Neutral Citation No: [2017] NIMaster 2 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **2017NIMASTER2** ***Delivered: 16/03/2017***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

16/008617

Between:

MCLAUGHLIN & HARVEY LIMITED

Plaintiff;

AND

LOCKTON COMPANIES INTERNATIONAL LIMITED

Defendant.

And

15/004438

MCLAUGHLIN & HARVEY LIMITED

Plaintiff;

AND

LOCKTON COMPANIES LLP

Defendant.

Master McCorry

[1] The plaintiff has issued two separate writs of summons with identical causes of action and pleadings against the defendants which are related companies, claiming damages for loss and damage caused by reason of the negligence, breach of contract, breach of fiduciary duty, negligent misstatement and misrepresentation by

the defendants in and about the provision of professional insurance brokerage advice and services, in respect of a major construction project undertaken by the plaintiff as main contractor, at the Royal Victoria Hospital in Belfast. On 15 December 2015 the plaintiff applied ex parte pursuant to Order 6 rule 7 to extend the validity of the writ in action number 15/004438 and an order extending validity was made by me on 18 December 2015. The defendants have issued 3 summonses: the first to challenge, or more properly to seek review, of the ex parte order extending validity of the writ in 15/004438 (Lockton Companies LLP case), and the other two seeking setting aside service of each writ of summons pursuant to Order 12 rule 8, or staying each action pursuant to the inherent jurisdiction of the High Court, on the ground that the High Court in Northern Ireland has no jurisdiction to hear and determine the plaintiff's claims.

[2] The plaintiff is a large construction and civil engineering contractor based in, and with a registered office in, Northern Ireland. In July 2008 it was engaged by the Belfast Health and Social Care Trust as main contractor for the construction of a new critical care and trauma unit at the Royal Victoria Hospital. This was a significant project costing some £120,000,000, the plaintiff's biggest ever contract. From in or about 1990 the Defendants had been retained as the sole insurance broker for the plaintiff placing insurance cover for the plaintiff's commercial needs across all sectors of its business activities, including an annual contractors all risk ("CAR") policy renewed each year since 1990, with the last renewal before the hospital contract being in 2007. The plaintiff's contract with the Trust included, inter alia, the provision of five sealed pipework systems, aspects of which work it sub-contracted to other companies. During the tendering stage the plaintiff had engaged the defendants to review the insurance provisions within the tender documentation. On 14 February 2007 the defendants had advised that a separate project-specific policy was required as the level of insurance required by the hospital contract exceeded the annual CAR policy limits. Essentially the plaintiff alleges that thereafter the defendants did not provide it with adequate advice as to the various options available, or risks, eventually providing a quotation which the plaintiff accepted and it formed part of the plaintiff's tender submitted on 5 March 2007. When the plaintiff was awarded the hospital contract the specific project CAR policy was placed by the defendants on the plaintiff's behalf with Allianz Plc as lead insurer. It was also a term of the hospital contract that the policy be placed in the joint names of the plaintiff and the Trust. The period of insurance was to run from June 2008 until October 2011 and provided cover for all other contractors and sub-contractors of each and every tier.

[3] The plaintiff says that at the time of placement there was no discussion about the different levels of CAR cover, extensions, conditions, or exclusions available or an explanation of the risks and costs associated with the different types of cover etc. Specifically it did not explain a particular exclusion clause (Limited Defective Condition Exclusion Clause 3). The five sealed water pipework systems were installed free of defect between October 2009 and August 2012 but thereafter suffered damage which caused leaks and contamination which was drawn to the

plaintiff's attention in October 2012. The Trust refused to accept practical completion until the plaintiff conducted the requisite remedial works at a cost of nearly £9,568,116. The insurers refused to provide indemnity for this expenditure on the basis of Limited Defective Exclusion Clause 3. The plaintiff sued the insurers for declaratory relief that indemnity ought to be provided. The insurers defended on the basis of exclusion clause 3 arguing that the plaintiff ought to have purchased another type of cover namely "DE5". During the trial the insurers made an offer of £3,750,000 exclusive of costs. After settling other related disputes the plaintiff was only able to recover £5,273,750. Taking into account costs and expenses arising from related litigation the plaintiff was left with a loss which it has quantified at £5,634,481 and which it now claims from the defendants.

The Extension of Validity Issue

[4] On 16 January 2015 the plaintiff issued the first of its writs of summons against Lockton Companies LLP (15/00438). The writ not having been served, on 15 December 2015 the plaintiff applied ex parte to extend the validity of the writ of summons for 12 months commencing 15 January 2015. It is important to note that had that application been refused the plaintiff still had plenty of time to proceed to serve the writ. However, extension of validity was granted by me on 18 December 2015, extending validity for 12 months from the date on which the initial period of validity expired. The defendants refer to an ex parte order dated 15 January 2015 but that is clearly mistaken and they are confusing the date of expiry of the initial period of validity with the date of the order extending it, which was 18 December 2015.

[5] In the affidavit grounding the application Mr James Turner (plaintiff's solicitor) set out the core reason for extending validity as follows:

> *"7. The purpose of this affidavit is to set out for the Court the reasons why the Writ has not been served and the reasons why the Plaintiff says the Court should exercise its discretion and grant the application to extend under the principles set down in Clyde v Hutchinson [2003] NIQB 74 [2004] 1 BNIL 73.*
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> *8. The Plaintiff issued Court proceedings against Allianz plc and others (the insurers under the Policy brokered and placed by the Defendant) on or about 2014 (Writ No: 2014/71741 [pp05-09]. These proceedings (and related proceedings) are currently the subject of the Direction from the Commercial Judge issued on 29th October 2015 [pp10-12]. In brief, Allianz plc and its fellow insurers have failed to pay out for a claim by the Plaintiff under the Policy.*
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> *9. These proceedings concern ongoing litigation between the parties which are currently listed for hearing before the Commercial Judge for 4 weeks from April 2016 and concern inter alia the installation and design of water pipes within the new critical care building in the Royal Victoria Hospital, Belfast (collectively, "the RVH proceedings").*

10. The RVH proceedings were previously listed for three weeks before the Commercial Judge from 5 October 2015 but, for various reasons, these proceedings were removed from the list for hearing and given the new dates in April 2016. The matters are listed for hearing for two weeks from 4 April then a further two weeks from 3 May 2016.

11. I am advised by Senior Counsel and believe that should the Plaintiff not recover all of its losses in the RVH proceedings, then it may need to look to the Defendant, its insurance broker, to meet those losses (or those losses which remain unrecovered) as a result of misselling the Policy to the Plaintiff on the basis that, if the Court do not accept the Plaintiff's case in the RVH proceedings then it may need to serve the current Writ on the Defendant and proceed.

12. I understand and believe that had the RVH proceedings case ran and resolved (either by settlement or judgment) in October 2015 then the Plaintiff would know whether it had any cause of action against the Defendant that it needed to pursue. If the Plaintiff had recovered its losses in full then the current Writ would most likely be allowed to expire. If it did not (or had a party appealed) then the Defendant would have had to decide to issue the Writ or apply to extend".

In short the reason proffered for not proceeding to serve the writ was that until the Allianz case resolved the plaintiff could not tell whether it had a loss claimable against the defendant or not and to serve the writ in those circumstances could be to incur unnecessary cost if the claim was not to proceed or was allowed to lapse. Having regard to the overriding objective at Order 1 rule 1A the court accepted that this was a good reason to extend validity.

[6] Order 32 rule 8 provides that the court may set aside an order made ex parte. This is because by its nature an ex parte order is essentially a provisional order made by the judge on the basis of evidence and submissions by one side only and therefore may be reviewed in the light of evidence and argument adduced by the other party (See The Supreme Court Practice ("The White Book") 1999 edition at 32/6/30). Thus a party who is refused an ex parte order may appeal but the party against who it is made should if they wish to challenge it seek review, when the court has wide discretion to vary or discharge his original order in the light of the new evidence or submissions. It follows that if there is no new evidence, or it is not persuasive, the court may not change its order. In practice applications by the party against whom the order is directed to set it aside, or to review it, will normally be heard by the Master who made the original ex parte order and is not in any way viewed as an appeal.

[7] Order 6 rule 7 (the equivalent provision in England and Wales was until 1999 Order 6 rule 8) provides: (1) that for the purpose of service a writ is valid in the first instance for 12 months beginning with the date of its issue; and (2) where a writ has not been served on a defendant the court may extend the validity of the writ from time to time for such period not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as

may be specified in the order or if the application is made before expiry to such later day if any as the court may allow. The most helpful summary of the relevant principles remains that set out at 6/8/6, 6/8/7 and 6/8/12 of The Supreme Court Practice ("The White Book") 1999 edition. I do not propose to rehearse in detail what is so clearly set out therein, suffice to say that the essential principles are:

(1) It is the duty of a plaintiff to serve the writ promptly accordingly there must always be a good reason for the grant of an extension of validity. The later the application is made the better the good reason must be. Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No.3)[1987] A.C. 597 HL and Waddon v Whitecroft-Scoville Ltd [1988] 1 All ER 996 HL.

(2) Whether a reason is good or bad depends on the circumstances of the case and normally the showing of good reason for failing to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension (Waddon v Whitecroft-Scoville Ltd).

(3) Good reasons include difficulty or impossibility in finding or serving a defendant particularly where he is evading service, or agreement with the defendant to defer service. Bad reasons include: negotiations in the absence of agreement to defer service; difficulties tracing witnesses or obtaining evidence; or carelessness. However, it is important to note that there is a dearth of recent authority in this jurisdiction and of course in England and Wales a somewhat different regime has been introduced with the establishment of their Civil Procedure Rules since 2000 and of course the Human Rights Act 1998.

(4) Where application for renewal is made after the writ has expired and after expiry of the relevant period of limitation the applicant must not only show good reason for the renewal but must also give a satisfactory explanation for failure to apply for renewal before the validity expired.

(5) Whether or not to extend validity is a matter for the discretion of the court and in exercising that discretion the court is entitled to have regard to the balance of hardship Jones v Jones [1970] 2 QB 576.

(6) The application to extend involves a 2 stage inquiry. At the first stage the court must be satisfied that the plaintiff has demonstrated good reason for the extension and a satisfactory explanation for failure to serve before validity expired. Only if it is so satisfied will the court proceed to the second stage by considering all the circumstances of the case including the balance of hardship.

(7) The application to renew the writ should be made within the appropriate period of validity but the court has power to allow extension after expiry as long as the application is received during the "first period of expiry" (i.e. the year following.) Chappell v Cooper 1980 1 WLR 958. This is arguably subject to a wider power to allow later extension according to a number of propositions in Singh (Jogrinder) v Duport Harper Foundries Ltd [1994] 1 WLR 769.

[8] As to the procedure to adopt in an application to review any order made ex parte Carswell LCJ, giving the Judgment of the Divisional Court in Re Moloney [2000] NIJB 195 at 201, 202 (Div. Ct.) held that:

> *"It is well-established principle applicable to ex parte applications for relief of certain kinds that the applicant is under a duty to make full and fair disclosure of all material facts known to him or of which he should obtain knowledge on making proper inquiries. It was first applied to ex parte applications for injunctions, then to applications such as those for a rule nisi for a writ of prohibition (R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486). Its most common application in modern conditions is in applications for Mareva injunctions and Anton Piller orders.*
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> *In Dalglish v Jarvis (1850) 2 Mac & G 231 the phrase uberrima fides was imported from the law of insurance, although one might question the necessity for the adjective. Although many of the cases concern deliberate withholding of material in order to mislead and deceive the court, it is quite apparent from the judgments in Brink's-Mat Ltd v Elcombe [1988] 3 All ER 188 that innocent non-disclosure, in the sense that the importance of the material was not perceived by the applicant, may be sufficient to cause the court to discharge the ex parte order. The court has a discretion whether to discharge the order, and, depending on the facts, may decide not to do so or may grant a new order: ([1988 3 All ER 188 at 193 per Ralph Gibson LJ). Where the police apply for an order for production of documents, it is not unlike the case where a plaintiff applies for an interim injunction: the court has to weigh up a number of factors and place them in the balance in reaching a decision whether to grant the relief sought. The order of the court will be immediately effective and may have serious consequences for the defendant. In such a case it is of importance that the court should be furnished with full and frank information, so that it will not make an order on incorrect or inadequate material."*

[9] In this case the defendants, whilst not necessarily conceding that the reason for requesting extension of validity, on the basis of the material provided, was a good one, applied to set aside the ex parte order of 18 December 2015 on the grounds that the plaintiff's solicitor Mr Turner, in his affidavit grounding the application, failed to make full disclosure in that he did not draw to the attention of the court various dates which would have alerted it to a potential limitation issue. Therefore defendants' counsel submitted that had the Master been aware of this then he would have directed that the application be taken by summons so as to put the defendants on notice and allow them to be heard. At the time of the ex parte application in late 2015 the defendants were actively assisting the plaintiff in its claim against Allianz. There was no letter of claim sent to them before the writ was issued and therefore they had no inkling that they might be the next target. Therefore, they submit, Mr Turner ought in his grounding affidavit to have informed the court that the insurance contract, on the basis of which the plaintiff sued, was made in 2008, which was when the cause of action accrued and it was up to the plaintiff to make a date of knowledge point. They further argue that, as the plaintiff submits that there is no limitation point, and if this is correct then there can be no prejudice in requiring it to

issue a new writ. There was an exchange of affidavit evidence on this issue with the plaintiff alleging that it was not until December 2014 that the plaintiff became aware that there would have been an enhanced policy of insurance available in 2008 which they were not advised about and which, had it been incepted, would have indemnified the plaintiff for the loss it had been unable to recover.

[10] One point which was not covered by either counsel was when the cause of action actually arose. For example, was it from the date of inception of the policy in 2008 or was it when the loss actually arose? Also, they did not address the question of the extent to which this interlocutory court should attempt, on the basis of affidavit evidence, to decide the issue of date of knowledge, or even provisionally, the plaintiff's likelihood or otherwise of success in establishing firstly that there was no limitation issue or if there was when was the date of knowledge. With all due respect to the parties, the court did not have sufficient material, in terms of legal argument or evidence, to resolve these issues even assuming, about which I have some concern, that an interlocutory hearing is the most appropriate forum to fairly deal with such issues. Therefore what the defendants' application really comes down to is whether or not I would have ordered the plaintiff to proceed by summons if I had been aware of a potential limitation issue.

[11] However, the plaintiff would argue, the matter does not rest there, citing the judgment of Weatherup J in Mullan v Mountainview [2014] NIQB 85. In that case, as in this one, the plaintiff had applied for the extension within the period of the validity of the writ and could have gone on to serve the writ within the first period of validity, if extension had been refused. Weatherup J held:

> *[11] Nevertheless the Order was made on the application of the plaintiffs prior to the expiry of the Writ. Had there not been that Order extending the Writ I expect that the plaintiffs would have served the Writ. In the event the Writ was not served within the original 12 month period but was served within the extended period of 4 months granted by the Chancery Master. To set aside the extension of the Writ retrospectively seems to me to involve prejudice to the plaintiff who would not have been at risk of the expiry of the Writ if the Chancery Master's order had not been made, given that I am satisfied that the Writ would have been served.*
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> *[12] Issues arise about the conduct of the related action and how the two actions and the respective pleadings might be accommodated together. I set aside those considerations for present purposes. In the circumstances that exist today I am satisfied that there is good reason to confirm the extension of the Writ. The good reason does not arise because of the circumstances that existed on 16 September 2013, when the matters relied on by the plaintiffs did not constitute good reason. The good reason arises because of circumstances that post-date 16 September 2013, namely the plaintiff not having served the Writ within the original 12 months because of the extension granted and then serving the Writ within the extended period.*
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> *[13] I am unable to agree with the Master that the position of the plaintiffs arose out of the carelessness of the plaintiffs or their solicitors. The plaintiffs came to Court*

to see what was the appropriate order, had it been the case that the plaintiffs had good reason to obtain that Order. In the event the Chancery Master agreed to grant the Order. In applying to the Master at that time the plaintiffs sought to regularise their position, as they saw it, because of the related action. Had the extension been refused on 16 September 2013 the plaintiffs would have served the Writ and not been at risk of losing the entitlement to proceed with the present action.

[14] Accordingly, I allow the appeal. I refuse the defendant's application to set aside the Order of 16 September 2013. There is good reason to extend the period for service of the Writ. Lest it be said that the Writ was not duly served on 4 January 2014 by the absence of good reason to extend the Writ at the date of the first Order, I extend the Writ to 4 January 2014. In so far as it might be necessary to do so I would extend the Writ for 12 months from 21 September 2013."

In Mullan Weatherup J held that the reason for extension of validity had not been a good reason but still went on to extend validity of the Writ because to do otherwise and retrospectively deem the writ invalid would effectively deprive the plaintiff of its legal remedy against the defendant, particularly given the limitation issues now alleged by the defendant.

[12] These cases of course turn on their own facts but it seems clear that if this court was to set aside the order of extension of validity made by me on 18 December 2015, upon which the plaintiff had relied to delay service of the writ until after the first period of validity had expired, then that must be prejudicial to the plaintiff, where but for the order it could, albeit reluctantly, have served the writ whilst it was still valid. If the order of 18 December 2015 is set aside then the writ is invalid and in the absence of a further order extending time, any purported service of it would be invalid. In other words the plaintiff would have to start afresh over 2 years after the writ was initially issued. That may or may not give rise to limitation issues which for the reasons already stated I cannot determine on the basis of the evidence before me. Also, unlike in the Mullan case, I have not held that the reason for extension accepted by me on 18 December 2015 was not a good reason. The point raised by the defendants is not that the reason was a bad one but that it was made on the basis of inadequate disclosure. Even accepting the need for caution when comparing the facts of one case with another, it seems to me that the plaintiff in this case is on stronger ground than the plaintiff in the Mullan case. Finally, it does not follow that because certain information is absent from a grounding application that the court will inevitably set aside the order. The court reviewing its previous order must determine whether the missing information was so important that fairness requires the order to be set aside. This again raises the question whether or not there is a limitation point or if there is how it would likely be resolved. In the end, having reviewed the order dated 18 December 2015 extending the validity of the writ of summons, in the light of the parties' affidavit evidence and submissions, I am not persuaded that the order should be set aside.

The Jurisdiction Issue

[13] The defendants request an order in each action setting aside service of the writ of summons pursuant to Order 12 rule 8, and staying the actions pursuant to the inherent jurisdiction, on the grounds that an exclusive jurisdiction clause confers jurisdiction in the courts in England and Wales. The starting point therefore is the purported exclusive jurisdiction clause which appears in the defendants' Terms of Business which was handed to the plaintiff at the annual renewal meeting on 5 February 2008, as it had been each year before since the plaintiff began placing its insurance business with the defendants, and each year since. The importance of the Terms of Business document was emphasised in the opening paragraph which states in bold print "This document contains important information. Please read it carefully." and then goes on to list a number of particular paragraphs none of which were the exclusive jurisdiction clause. The document thereafter is typical of insurance documents of its type and on the final page under the highlighted heading "Governing Law and Jurisdiction" provides: "Alexander Forbes Risk Services Limited undertakes its activities as an insurance intermediary in accordance with the laws of England and Wales. Any disputes will be governed by and construed in accordance with the laws of England and Wales **and subject to the exclusive jurisdiction of the courts in England and Wales**"(my emphasis). It then continues: "Please contact us immediately if there is anything in these terms of business that you do not understand, or with which you disagree, or if you have any questions, please contact your usual contact in the first instances who will be pleased to assist you". It then requests the client to sign and return a copy of the Terms of Business Agreement (which incidentally the plaintiff never did) to signify acceptance and states: "Your instruction or confirmation of an order to arrange cover on your behalf will be acceptance of the terms of this Terms of Business Agreement".

[14] I assume that the reference to Alexander Forbes was to the company name at the time, or to some predecessor to Lockton, but certainly no point was raised about this by either party and other documents in the bundle refer to Lockton. I also note that the exclusion clause changes after Lockton became the named service provider, for example in 2012 where it states only "Any disputes will be governed by and construed in accordance with the laws of England and Wales" but omits to say "and subject to the exclusive jurisdiction of the courts in England and Wales". It also states that if they did not hear from the insured within 30 days that would be considered acceptance of the terms and conditions of the Terms of Business Agreement, something omitted from the later document. This of course has no bearing on the terms of the Terms of Business Agreement in 2008 but does suggest that the defendants are not correct when they say that the plaintiff and defendant have continued to work on the same Terms of Business since 2008 because clearly they have not, particularly given the context of the issue before this court.

[15] The defendants also argue that the importance of the Terms of Business was highlighted by the fact that it was included in the index to the bundle of documents headed "2008 Renewal Working Document" dated 21 January 2008 which was handed over at the meeting on 5 February 2008. It does indeed appear there, at Appendix D Terms of Business Agreement for Commercial Customers (L1029), but

there is no reference to any exclusive jurisdiction clause specifically. All in all I have to say that the documents exhibited, and in particular the Terms of Business, look very much like standard form documents rather than documents tailored for the plaintiff.

[16] I turn then to the affidavit evidence in respect of the handing over of the bundle of documents which included the Terms of Business Agreement at the meeting on 5 February 2008. This relates primarily to what was done or said by Mr Graham, the defendants' representative, at the meeting and afterwards, to draw the plaintiff's representative's attention to the terms of business, which the plaintiff submits fell far short of what would be required to put them on notice of the terms sufficiently to demonstrate actual acceptance of the exclusive jurisdiction clause. The main deponent for the plaintiff is Stephen Hamill who along with a Mr Patrick Buchanan was in attendance at the meeting on behalf of the plaintiff. Mr Hamill's first affidavit was filed on 28 October 2016. He avers at paragraph 6 that not only was the plaintiff domiciled in Northern Ireland but that the contract works were carried out here. He details the relationship between the plaintiff and the defendant going back to 1990 and notes: "…. At all material times the Plaintiff dealt directly with Mr Graham, an individual who is habitually resident in Northern Ireland, at its offices in Northern Ireland, and that has always been the case." At paragraph 10 he says that "Throughout this relationship I believed the Plaintiff was dealing with and represented by a local Belfast based individual for and on behalf of a Belfast based subsidiary/branch of a national or international firm." At paragraph 11 he says that "this local business relationship was and remains a crucial factor in the plaintiff's choice of broker as we wanted someone with intimate knowledge of the local market and its nuances and was able to attend our office at short notice".

[17] In a subsequent affidavit filed 23 December he adds further detail including the defendants' place of business at 40 Linenhall Street Belfast. He acknowledges that the Terms of Business were handed over at the renewal meetings but he never read the exclusive jurisdiction clause and it was never highlighted by Mr Graham. He said that at the renewal meetings the information for discussion was usually presented on a one or two page summary (paragraph 16).

[18] In his grounding affidavit in the jurisdiction application in the Lockton Companies International case, filed 5 October 2016, Mr Graham, a senior vice president in the defendants' organisation, referring to the 2008 Renewal Document, which includes the Terms of Business Agreement containing the exclusive jurisdiction clause, states at paragraph 11: "This document, together with Appendices, was provided to the plaintiff at an annual review meeting on 5 February 2008 that I attended with Ian Millar from Lockton and Patrick Buchanan and Stephen Hamill of the Plaintiff". He then goes on (paragraph 14) to describe how the plaintiff did not sign or return the document but subsequently instructed the defendant to arrange cover as a result of which annual cover was arranged from 30 April 2008 onwards. No objection was taken to the Terms of Business. His second

affidavit filed 25 October 2016 does not deal with the issue of how the bundle of documents was given to the plaintiff at all.

19] It is only in a third affidavit filed on 23 December 2016, immediately before the hearing, in response to the affidavit referred to in the foregoing paragraph herein, filed by the plaintiff's Mr Hamill that Mr Graham elaborates, refuting the averment by Mr Hamill in his affidavit of 25 October 2016 that the documents had been handed over in a wholly informal manner and for the first time describing how they had been handed over. At paragraph 5 he avers:-

> "….. I brought to the pre-renewal meetings with the Plaintiff a renewal Document and Appendices which was a bound series of documents including the Terms of Business. These meetings were formal meetings in the Plaintiff's boardroom. A number of copies of this document were brought to pre-renewal meetings. I handed over this document at the start of the meeting and informed Mr Hamill that within what I was providing included the Terms of Business. I recommended that the Terms of Business should be read by the Plaintiff. …."

[20] In this short extract Mr Graham refers variously to "meeting" and "meetings". I had understood from his earlier affidavit that there was just the one pre-renewal meeting which took place on 5 February 2008 and assume that the use of the plural referred to pre-renewal meetings generally, in which case he does not specifically state that it was at the meeting on 5 February 2008 that he placed emphasis on the need to read the Terms of Business when handing the document over, or whether he did that at all such meetings. At paragraph 6 Mr Graham does go on to say: "I confirm that I provided the Terms of Business and the Business Principals Documents to the plaintiff for each year referred to in my previous affidavit …." He points out that when Mr Hamill deposes that he cannot specifically recall the 'Business Principals Documents' he appears to be deposing solely from his own personal records and suggests that he check out his records. It is unclear what records of the meeting the plaintiff may have. The defendants prepared a minute of the meeting however this is of no assistance as it is entirely silent as to the handing over of the 'Business Principals Document' and there is no record of any emphasis being placed on the need to read the Terms of Business.

[21] The plaintiff submits that this evidence is insufficient for incorporation of the Terms of Business, and in particular the exclusive jurisdiction clause, into the contract governing relations between the parties, and therefore the exclusive jurisdiction clause is not binding upon them. As I have observed above at [15] the documents exhibited and in particular the Terms of Business look very much like standard form documents, except where they include detailed particulars such as for example the level of cover provided, rather than documents tailored for the plaintiff. The principles relating to standard form contracts, and incorporation of the terms they contain, is usefully summarised at 13-008 to 13-018 of volume 1 of the 32nd edition of Chitty on Contracts. These typically will be documents which are handed

by one party to the other at the time the contract comes into being and the question which then arises is whether or not the terms set out in the document become terms of the contract. It is not necessary that the conditions contained in the standard form contract should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect, but at 13-013 Chitty sets out the three tests which have been laid down by courts regarding whether notice of a term or condition is sufficient to bind the person receiving the standard form documents. The first test is: if the person receiving the document did not know that it contained writing or printing, he is not bound. I think that primarily relates to situations where the person receives a brief document such as a ticket or receipt or a single sheet with terms and conditions in fine print on the back, handed over, or emailed in the case of online transactions, at the time goods or services are purchased. In the present case it was clear that a bundle of printed documents was being handed over, but the principle remains the same.

[22] The second test is: if the person receiving the document knew that it contained writing or printing, or referred to conditions, he is bound. Again the plaintiff's representatives were obviously aware that the documents contained writing or printing, but their awareness of what those written documents comprised is another issue. They would have been aware that the documents set out the level of cover to be provided and the like, and as experienced businessmen must have been aware that the defendants' terms of business were likely included, without being aware of the details of what those terms were.

[23] The third test is perhaps more relevant to the issues here. If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become terms of the contract between them. On its face none of this appears to assist the plaintiff because they were well aware that they were being handed a bundle of documents of some importance albeit that many were in standard form and likely to be aware that they would have included terms of business, but unless they actually read the entire document would not have been aware of specific conditions such as the exclusion clause.

[24] Most disputes which arise relate to the third test and the issue of reasonable sufficiency of notice, namely whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions. Whether they did so or not is a question of fact (Chitty 13-014). It is well established that where the party tendering the document knows it contains an onerous or unusual term it must show that it has been brought fairly and reasonably to the other's attention (Chitty 13-015). As Lord Denning said in J Spurling Ltd v Bradshaw [1956] 1 WLR 461 at 466: "Some clauses which I have seen ….would need to be printed in red ink on the face of the document with a read hand pointing to it before the notice could be held to be sufficient." Whilst one suspects that many such terms would no longer appear in properly drafted contracts, or be enforceable where they do, as a

result of legislation such as the Unfair Contractual Terms Act 1977 and development in case law, nevertheless the principle remains that a party tendering a document containing a very onerous term must take more care to draw to the other party such a term, with very significant implications, as opposed to something very routine. The plaintiff would argue that an exclusive jurisdiction clause is such a term, and it is quite clear on any analysis of the documentation, and the way in which it was provided, no steps were taken to draw the exclusive jurisdiction clause to the plaintiff's attention. It was there if they chose to read the Terms of Business but there was nothing to highlight its inclusion and no persuasive evidence that anything was done at the 5 February 2008 meeting that had not been done in the course of annual review in previous years going back to 1990. Against this background the central issue is whether or not the defendants gave the plaintiff sufficient reasonable notice of the exclusive jurisdiction clause contained within the Terms of Business. Ancillary to that is the question whether an exclusive jurisdiction clause is onerous or unusual.

[25] Consideration of the effect of an exclusive jurisdiction clause is central to the assessment as to whether or not it is an unusual or onerous term I think that the number of cases in which exclusive jurisdiction clauses come before this court is testament to the fact that they are not unusual. Are they, however, onerous? Paragraph 1 of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 provides: "Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part." Paragraph 3 provides: "A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question." Paragraph 12 provides: "(1) If the parties have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, and, apart from this schedule, the agreement would otherwise be effective to confer jurisdiction under the law of that part, that court or those courts shall have jurisdiction." Finally, section 49 of the Act provides: "Nothing in this Act shall prevent any court in the United Kingdom from staying, … striking out or dismissing any proceedings before it, on the grounds of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention" (Brussels Convention or as the case may be Lugano Convention).

[26] In Walker t/a The Country Garage v BMW (GB) Ltd [1990] 6 NIJB 1 Campbell J held that in cases where the parties are resident in different parts of the United Kingdom, an exclusive jurisdiction clause may be overridden in certain circumstances and the action stayed on the grounds of forum non conveniens. Carswell J in Adair Smith and Marcus Smith t/a Adair Smith Motors v Nissan Motor (GB) Limited (Unreported, 19.05.1993) was of like mind but he held that the circumstances in which a court would override an exclusive jurisdiction clause on grounds of forum non conveniens were limited. In deciding whether or not to override the exclusive jurisdiction clause Carswell J followed the principles set out by Brandon J in The Eleftheria [1970] P94, 99-100, a summary of which was approved by the Court of Appeal in The El Amria [1981] 2 Lloyd's Rep 119, 123 and

accepted as correct by the House of Lords in The Sennar [1985] 2 All ER 204. Those principles are:-

> *"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiff. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, and without prejudice to (4), the following matters, where they arise, may properly be regarded: -(a) In what country the evidence on the issues of fact is situation, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."*

[27] In Antec International Limited v Biosafety USA Inc. [2006] EWHC 47 (Comm.) the courts in England had jurisdiction to hear the case because the plaintiff company was incorporated and domiciled in the United Kingdom. The claim concerned a distribution agreement which contained a clause whereby the parties submitted to "the non-exclusive jurisdiction of the English Courts". The defendant argued that the appropriate forum for trial was Florida. Gloster J summarised the applicable principles derived from the authorities as follows:

> *"i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive ….*
>
> *ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule …..*
>
> *iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded.*

Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain …"

[28] So the effect of an exclusive jurisdiction clause is that once it is deemed to have been agreed, and is enforceable, a party to an agreement although made in Northern Ireland between parties based in, or operating, here with a subject matter and alleged breach in this jurisdiction, could find themselves nevertheless having to sue for redress somewhere else. Furthermore, unlike the position in forum non conveniens applications where there is no exclusive jurisdiction clause, when the onus rests upon the defendant seeking a stay to show that there is another jurisdiction with which the case is more closely connected, where there is such a binding clause the onus is on the plaintiff to show that a stay should not be ordered. That suggests to me that exclusive jurisdiction clauses are by their very nature, at least potentially onerous terms, where the party tendering the document containing it must give the other sufficient reasonable notice of the term if it is to be binding.

[29] Running through these authorities are phrases such as "*the parties have freely negotiated a contract providing for the non- exclusive jurisdiction"* (Gloster J) or *"of an agreement to refer disputes to a foreign court"* (The House of Lords in The Sennar). It is clear therefore those exclusive jurisdiction clauses, like any other contractual term, must be agreed and agreement requires notice of their existence. The plaintiff's point in essence is that there is an absence of real agreement in this instance because the defendants did not give them sufficient reasonable notice of the term to enable them to object to it and therefore they cannot be bound by it.

[30] Quinn Building Products Ltd v. P&S Civil Works Ltd [2013] NIQB 142 concerned a roadworks contract in the Republic of Ireland where the defendant was domiciled, with the plaintiff being based in Fermanagh. The defendant relied on the Brussels I Convention as founding jurisdiction in the Republic based on the defendant's domicile, and in addition an exclusive jurisdiction clause in the contract. Weatherup J considered these issues in the context of Council Regulation EC 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters: holding:

[16] In s 7 of the Regulation which relates to "Prorogation of jurisdiction", art 23 states:-

"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, the court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction should be either:

(a) In writing or evidenced in writing; or

(b) In a form which accords with practices which the parties have established between themselves".

[17] What must be established under art 23 is actual acceptance of jurisdiction. The burden of proof is placed on the party asserting the agreement for jurisdiction. The standard of proof is that the party demonstrates clearly and precisely that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. As appears from Bols Distilleries BV v Superior Yachts Services Ltd [2006] UKPC 45, [2007] 1 All ER (Comm 461 –

"The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice what amounts to 'a good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate 'clearly and precisely' that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the 'good arguable case' standard, the claimant must show that they have a much better argument than the Defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause confirmed jurisdiction on the court was the subject of consensus between the parties."

[my emphasis]

[18] Thus the Plaintiff must demonstrate clearly and precisely that the Defendant agreed to the jurisdiction clause providing that jurisdiction should rest in Northern Ireland. That agreement may arise from an express jurisdiction clause in the contract entered into by the parties or secondly from express incorporation of a jurisdiction clause or thirdly by a course of dealing between the parties that denotes incorporation of a jurisdiction clause.

[31] Whether one approaches the question from the statutory framework of the 1982 Act or the Regulation, or from the perspective of the common law in respect of incorporation of a contractual term, what is clear is that the party relying upon an exclusive jurisdiction clause must have taken steps to ensure that the other party had sufficient reasonable notice of the clause (to use the common law terminology), or that it was the subject of consensus or agreement between the parties (the legislation), in order for the term to become binding. In the present case the clause was set out in a Terms of Business document contained in a bundle referred to in the affidavits as the "2008 Renewal Document" or "Business Principal's (defendants' spelling) Document". The index to the bundle includes reference to the Terms of Business but not to any particular term therein. This bundle was handed over at the annual renewal meeting on 5 February 2008. Most of the documents in the bundle are typical of the type you would expect in an insurance transaction, including

schedules setting out levels of cover etc. Interestingly the plaintiff says that at the meetings they worked from a one or two page summary rather than the detailed bundle itself and the defendant has not denied that. Acceptance of the terms was to be confirmed by signing and returning the Terms of Business (which the plaintiff never did) or by placing instructions (which they did). I do not think that anything turns on the fact that the plaintiff did not sign and return the Terms of Business as they subsequently instructed the defendants with respect to arranging cover.

[32] It was not until a third affidavit filed by Mr Graham, very shortly before the hearing, that for the first time he said "I handed over this document at the start of the meeting and informed Mr Hamill that within what I was providing included the Terms of Business. I recommended that the Terms of Business should be read by the Plaintiff. …." This is not supported by the minutes of the meeting prepared by the defendants. Also, as he uses the words "meeting" and "meetings" I am not entirely sure that he was referring to an actual recollection of what he said on 5 February 2008 or more generally what it was his practice to say at all such meetings. Mr Graham also averred to handing over the same bundle at each annual review before and since, which is agreed, and defendants' counsel at hearing told me that the plaintiff had continued to do business on the same terms. However, and without suggesting any criticism of counsel, as I have previously noted, that is not strictly correct because whereas the crucial clause in 2008 contained the words: "and subject to the exclusive jurisdiction of the courts in England and Wales", in 2012 for example those words are omitted.

[33] I am conscious of the need for caution when evaluating evidence by affidavit in the course of interlocutory hearings or in reaching conclusions based on such evidence. Generally where there is an exclusive jurisdiction clause in place the authorities indicate that the onus rests with the plaintiff to show why a stay ought not to be granted. However, in this case we have not reached that stage. The words used by Weatherup J at [17] in Quinn were "The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice what amounts to 'a good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction." He continued at [18] "So, applying the 'good arguable case' standard, the claimant must show that they have a much better argument than the Defendants that, on the material available at present, …… it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties". Such consensus cannot, in my opinion, exist unless the defendants can demonstrate that that they took steps to ensure that the plaintiffs had sufficient reasonable notice of the clause. Having reviewed the material placed before the court I am not persuaded that the plaintiff had such notice and therefore had not agreed to be bound by the terms of the exclusive jurisdiction clause. That being so, and the defendants not having sought a stay on any other grounds such as forum no conveniens, there is no basis demonstrated upon which to grant the defendants the stay sought.

[34] For the reasons summarised at [12] above I refuse to set aside the ex parte order dated 18 December 2015 extending validity of the Writ of Summons in the Lockton Companies LLP case, and dismiss the defendants' summons with costs to the plaintiff. For the reasons summarised at [32] above I refuse to stay either of the two actions on grounds of an exclusive jurisdiction clause purporting to reserve jurisdiction to the courts in England and Wales, striking out the summonses with costs to the plaintiff. I certify for counsel.