Neutral Citation Number: [2022] EWHC 2080 (Ch) **Case No: BL-2022-000645**
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London

Date: 16/08/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

SITTING AS A HIGH COURT JUDGE

- -

Between :

EVA-MARIA BUCHER-HAEFNER

Claimant

-and-

(1) MAX LEWINSOHN

(2) MAXIMILLIAN AND CO

Defendants

- -
- -

Mr Darragh Connell (instructed by **Cooke, Young & Keidan LLP**) for the **Claimant**
Mr Rory Brown (instructed by **Brandsmiths S.L. Limited** for the **Defendants**

Hearing dates: 28-29 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 16/08/22.....

I.C.C. JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT

I.C.C. Judge Jones:

A) The Claim

1. Ms Bucher-Haefner by claim form issued on 14 April 2022 asks for an anti-suit injunction in respect of "Verified Complaint and Jury Demand" proceedings ("the Complaint"). It was issued in the Third Judicial District Court of the State of Utah by the above-named Defendants (although the second defendant is Mr Lewinsohn's business's trade name) and is dated 18 March 2022. It claims: (i) damages for breach of an Intercreditor Agreement; (ii) damages for breach of an implied covenant of good faith and fair dealing; and (iii) compensation for unjust enrichment. In essence it seeks recovery of costs and expenses incurred by Mr Lewinsohn as a collateral agent under the terms of the Intercreditor Agreement dated 18 March 2005. The only liquidated sum is a figure for unjust enrichment of US$4.8 million.

2. Whilst the damages claimed are not particularised, the sums in issue can be identified (and this is not in dispute) from the preceding demand by letter dated 11 February 2022. Namely: (i) $2.45m (£1,803,664.39) being *"the total Collateral Agent Costs" unrelated to the UK action which remain outstanding despite request for payment. The total … $3.3m … has been reduced as the Collateral Agent has received payment of $850,000 to date". (ii) £854,314 being the sums incurred in defending the claims brought in the UK by Catalyst Investment Group Limited and others including you, which are subject to the Application [to strike out the old UK claim … for want of prosecution]; and (iii) £112,201.50 … incurred by Brandsmiths, associated with the Application to dismiss the UK action."*

3. Ms Bucher-Haefner contends that the sums claimed in the Complaint mirror the sums previously counterclaimed by Mr Lewinsohn and his firm in claim number BL-2020-001467 to which she had been a claimant (together to be called "the Claim and Counterclaim").

4. The Counterclaim included the following description of claim:

> *"68(1) All costs incurred as Collateral Agent pursuant to the terms of the Intercreditor Agreement, including the Collateral Agent's costs and legal expenses relating to proceedings in Utah and England*
>
> *(2) An indemnity against any liability that he might have for the Claimant's [sic] costs of these proceedings insofar as they are brought against him or by him in his capacity as the Collateral Agent."*

5. The Claim and Counterclaim were dismissed as between Mr Lewinsohn and Ms Bucher-Haefner on 15 March 2022 in circumstances of Mr Lewinsohn's application "to strike out" (strictly it should have read "dismissed") the Claim for want of prosecution and his and Ms Bucher-Haefner's acceptance that this should be the result for both Claim and Counterclaim. This occurred in the circumstance of both having accepted that a fair trial could no longer be achieved because of the time that had expired. For reasons set out in a judgment of Deputy Master McQuail no order as to costs was made in respect of the Claim and Counterclaim upon their dismissal. There has been no appeal.

6. Costs orders were made subsequently requiring Mr Lewinsohn to pay Ms Bucher-Haefner's costs of the "strike out" application with an interim payment of £100,000 but set off against a costs order for a specific period in favour of Mr Lewinsohn. There were also certain other outstanding costs orders against Mr Lewinsohn.

7. Ms Bucher-Haefner contends that the decisions of Deputy Master McQuail (i.e. the dismissal, the no order as to costs and the other costs orders) mean that this Court has already decided the claims which the Complaint seeks to raise and/or that it would in any event be an abuse of process for Mr Lewinsohn to be able to pursue again in another jurisdiction the very matters raised by him or which ought or could have been raised by him in the dismissed Counterclaim and within the costs decisions. In particular that it has been decided that he should not claim or that it would be wrong to permit him to continue to claim the right to be paid the costs sought under the indemnity provision of the Intercreditor Agreement.

8. As a result, Ms Bucher-Haefner's case is that the Complaint recently commenced in the State of Utah is vexatious, oppressive, unconscionable and/or an abuse of process. That it would not be in the interests of justice for Mr Lewinsohn to be permitted to continue those proceedings. Her case is that absent an injunction *"she will face a Hobson's choice of defending the proceedings or having a default judgment in the sum of US$4.8 million entered against her"*.

(B) Background

9. Ms Bucher-Haefner is a Swiss national. Mr Lewinsohn is resident and domiciled in England and Wales. Maximilian and Co is an unincorporated firm and, therefore, is the trading name of his business. It appears that the two have been separately named as litigants in proceedings in this jurisdiction and in Utah. The reasons for that may be described as "lost in history" but in practical terms it matters not for this decision. This judgment will not distinguish the two as separate legal entities.

10. The dispute can be traced back in terms of proceedings to the Claim issued by Catalyst Investment Group Limited ("Catalyst") against Mr Lewinsohn concerning his role as the Collateral Agent under the terms of the Intercreditor Agreement for the holders of promissory notes issued in 2005 by Eneco Inc ("Eneco"), now dissolved. Mr Lewinsohn became the Collateral Agent by assignment as a successor from 3 November 2007 or thereabouts to the original appointee, Christopher P. Baker.

11. The terms of the notes provided that principal and 12% annual, quarterly compounded, interest were due to be repaid by no later than 31 March 2006. Extensions of time for repayment were granted but nothing has been paid. Eneco's repayment obligations under the Notes were secured rights in favour of the Collateral Agent under the Intercreditor Agreement. Those rights were held for the benefit of the holders of the Notes (including Ms Bucher-Haefner) against Eneco's reversionary interest in certain international patents registered in Eneco's name. There were separate Security and Lending Agreements.

12. Upon Eneco's default the Collateral Agent was empowered but not obliged to realise the IP Rights and apply the proceeds of sale in accordance with the terms of the

Intercreditor Agreement, including in the discharge of Eneco's obligations to the Noteholders. The duties and obligations on the collateral agent are set out in sections 3.02 and 3.03. They included the taking of actions deemed *"necessary or advisable to preserve its rights in the Collateral."* It appears that the Collateral Agent was to act in a commercial, reasonable manner in the exercise of its rights, powers and duties and was not bound to act.

13. The Security Agreement and the Intercreditor Agreements were expressly governed by Utah law. However, both omitted the State of Utah, exclusive jurisdiction clause that was also included in the Notes and the Secured Loan Agreements. Mr Lewinsohn claims that the clause must equally apply to the other two agreements because they are all documents within a linked transaction.

14. Further background details can be found in the 31 July 2009 judgment of Mr Justice Barling, as he then was, in the Claim. I certainly could not improve upon his analysis of the facts and should not even seek to do so. Paragraphs 5-44 of that judgment are to be read into this.

15. Of detailed relevance as background for this claim for specific mention are the paragraphs referring to: (i) The June to October 2008 proceedings in the Utah Bankruptcy Court concerning approval of the sale by Eneco of IP rights to Mr Lewinsohn. (ii) The proceedings commenced on 8 November 2008 by the Noteholders against Catalyst and ARM Asset Backed Securities Inc ("ARM") and another alleging fraud or negligent misrepresentations concerning letters in December 06. (iii) A mirror action in Utah issued by Mr Lewinsohn about the same time covering more or less the same facts and matters. It was dismissed on 13 October 2009 at the request of Mr Lewinsohn and other claimants. (iv) The allegations of Catalyst in 7 November 2008 correspondence to the effect that Mr Lewinsohn when purchasing the IP Rights breached the fiduciary duties owed to the Noteholders. (v) The issuing here on 17 November 2008 of the Claim by Catalyst against Mr Lewinsohn seeking (in summary) declarations as to title, that there had been no breach of Catalyst's contractual obligations to Eneco or any misrepresentations by Catalyst and claiming (amongst other matters and against other parties) that Mr Lewinsohn had breached duties owed to the Noteholders. The claim included by later amendment 10 further claimants including Ms Bucher-Haefner. (vi) A claim by Catalyst and Timothy Roberts against Mr Lewinsohn but although this runs alongside the Claim, it and a claim issued by ARM need not be referred to separately for the purposes of this judgment.

16. On 31 July 2009 Barling J. refused Mr Lewinsohn's application for Catalyst's claim to be dismissed in circumstances of the State of Utah being the most appropriate forum. The reason being that the burden of showing the State of Utah was a more appropriate forum had not been met. Alternatively, that even if it had been met, the Court in its discretion would have refused the application. The reason for that decision can be found within the following passage of his judgment: *"This is essentially a dispute between two English entities about the duties one owed and owes to the other, and about the ownership and control of worldwide intellectual property rights currently in the hands of a British Virgin Islands company, having been transferred to that entity by one of the English protagonists."* It was a decision reached in circumstances of Mr Lewinsohn by his counsel abandoning the argument that the State of Utah had exclusive jurisdiction

because the exclusive jurisdiction clauses in the Secured Loan Agreement and the Notes also applied to the Intercreditor Agreement.

17. On 30 October 2009 Mr Lewinsohn and Micropower Global Limited filed an amended defence and the Counterclaim referred to in paragraph 3 above. A Reply and Defence to Counterclaim was filed on 11 November 2009. It is unnecessary to detail the Defence to Counterclaim and sufficient to observe that: (i) It raised (amongst other matters) issues of construction concerning the Intercreditor Agreement with regard to Mr Lewinsohn's entitlement to reimbursement. (ii) It required an account of the expenses. (iii) It disputed factually whether the US$1.8 million was incurred by Mr Lewinsohn as the Collateral Agent. (iv) It denied entitlement to recovery on the basis that any expenses to which there was a right had been satisfied through receipt of Eneco IP Rights. (v) It also relied upon the Claim to extinguish any liability that might be established.

18. The Claim and Counterclaim were stayed by consent between 10 May 2010 and 10 August 2021. Despite the stay (although that fact does not take this matter further) by an application dated 8 September 2020, Mr Lewinsohn asked for the Claim to be "struck out" for want of prosecution. The evidence in the bundle clearly establishes that he accepted that the same result, dismissal, would have to apply to the Counterclaim for the same reason. Namely, because lapse of time in prosecution of those claims prevented a fair trial as detailed below.

19. Whilst the background facts set the scene, in the context of the relief sought in the counterclaim set out in paragraph 4 above the key facts concern the fate of that application for dismissal and its outcome. That is because it is apparent from the description of the claim within the Complaint that it seeks the same relief as the Counterclaim (as set out in paragraph 4 above). This is apparent from the wording used and, whilst it is probably fair to observe that Mr Lewinsohn was coy with regard to the instructions he would give Mr Brown for the purpose of identification of the subject matters of the two sets of proceedings, was not in dispute.

C) Key Facts

20. The evidence in support of the application to "strike out" from Mr Morallee, a solicitor, dealt in detail with the history of the dispute and proceedings and then, in reliance upon a delay of over 10 years in the prosecution of the claim, stated that: (i) the parties needed finality; (ii) the claimants' inactivity constituted an abuse of process; and (iii) for detailed reasons given concluded that it was now no longer possible to have a fair trial. A second witness statement addressed the fact of the "missed" stay. Mr Lewinsohn also made a witness statement addressing the stay. In the course of that statement he explained that he had applied to strike out because the Claim had not been pursued for many years and he did so *"in order to achieve certainty and finality"*.

21. The letter of demand dated 11 February 2022, which details the sums to be claimed in the Complaint, was sent.

22. On 7 April 2021, Deputy Master McQuail without knowledge of the stay dismissed the Claim and Counterclaim so far as they related to claimants other than Ms Bucher-

Haefner and adjourned the application so far as she was concerned with directions. The stay was subsequently recollected and was lifted by the Deputy Master on 10 August 2021 with a costs order in favour of Ms Bucher-Haefner. The application to "strike out" remained extant as between her and Mr Lewinsohn.

23. A second witness statement was filed and served by Mr Lewinsohn as reply evidence. He explained that his motivation for the strike out application, finalisation of the litigation, remained. He drew attention to the fact that Ms Bucher-Haefner also wanted dismissal and asserted that the only real issue between them was costs. In that context he addressed the history of the matter, including the Intercreditor Agreement and the other proceedings. He also referred to the positions of Ms Bucher-Haefner and himself including the fact that she had given a *"full indemnity for legal and other costs in relation to [him acting as] the Collateral Agent and any relevant actions"*. Amongst his conclusions was the following statement: *"I have always considered that I have no personal financial interest in these proceedings …. As Collateral Agent it was right and proper [to] defend the interest of Noteholders … I have the protection afforded by the Intercreditor Agreement."*

24. There was further evidence including a third witness statement from Mr Lewinsohn supporting his request for costs. Amongst other matters he said this: *"Apart from the costs relating to the Application, [he is] seeking payment of historic costs relating to the legal action brought by the Claimants in England"*. He then identified those costs as: £124,804 in respect of US lawyers, Burbidge Mitchell & Gross, whose involvement in the English proceedings was required; £570,390 for the English solicitors, Mark Taylor & Company; and £637,920 for himself through his firm less £480,000 paid by the third Defendant, Micropower Global Inc, namely £159,120. The total claimed, therefore, was £854,314 plus interest. Plainly this is the same sum as the £854,314 which forms part of the $2.45m (£1,803,664.39) demanded within the letter dated 11 February 2022.

25. On 15 March 2022 Deputy Master McQuail addressed the procedural history in detail, this and her other judgments being typified (if I may say this) by clarity when setting out detail, providing analysis and explaining her decision. She considered the relevance of the stay to the application "to strike out" for delay, an application still being pursued, and the fact that Ms Bucher-Haefner also sought dismissal. The Deputy Master concluded that the stay meant she could not find there had been want of prosecution or an abuse of process by failing to proceed with the litigation. However because the *"parties are agreed that no fair trial is possible and therefore that the whole of the proceedings must be finally disposed of"*, she decided pursuant to the overriding objective to make *"an order which brings these proceedings to a final conclusion and records that both parties are agreed that should occur"*.

26. The Deputy Master also decided in accordance with ***the CPR*** that there should be no order as to costs subject to adjourning the issue of costs in respect of the application to strike out. In doing so she set out the submissions in detail but did not include any reference to submissions made concerning the Intercreditor Agreement's indemnity. However, plainly they had been made because in reaching her decision she decided that she was *"not assisted by the existence of the contractual provisions of the Intercreditor Agreement which are the subject of the untried counterclaim, whether or not it could*

have had any separate existence to the claim. [She was] not in a position to determine who has succeeded or failed on either the claim or the counterclaim …".

27. The Complaint dated 18 March 2022 was issued three days after that decision.

28. On 5 May 2022 Deputy Master McQuail decided the costs of the application in favour of Ms Bucher-Haefner. In doing so she applied ***the CPR*** and did not address the Intercreditor Agreement.

D) The Grounds of Opposition

29. The position of Mr Lewinsohn as submitted by Mr Brown can be summarised as follows:

a) This Court should not restrain the Complaint when it seeks to enforce contractual rights granted by an agreement, the Intercreditor Agreement, which expressly provides that it must be construed pursuant to the laws of the State of Utah and which by reference to linked agreements is to be construed as containing an exclusive jurisdiction clause in favour of that State.

b) As a result of those terms and in any event when applying international law of comity, this Court should recognise that it is for courts of the the State of Utah to decide the merits of the issue of liability under the Intercreditor Agreement.

c) The Complaint is not re-litigation, as asserted, but asserts a claim which arises in contract and will refer to the orders made within this jurisdiction. Mr Lewinsohn does not seek to deny the dismissal of the Claim and Counterclaim or the resulting costs orders within the Complaint but will ask the courts of the State of Utah to determine their relevance within a claim relying upon a contract subject to the jurisdiction and/or governed by and laws of the State of Utah.

d) It will be for the courts of the State of Utah to decide whether to determine the Complaint in the context of proceedings in this jurisdiction having been dismissed without any determination of the merits and when these courts have decided costs without addressing (and deliberately so) the contractual right to recover costs and expenses under clause 3.09 of the Intercreditor Agreement.

e) The Complaint is not vexatious or unconscionable or an abuse of process. It is Ms Bucher-Haefner who is seeking to defeat her contractual submission to the jurisdiction of the State of Utah.

f) Furthermore, no determination was made upon the merits in respect of the Claim and Counterclaim. A claim which has not been tried cannot as a matter of fact or in any legal sense be relitigated, vexatiously, oppressively or otherwise.

g) Insofar as, contrary to those submissions, the Court reaches the point of exercising its discretion, that should be decided in Mr Lewinsohn's favour: (i) applying general principles of comity; (ii) in circumstances of the contractual submission to the law and jurisdiction of the State of Utah; (iii) when the

evidence supports the conclusion that proceedings in Utah will be less expensive and afford Ms Bucher-Haefner every opportunity to present her defences; and (iv) when it will be a Utah Judge who decides Utah law without the need for expert evidence.

E) The Law

30. The submissions concerning the tests to be applied have varied between the two sides and a large number of authorities have been referred to. Mr Connell has asked the Court to accept the analysis of Mr Thomas Raphael Q.C. argued within his book, *"The Anti-Suit Injunction"*, 2nd edition at 4.02–4.06, Oxforf University Press. In essence the argument being that the general principles identified by Lord Justice Toulson, as he then was, in ***Deutsche Bank v Highland Crusader Partners*** [2010] 1 W.L.R. 1023 (CA) at [50] need to be added to and reformulated to cover situations when an anti-suit injunction may be needed but he was not addressing. That is because, as argued, whilst the principles he identified are to be recognised as *"a good exegesis of most of the general principles in non-contractual alternative forum situations"*, they do not *"cover (a) injunctions to enforce a specific legal right; (b) injunctions to protect the processes, jurisdictions, or judgments of the court; (c) single forum injunctions; and (d) 'sufficient interest"*.

31. Mr Brown's submissions on the law were formulated on the basis that categorisation and the listing of wide-ranging general principles was unnecessary and inappropriate; potentially generally but certainly here. His more, all-purpose approach was that the Court should only interfere if there is a sufficient interest justifying that course, if Mr Lewinsohn's conduct was unconscionable and if the Court should exercise its discretion in Ms Bucher-Haefner's favour taking into account all relevant facts and circumstances and also ensuring that international comity is respected.

32. I too do not consider it necessary or appropriate for me to approach this reasonably straight forward case by deciding which general principles best summarise the overall law applicable to anti-suit injunctions. The summary of law required from me can be case specific in the context of the relief sought being founded in equity for the purpose of preventing injustice. It is, after all, a jurisdiction, now statutory, which is not predicated upon categorisation.

33. In short, Ms Bucher-Haefner's case as presented is based upon and asks the Court to decide in her favour the following straight forward propositions:

    a) The order sought may be made when appropriate without trespassing upon the jurisdiction of a foreign court and, therefore, impinging upon the principles of international comity by the Court exercising its existing in person jurisdiction pursuant to the power now prescribed by ***s.37 of the Senior Courts Act 1981***.

    b) It will be appropriate in this case to make an order if this Court is satisfied that the Complaint is a vexatious and oppressive step or is otherwise an abuse of process because Mr Lewinsohn is seeking to re-litigate matters which were disposed of in this jurisdiction when the Counterclaim was dismissed and orders

for costs made. That as a result, the Complaint will interfere with the jurisdiction and process of this Court unless Mr Lewinsohn is restrained.

c) In those circumstances this Court will have a sufficient interest and it is not a case where the decision should be left to the foreign court to decide in accordance with international principles of comity.

d) In all the circumstances the Court should exercise its decision in favour of granting an anti-suit injunction in accordance with established principles and guidance.

34. I will decide the claim based on those propositions. That does not mean I am not grateful for the references by counsel to and guidance received from the cases to which I was referred including: ***Deutsche v Highland Crusader Partners*** for the principles mentioned above; the approach to re-litigation addressed in ***Masri v Consolidated Contractors International (UK) Ltd and others (no 3)*** [2009] QB 503; and the importance of comity as expressed and applied in ***Seismic Shipping Inc & Anther v Total E & P UK plc ("The Western Regent")*** [2005] CA Civ 985.

35. In respect of the latter I should make clear (because it was heavily relied upon by Mr Brown) that the judgments of the Court of Appeal emphasise that the purposes of an anti-suit injunction is to prevent oppressive behaviour. However, I should also point out that this case potentially presents a different scenario to the facts and matters which led the Court of Appeal to decide that the Judge had been right not to grant an anti-suit injunction:

a) In that case the Court of England and Wales had granted a decree limiting the liability of the defendants to the intended Texas proceedings under a Convention which applied in this jurisdiction. That decision might prevent enforcement here of any judgment made in Texas for a sum above that limit. However, it did not mean there was no claim available to the claimant in Texas and in those circumstances it would be for the court in Texas to decide whether the decree should be applied to its decision on that claim.

b) In this case, in contrast, the scenario is based upon the proposition that there should be no claim to be pursued in the State of Utah because the relevant matters have been finally resolved here by dismissal and costs orders in circumstances of it no longer being possible to have a fair trial. In this case Mr Lewinsohn brought the Counterclaim in this jurisdiction and had that Counterclaim dismissed. In contrast the claimant in Texas had not brought proceedings seeking judgment on the claim it was pursuing in Texas.

c) That does, however, leave open the potential for different decisions to be made in respect of the Counterclaim dismissed and the costs orders. It might be that one has been sufficiently determined to support Ms Bucher-Haefner's case but not the other. For example, it might be the case that the Counterclaim addressed the Intercreditor Agreement but that this was not addressed within the judgments for costs. That will depend upon an analysis of what occurred.

36. I have also found assistance from the decision of the Court of Appeal in ***LA Micro Group (UK) Ltd and another v LA Micro Group Inc and another*** [2021] EWCA Civ

1429, [2022] 1 W.L.R. 336 which considered in detail in the context of litigation the principle of estoppel by conduct or the approach of equity to unconscionable conduct constituting an abuse of process if that is the preferable analysis (it matters not for this judgment as equally applied in ***Spicer v Tuli*** [2012] EWCA Civ 845, [2012] 1 W.L.R. 3088). The decision referred to the illustration of a litigant who by positive conduct makes an election which achieves an order of the Court affecting the other party. An example given by reference to previous authority being where a litigant argues "x" in earlier proceedings and seeks to argue the opposite in subsequent proceedings. This can give rise to an estoppel or unconscionable conduct establishing an abuse of process if:

> *"(a) that the party's stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance"* (Sir Christopher Floyd at [22]).

37. Sir Christopher Floyd identified as rule that a party who assumes and successfully maintains one position in legal proceedings may not simply assume a contrary position because their interests have changed in the context of subsequent proceedings in particular if that would prejudice a party who acquiesced in the position first adopted. Whilst emphasising that this estoppel or unconscionable conduct constituting abuse of process requires a broad merits-based assessment, for example by considering whether the stance taken in fact achieved anything in the earlier proceedings, and is not constrained by strict rules, he described the purpose of the rule as being:

> *"to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties from playing fast and loose with the court."*

38. An issue arose during the hearing, at my instigation, concerning the effect the dismissal of the Claim and Counterclaim would have had should Mr Lewinsohn have started fresh proceedings in this jurisdiction. Whilst recognising that Mr Brown submits that is not a relevant question because it is for the law of the State of Utah to decide the consequences, there is no ***Civil Procedure Rule*** or (indeed) statutory provision which expressly prohibits such a step being taken without permission of this Court. That is to be contrasted with cases of discontinuance. However, it is the case that the Court may, whether of its own volition or upon application, dismiss such proceedings as an abuse of process in an appropriate case applying the overriding objective and the Court's management powers under ***CPR Part 3***. That may occur whether or not the original dismissal resulted from a determination giving rise to the doctrine of res judicata or to a specific relevant cause of action or issue estoppel or to the application of the rule in ***Henderson v Henderson*** (1843) 3 Hare 100.

39. In that context I refer to the decision of ***Zavarco plc v Nasir*** [2020] EWHC 629 (Ch), [2020] Ch 651 not to address the doctrine of merger that arises from a judgment on the merits that supersedes the original cause of action but because at paragraph [36] Mr Justice Birrs, as he then was, refers to the following passage from Lord Bingham of Cornhill's speech in ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 at [31] (addressing cause of action estoppel, although Lords Goff and Millett preferred the unconscionable conduct giving rise to an abuse of process analysis applying the same principles):

> *"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the*

> *parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all . . . It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before . . . While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

40. Although that passage specifically addresses the topic of abuse of process in the context of subsequent cases raising matters which could have been raised in earlier proceedings, (i.e. as considered in ***Henderson v Henderson*** (above) and ***Johnson v Gore Wood & Co*** [2002] 2 AC 1), it is axiomatic that the observations equally apply to subsequent litigation seeking to raise the same matters as previous litigation disposed of by dismissal without the Court having addressed the merits. For example when there has been dismissal on procedural grounds such as upon breach of an "unless order".

41. An example of avoidance of *"too dogmatic an approach"* and of the application of the need to ask *"whether in all the circumstances a party's conduct is an abuse"* can be found in the decision of ***Spicer v Tuli*** (above). It was emphasised by Lord Justice Lewison that dismissal of a case or a party's decision to withdraw will not necessarily lead to the conclusion that a new claim cannot be made. There may be cases where the reasons for this step lead to the conclusion that the claim was not abandoned and that there was no decision or election which would prevent those fresh proceedings. An obvious potential case being where the withdrawal is attributable to having started the claim before the wrong court. Similarly it may be necessary to very carefully analyse the other side's claim that the litigant waived their right to a future fair and public hearing of the claim.

42. It is now necessary to address that and the other matters of dispute in the context of the law summarised above.

F) The Decision

43. Applying the law to the facts set out above, the most obvious conclusions to be drawn are:

    a) Mr Lewinsohn by the Counterclaim asked this jurisdiction to give him judgment by applying the Intercreditor Agreement and ordering Ms Bucher-Haefner to pay all costs he and his firm incurred as Collateral Agent including the costs and legal expenses relating to proceedings in Utah and England. Those are the same costs as he is seeking in the Complaint.

    b) In addition, he sought an indemnity against any liability that he or his firm might have for the costs of the Claim and Counterclaim insofar as they were brought against him or by him in his capacity as the collateral agent of the Intercreditor Agreement. This applies to any costs order made in the Claim and Counterclaim and, therefore, applies to the costs orders made before, at the time and after the order of dismissal.

    c) Mr Lewinsohn elected to have the Counterclaim dismissed together with the Claim he was defending on the ground that a fair trial could no longer be contained because of delay. He represented that he did so *"in order to achieve certainty and finality"*. Whilst that was first sought in circumstances omitting consideration of the existing stay, that election was maintained after its existence was appreciated.

    d) That election caused the Claim and Counterclaim to be dismissed.

    e) The counterclaim was dismissed with no order as to costs save for costs orders made subsequently addressing the application to dismiss.

44. Therefore, Mr Lewinsohn obtained the relief he sought, dismissal, and had been able to argue his case for costs upon the basis represented to Ms Bucher-Haefner and this Court that he no longer wanted the Claim and Counterclaim to be determined on the merits and for good reason. Namely because a fair trial was no longer possible. That stance resulted in Ms Bucher-Haefner also asking the Court for the same outcome and the Court deciding there should be finality by dismissal of the Claim and Counterclaim. Plainly this will give rise to an estoppel by conduct or an abuse of process by unconscionable conduct should fresh proceedings be started provided the circumstances are such that the Court should hold Mr Lewinsohn to that election.

45. It should. The starting point for that decision is to consider the position had he started new proceedings in the equivalent form of the Complaint here. It would have been entirely wrong to allow Mr Lewinsohn to start his Counterclaim afresh in this jurisdiction. First, because nothing has changed. There is no suggestion that there are different circumstances leading to the conclusion that a fair trial cannot be obtained. Second, because he would be maintaining a contrary position to the one which led to Ms Bucher-Haefner asking the Court for the same outcome for the Claim. Third, because he would be maintaining a contrary position to the one which caused the Court to decide to dismiss the Claim and Counterclaim. He would be "playing fast and loose with the court". Fourth, because it would offend the principle formed in the public interest that there should be finality in litigation. It is no answer to assert in this case

that there was no finality because there was no decision on the merits. There was finality because Mr Lewinsohn elected for dismissal because a fair trial was no longer possible.

46. It follows that it would be an abuse of process for new proceedings to be brought in this jurisdiction either for the relief claimed in the Counterclaim or for relief which should have been raised in those proceedings applying (to the extent necessary and appropriate to do so) the rule in ***Henderson v Henderson*** (1843) 3 Hare 100. There are no special circumstances to justify or excuse such conduct.

47. The same conclusion must follow in respect of the Complaint when it plainly mirrors the relief sought in the Counterclaim. It is no answer in these circumstances that this issue can be decided by the Courts of the State of Utah. This Court is being asked for a decision based upon its in person jurisdiction to prevent Mr Lewinsohn avoiding the consequences of his election to apply for dismissal of proceedings he brought in this jurisdiction by seeking the same relief elsewhere. This Court has jurisdiction and a sufficient interest to grant that relief and can and should conclude that such a step is an abuse of the process of this Court for the same reasons as it would have been an abuse to start new proceedings here.

48. That decision does not offend the principles of international comity. It is the obvious and right decision to make exercising the jurisdiction this Court has over Mr Lewinsohn. There is no reason why this discretionary power should not be exercised and every reason why it should. The fact that the Intercreditor Agreement is subject to the laws of the State of Utah and, let it be assumed, an exclusive jurisdiction clause makes no difference. The issue being addressed on the facts of this case is whether parties who have accepted that the claims in issue should be determined by this Court, who have participated in the proceedings and who have decided that the claims should be resolved by their dismissal because delay means a fair trial cannot be achieved should be retrained from commencing the same proceedings abroad. The answer is "plainly they should".

49. Whilst I have considerable concern not to trespass on the State of Utah's jurisdiction, the position here is that a litigant within this jurisdiction is seeking to abuse the process of this Court and this Court should exercise its in person jurisdiction to prevent that. The purpose of the injunction is not to achieve recognition or enforcement of the dismissal order but to prevent unconscionable conduct and injustice by proceedings being recommenced with claims which it has been accepted cannot be pursued and when that acceptance has resulted in the dismissal of proceedings pursuing those claims before this Court.

50. Indeed, although I am not sure I have seen case law expressly referring to this and, therefore, I reach my decision without it if required: it would seem to me that comity requires this Court to assist the Utah Courts by ensuring that this jurisdiction's litigants do not use their resources and thereby adversely affect their court users by seeking to advance proceedings which have been resolved finally here. There should be an anti-suit injunction to prevent re-litigation of the counterclaim.

51. It is unnecessary and would be wrong to address the costs of the Claim and Counterclaim, which are covered by paragraph 68(2) of the Counterclaim, separately from the costs and legal expenses relating to proceedings in Utah and England, which

are covered by paragraph 68(1) of the Counterclaim (see paragraph 4 above). If it had not been for the terms of the relief sought in the dismissed Counterclaim at paragraph 68(2), as set out in paragraph 4 above, there would have been potential for deciding that the State of Utah should decide if the costs ordered by this Court against Mr Lewinsohn and his costs of the Claim and Counterclaim which Ms Bucher-Haefner was not ordered to pay (whether because of a favourable costs order, no order as to costs or because they would be solicitor/client costs not recoverable from her under a costs order) were nevertheless recoverable by him as a matter of contract under the Intercreditor Agreement under the laws of the State of Utah.

52. However paragraph 68(2) of the Counterclaim expressly asked this Court to decide whether the Intercreditor Agreement gave Mr Lewinsohn an indemnity against any liability that he might have for the Claimants' (including Ms Bucher-Haefner) costs of the Claim and Counterclaim insofar as they were brought against him or by him in his capacity as the Collateral Agent. If so, the Court was asked to award that indemnity.

53. By seeking dismissal, he elected not to have that issue determined and not to have the Court decide whether to order an indemnity in respect of his costs and expenses as a Collateral Agent under the Intercreditor Agreement caused by or resulting from the Claim and Counterclaim including but not limited to costs he was ordered to pay Ms Bucher-Haefner.

54. Therefore, the costs of the Claim and Counterclaim, which are covered by paragraph 68(2) of the Counterclaim, are not to be treated separately from the costs and legal expenses relating to proceedings in Utah and England covered by paragraph 68(1) of the Counterclaim when deciding whether to grant the relief sought. For the reasons set out above, I will grant an anti-suit injunction.

Order Accordingly