frustrating the policy which the limitation defence was intended to serve of ensuring a degree of finality and protecting parties against the burden of litigating "stale" claims long after the events giving rise to them occurred.

32. The applicable legal principles on this aspect of abuse of process have recently been reviewed by the Court of Appeal in *Asturion Foundation v Alibrahim* [2020] 1 WLR 1627 from which the following guidance can be derived:

    i) Commencing and maintaining litigation can constitute an abuse of process both when the claimant has no intention of ever bringing the claim to a conclusion, and where the claimant has no present intention to do so, but would do if a particular contingency materialised ([49]).

    ii) However, conduct of the latter kind is not automatically abusive. Whether such conduct will amount to an abuse depends on the reasons for not progressing the

claim, and "the strength of that reason, objectively considered, having regard to the length of the period in question" ([61]).

iii) If the court decided that the claimant's conduct is abusive, there is then a separate enquiry as to whether the court should strike out the claim in the exercise of its powers under CPR 3.4(2)(b) ([64]).

33. In this case, I am satisfied that BAE's and MLI's decision not to progress the English Proceedings was not abusive. I have explained the reasons why they followed this course at [27(iii)]-[27(v)] above. The decision reflected legitimate concerns on BAE's and MLI's part, albeit I have concluded that BAE and MLI did not adopt the appropriate means of addressing those concerns. There is a direct connection between those reasons and the length of the inactivity – namely it continued for so long as Milano did not appear to be pursuing or acting upon the matters raised in the Letter of Complaint – and it came to an end when Milano commenced the Italian Proceedings.

34. For that reason, I do not regard the fact that BAE and MLI consciously chose to allow the Automatic Stays to come into effect as determinative of the *Denton* analysis. Their conduct was far removed from the deliberate flouting of a court order. I agree with His Honour Judge Pelling QC in *Bank of Beirut (UK) Limited v Sbayti* [2020] EWHC 557 (Comm), [7] that a desire to avoid incurring unnecessary costs while performance of the disputed obligation continues can be a good reason for not pursuing a claim. I am also satisfied that while BAE's and MLI's conduct involved a deliberate decision, there was no conscious breach of any rule, but (on my analysis) a misunderstanding as to what the rules required.

All the circumstances of the case

35. At this stage of the *Denton* test, it is necessary to address a number of factors relating to both applicants, and a number of additional points raised only in relation to MLI's application.

Matters relating to both applicants

36. Both sides suggest that they will be prejudiced if their position in relation to the CPR 15.11(2) applications is not upheld:

i) BAE and MLI contend that the effect of refusing the applications will, in substance, be to strike the claims out. In my view that is right – if the court refuses this application to lift the Automatic Stays, it is difficult to see how the actions could ever be revived, or what useful purpose their continuing existence might have. As Coulson LJ noted in another context in *Cable v Liverpool Victoria Insurance* [2020] 4 WLR 110, [62], "if the defendant is seeking to prevent a valid claim going further, then no matter the mechanism by which that debate comes about, the judge must grapple with the central dispute: should the claim be allowed to proceed, or should it be struck out?" Reflecting this reality, if the applications under CPR 15.11(2) are refused, Milano submits that "the appropriate course would be to dismiss the English [Proceedings] in order to bring them to an end once and for all".

ii) In this case, refusing to lift the CPR 15.11 stay and striking the English Proceedings out would entail the loss to BAE and MLI of whatever jurisdictional advantages being "first movers" was intended to realise within the Brussels Regulation Recast regime. I have not sought (nor am I in a position) to establish what the practical consequences of striking the English Proceedings out might be so far as the Italian Proceedings are concerned. That would be a complex and speculative enquiry, and involve a degree of "second guessing" of decisions the Italian court might make in respect of proceedings before it. However, I accept that there is a real risk that BAE and MLI's position would be materially worsened. I therefore accept that in this case BAE and MLI would suffer "considerable" or "significant" prejudice if the stay is refused (adopting the descriptions in *Citicorp*, [58] and *McLinden*, [10]). By contrast, I do not accept that granting the application would occasion any prejudice to Milano beyond that which would inevitably arise in any case in which a CPR 15.11 defendant, who has previously refused to engage with the proceedings, decides to change that stance if the stay is lifted.

iii) Milano contends that it will be prejudiced if the applications are allowed, because it will have to incur the expense of responding to the English Proceedings in whatever it decides to be the appropriate manner, when it believed that those proceedings had come to an end. I am unable to accept, however, that Milano had formed the view that the English Proceedings had gone away. It is reasonable to infer that Milano would have been aware of the possibility of an application under CPR 15.11(2), and the risk that it might succeed.

iv) Further, there is no suggestion that Milano would face any additional expense or cost in responding to the English Proceedings now than would have been the case when they were issued, or if the stay had been imposed by the court for a more limited period.

37. I have dealt with Milano's suggestion that this was a deliberate and unacceptable attempt to "warehouse" claims when addressing the second limb of the *Denton* test.

38. Milano also submits that neither BAE nor MLI have acted promptly in applying to lift the stay. As far as the period up to 12 May 2021 is concerned (when BAE and MLI became aware of the Italian Proceedings), I have taken this into account when concluding that this was a serious and significant breach, but, for the reasons I have explained, the duration of that delay followed inevitably from the procedural misjudgement which BAE and MLI made. As far as the further 5-month period which elapsed between 12 May 2021 and the making of the present application is concerned, I accept that it was necessary for BAE and MLI to obtain Italian legal and financial advice on the contents and implications of the allegations made by Milano in the Italian Proceedings. The summons was 90 pages and the Invito (served in July 2021) was 107 pages. While I accept that BAE and MLI could have moved more quickly out of the blocks, I do not think the 5-month period is unreasonable.

39. Finally, as I have noted, the CPR 15.11 stay came into effect as a result of the combination of Milano's failure to serve a defence and BAE's and MLI's failure to bring the issue before the court. It would have been open to Milano at any time to bring its own CPR 15.11(2) application (which for understandable reasons, it chose not to

do). While this particular feature of CPR 15.11(2) applications cannot be determinative, it is a relevant factor when assessing the overall position, in particularly in answering any suggestion that the delay has prejudiced Milano (cf. Clarke LJ's observations in *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792, [48]).

The additional matters relied upon in relation to MLI

40. Milano relies on two further matters relating to MLI. To understand both of them, it is necessary to say a little more about the 2001 Agreement:

    i) It describes itself as an agreement "for the activity of Rating Advisor" and appointed Dexia and MLI as ratings advisors for a joint fee of €50,000 (Articles 1 and 2).

    ii) By Article 3, Milano "reserves the right" (but was under no obligation) to entrust MLI and Dexia with co-ordinating the preparation of the EMTN programme to place securities issued by Milano and to appoint MLI and Dexia as joint lead-managers and joint bookrunners. The issue of whether this option was also facultative on MLI and Dexia's part, or in the nature of a facultative/obligatory arrangement, is in dispute and not something which can be resolved in this application.

    iii) If appointed as joint lead-managers and joint bookrunners, Article 3 stated that part of that role would be "to provide for any hedging (swap) transactions that should be rendered necessary". There is obvious scope for argument as to whether this last phrase extends only to swaps entered into in connection with securities placement (as MLI contends) or any swaps (as Milano contends), that being significant because only the Second Swap would fall within the first construction.

    iv) Article 13 provided "this agreement is governed by Italian law. In the event of disputes, the jurisdiction of Milan is competent."

    v) Article 3 also recorded the understanding that, if so appointed, MLI and Dexia would waive the fee entitlement in Article 2, while Article 5 provided that MLI and Dexia would not be paid for the performing the roles referred to in Article 3 but would obtain standard market commission on any issuances placed.

41. Against that background, Milano first contends that the English court does not have jurisdiction over the claims asserted in the MLI Proceedings because those claims fall within the exclusive jurisdiction clause in favour of the Italian courts (**the IJC**) in the 2001 Agreement, with the result that the Italian court has exclusive jurisdiction over those claims under Articles 25 and 31 of the Brussels Regulation Recast. While accepting that "the Court is not being called upon to conclusively determine the jurisdiction issue within the present applications," the court is nonetheless asked by Milano to have regard to the fact that "the challenge has strong (Milano would say overwhelming) prospects of success."

42. There are a number of reasons why I do not believe this factor is of assistance at this stage:

i) The question before the court is whether the Automatic Stays should be lifted. Save in a particularly clear-cut case, I am not persuaded that it would be appropriate for the court to engage in that context with the competing merits of any jurisdictional challenge which Milano might advance if the action proceeds (any more than it would for the court to engage extensively with the merits of the claims for this purpose).

ii) The issue of whether or not the claims asserted in the MLI Proceedings fall within the IJC is a matter to be determined by Italian law. No evidence of Italian law is before the court.

iii) Milano's suggestion that it is "overwhelmingly likely" that the claims in the MLI Proceedings fall within the IJC assumes in its favour the construction argument referred to at [40(iii)] above. It is also not easy to reconcile with the fact that (a) the Letter of Complaint does not refer to the 2001 Agreement and (b) the MLI Proceedings were commenced in response to the Letter of Complaint. At the moment, at least, I can see real scope for argument as to how far the IJC extends to claims relating to MLI's involvement in the First and Second Swaps, and scope for different outcomes for different parts of the MLI Proceedings. However, this part of Milano's argument is premised on an assumption of complete success on the jurisdictional issue.

iv) Milano accepts that the court could not even form a "prima facie view" at this hearing on the merits of MLI's reliance on Article 7(2).

v) Finally, there is a live issue (which I address below) as to whether Milano should be given an extension of time within which to lodge an AOS in order to bring a challenge to the jurisdiction, and whether the court would be required to consider the issue of jurisdiction itself even if no such extension is granted. In my view, it would be wrong in principle to allow Milano to avoid whatever difficulties that aspect of the case might present by arguing its case on jurisdiction in the CPR 15.11(2) context.

43. For these reasons, I am also unable to accept the variation of this argument that it would be pointless to lift the CPR 15.11(2) stay of the MLI Proceedings because "under Article 31(2) of the Brussels Regulation Recast the English Court would be required to stay the MLI Claim until such time as the Civil Court of Milan has determined its own jurisdiction in respect of the Italian [Proceedings]" and "it would be pointless to lift the automatic stay only to immediately re-impose another different stay". In addition:

i) The argument assumes that the Italian and MLI Proceedings involve (and only involve) the same cause of action: see Recital (22) to the Brussels Recast Regulation. I heard no argument on this issue.

ii) The argument also ignores the very different nature of the two stays (one which would lead to the final termination of the MLI Proceedings, the other what might be only a temporary hiatus).

44. Second, it contends that MLI behaved inappropriately in commencing the MLI Proceedings and in relation to the evidence it has filed in the English court, and that the court should not "condone" or "reward" that behaviour by granting MLI's application

to lift the automatic stay. This aspect of Milano's argument has generated a considerable amount of heat, and at times Milano's complaint has been put in rather more wide-ranging terms than the form it took in Mr Ulyatt's submissions.

45. At one point, the complaints appeared to be as follows:

    i) There were no reasonable or proper grounds for certifying in Form N510 that the English court had jurisdiction over the MLI Proceedings under the Brussels Regulation Recast.

    ii) MLI "concealed the existence and contents of the 2001 Agreement" when completing Form N510 and/or in the Claim Form and Particulars of Claim and did so to avoid having to seek permission to serve the MLI Proceedings on Milano in Italy.

    iii) MLI did not apply for default judgment to avoid "revealing" the 2001 Agreement.

46. I am satisfied that there is nothing in any of these assertions.

47. As to the first, in circumstances in which Milano had not itself, in the Letter of Complaint, formulated its claims as breaches of the 2001 Agreement, I am not at all surprised that BAE and MLI did not regard the IJC as an obstacle to the commencement of the English Proceedings. As I have indicated, I see obvious scope for argument as to whether any of the claims in the MLI Proceedings fall within the IJC in the 2001 Agreement. Whatever the right answer to that question might ultimately prove to be, I cannot accept that the position was so clear cut (or even close to that) that the relevant certification could not be given. Nor (in circumstances in which the English legal team who would play the principal role in drafting the Claim Form and Particulars of Claim were unaware of the terms of the 2001 Agreement and hence the IJC) can I accept that those documents were drafted with a view to concealing the existence of that agreement, still less that this "has all the hallmarks of sharp conduct".

48. As to the second, there was no obligation to file supporting or surrounding documents when serving under CPR 6.33 in 2016 and no duty of "full and frank disclosure" arose because the act of issuing the claim form did not involve the exercise of a judicial discretion (cf *The Varna* [1993] 2 Lloyd's Rep 253). Further, if, in respect of a "civil and commercial matter" such as this, the English court did not have jurisdiction in respect of a clam against Milano under the provisions of the Brussels Regulation Recast, it was not open to BAE and MLI to apply for permission to serve out. The English court would simply not have jurisdiction.

49. As to the third, I accept that, before entering default judgment against Milano, it would have been necessary for the court to determine that it had jurisdiction under the Brussels Regulation Recast (Article 28(1)). While this process might have identified a possible argument as to the effect of the IJC in the 2001 Agreement, that seems unlikely given that the existence of the IJC was (as I have mentioned) not known to the London lawyers handling the English Proceedings at that time. In any event, I do not accept that MLI or its legal representatives (Italian or English qualified) were in any way motivated by a desire to conceal the 2001 Agreement from the English court, or that the officers at Freshfields' Milan office sought to conceal the existence of the 2001 Agreement from their English colleagues. In my view it is far more likely that MLI took the same course

as BAE did (in relation to whom no such issue could have arisen) in not seeking a default judgment for the same reasons as BAE, and not because of any perceived concern that the IJC was engaged. There is simply no basis for taking what would be the serious step of rejecting the evidence before the court that Mr Taylor, Mr Chapman and Mr Clark of Freshfields honestly and conscientiously believed that the English court had jurisdiction over the MLI Proceedings, that Mr Castellani had concluded that the 2001 Agreement (of which he had seen an unsigned draft) was not engaged by the claims to be advanced in the English Proceedings, and the evidence as to the reasons why MLI did not seek to enter a default judgment. On the contrary, that evidence accords with the inherent probabilities, having regard to the events which had occurred at that time.

50. In Mr Ulyatt's skeleton, a different argument was deployed, namely that in the witness statement filed on 8 October 2021 in support of the application to lift the Automatic Stays, Mr Clark of Freshfields did not exhibit the 2001 Agreement, and while referring to the 2001 Agreement in the body of the witness statement, did not refer to the IJC. The suggestion made is that the witness statement took this form to keep open the possibility that it would not be necessary to draw the existence of the IJC to the court's attention if Milano did not engage with the application. I agree that it would have been the better course to include the 2001 Agreement in the exhibits and to refer in the witness statement to the basis on which Milano was now asserting that the Italian court had jurisdiction. However, I am not persuaded that there was any nefarious intent in those omissions, and I accept Mr Clark's evidence to this effect. The witness statement exhibited an English translation of the Writ of Summons which commenced the Italian Proceedings which dealt comprehensively with the IJC. Even if I had accepted Mr Ulyatt's submission that the failure to deal with the IJC in this witness statement was somehow culpable, the issues relating to the IJC had been thoroughly ventilated by the time the applications to lift the stay were heard, and I would not have regarded this factor as weighing in the balance when determining whether to grant the applications.

51. For these reasons, I have concluded that none of the factors raised with specific reference to MLI assist Milano's argument as to whether the *Denton* test is satisfied.

Conclusion

52. Pulling these threads together, while I accept that failing to progress the claims and allowing the CPR 15.11 stay to come into effect involved breaches of BAE and MLI's obligations under the CPR of (moderate) significance and severity, I am satisfied that (applying the second and third limbs of the *Denton* test) it is appropriate to grant the application under CPR 15.11(2). BAE and MLI were seeking to address legitimate litigation concerns but made a procedural misjudgement as to how best to do so. Refusing the applications would involve significant prejudice to BAE and MLI, whereas granting them would not give rise to significant prejudice to Milano, which is in part the author of any difficulties it may face. BAE and MLI have acted reasonably promptly after learning of the Italian Proceedings, and the additional matters relied upon by Milano as against MLI do not assist.

MILANO'S APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO SERVE AN AOS

53. This makes it necessary to consider Milano's application for an extension of time within which to serve an AOS in the MLI Proceedings, for the purposes of bringing a jurisdictional challenge. It is common ground that I should do so within the framework of the *Denton* test, the failure to file an AOS being a breach of CPR 58.6(1). There is no application for such an extension in the BAE Proceedings, it being Milano's stated intention to serve a defence and to defend those proceedings on the merits if the Automatic Stay is lifted.

Serious and significant breach

54. There was clearly a serious and significant breach in failing to acknowledge service, 8 months elapsing between the date for filing AOS and the date when the CPR 15.11 stay came into force. MLI argues that the period of delay continued until Milano issued its application for an extension of time on 4 February 2022. However, I do not believe it would be appropriate to measure Milano's breach by reference to the period during which the MLI Proceedings had been stayed, as a result of a deliberate choice by MLI to that end, and in circumstances in which both parties were content to leave the dispute in abeyance.

55. Milano's failure did not impact on a trial or hearing date, interfere with any directions given by the court, or with MLI's conduct of litigation which MLI was perfectly content not to pursue in the circumstances I have described at [27(iii)]-[27(v)] above. Had Milano engaged with the MLI Proceedings, in circumstances in which it had clearly yet to take a definitive decision as to whether or not to commence proceedings in Italy (and in due course, decided not to do so under prevailing circumstances), it would clearly have been in both parties' interests to seek to put the MLI Proceedings on hold – MLI for the reasons I have referred to, and because doing so would preserve whatever "first seised" advantage the MLI Proceedings might confer, and Milano because of the financial issues referred to at [56] below, and because it had yet to decide whether to follow up on the issues raised in the Letter of Complaint.

The reason for the breach

56. It is accepted that, with the benefit of legal advice, Milano took a conscious decision not to engage with the BAE Proceedings. I accept the evidence of Mr Frapwell that there were two reasons for this. First, and the primary reason, was the financial difficulties which Milano was in (something corroborated by the difficulties which Milano had in discharging the relatively small costs order made against it in the English proceedings commenced by Dexia which culminated in a default judgment). Second, it believed that failing to do so would not close off Milano's options in Italy, because Milano was not intending to dispute the validity of the First and Second Swaps. Neither of those are satisfactory excuses, and Mr Ulyatt did not seek to suggest otherwise.

57. As far as the MLI Proceedings are concerned, Milano does not have any record of any separate consideration of whether or not to engage with those proceedings. It may well be, as Mr Ulyatt submits, that it was simply assumed that they did not raise any different issues from the BAE Proceedings, whereas it is now argued that, in jurisdictional terms at least, there may be a difference between the two. If so, then the decision not to serve an AOS in the MLI Proceedings was also the result of a deliberate decision, and not a mistake as Mr Ulyatt submitted, even if that decision was reached without full consideration of all relevant factors.

"All the circumstances of the case"

58. While the facts that the breach of the rule or practice direction is serious and significant, and that there is no good reason for it, are of particular importance when determining whether or not to grant relief against sanctions under CPR 3.9, it is clear from *Denton*, [36] that they are not inevitably determinative.

59. I first consider the issue of prejudice:

    i) MLI submits that if relief against sanctions is granted, it will be prejudiced because of the delay and expense which it will incur in defending any jurisdictional challenge. As far as expense is concerned, I am not persuaded that there will be any additional expense over and above that which would have been incurred had the AOS been filed in time.

    ii) In any event, it seems inevitable that MLI will now need to seek to pursue the MLI Proceedings to judgment. If Milano is refused an extension of time to serve an AOS, then it will not have submitted to the jurisdiction under CPR 11(5). In those circumstances, in order to obtain judgment, it will be necessary for MLI to satisfy the court that it has jurisdiction in any event (Article 28(1) of the Brussels Regulation Recast). That will require it to incur the expense of preparing to deal with the jurisdiction issues which have been flagged in Milano's evidence in this application.

    iii) In considering MLI's complaint about delay, it is necessary to have in mind the 5-year period during which it was content to leave the MLI Proceedings "on ice", the 5 months it took to issue its application to lift the Automatic Stay, and the 8 months it has taken to hear that application. Against that background, the delay to the end of November before a one-day hearing could be secured, while unfortunate, is of limited weight.

    iv) By contrast, if the application is refused Milano would lose the ability to argue its jurisdictional objection to the MLI Proceedings, and to lay before the court the material which it regards as relevant to the determination of that argument. On the materials before me, that jurisdictional objection is clearly arguable. While MLI submits that "jurisdictional questions do not finally determine cases," the resources which MLI has been prepared to devote to resurrecting the MLI Proceedings against the background of the Italian Proceedings reflect the importance of this issue to both parties.

60. If the court had to determine the issues of jurisdiction without Milano's involvement, it would have to address complex issues as to the scope of the IJC under Italian law and the Article 7(2) argument (including the issues arising from reliance on a provision addressing claims in tort to seek a negative declaration as to the absence of a contractual liability where Article 7(1) is not said to be engaged). Resolving those issues will inevitably be easier if the court has the benefit of argument from both sides.

61. Finally, in my view it is appropriate to have regard to the fact that both sides in this case have had to seek relief against sanctions, in a case in which avoiding active participation in the English Proceedings suited both parties for a long period. It now suits both parties to reverse their previous strategy. While I agree with Mr Handyside QC that there is

not complete equivalence between their respective positions, that factor is also relevant when considering whether relief against sanctions should be given in all of the circumstances of this particular case.

62. Taking all of these matters into account, I am persuaded that it is appropriate to give Milano relief against sanctions under CPR 3.9 and to grant it an extension of time within which to file an AOS.

CONCLUSION

63. For these reasons:

i) The applications of BAE and MLI to lift the CPR 15.11 stays are granted.

ii) Milano's application for an extension of time within which to lodge an AOS in the MLI proceedings is granted.