Neutral Citation Number: [2023] EWHC 2700 (Comm)

Case No: LM-2022-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 1 November 2023

Before :
David Elvin KC
(sitting as a Deputy Judge of the High Court)

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Between :

ECHOSENSE JERSEY LIMITED	**Claimant/ Respondent**
- and -	
(1) MR ERIC LAWRENCE SCHLEELEIN **(2) MR CHRIS JOHN GARLINGTON** **(3) MR MASAO KONOMI** **(4) MR JOHN JOSEPH SHALAM** **(5) MR LEVY GERZBERG**	**Defendants/ Applicants**
(6) DR YORAM PALTI **(7) MR ALON PALTI** **(8) MR GERT LENNART PERLHAGEN** **(9) MR RICHARD CAL PERLHAGEN**	**Defendants**

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Marcos Dracos KC (instructed by **Cooke, Young & Keidan LLP**) for the **Applicants/Defendants**
Simon Colton KC (instructed by **W Legal Limited**) for the **Respondent/Claimant**

Hearing dates: 15 June 2023

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Approved Judgment

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 01 November 2023 at 14:00.

DAVID ELVIN KC (Sitting as a Deputy Judge of the High Court):

1. In these proceedings, the Respondent Claimant, Echosense Jersey Limited ("**Echosense**") seeks 4 declarations in connection with certain investment agreements concluded between the Applicant Defendants as investors ("**the Applicants**") and Echosense. There are 5 agreements entered into by Echosense with one or more of the Applicants between 2016 and 2021 ("**the Investment Agreements**") and which are particularised at paras. 11-16 of the Particulars of Claim ("**PoC**"). For present purposes, nothing turns on the precise terms of those agreements other than the jurisdiction clause.

2. Each of the Investment Agreements contains a governing law and jurisdiction clause, providing for the application of English law and for the jurisdiction of the English court, to which jurisdiction each party irrevocably submitted ("**the Jurisdiction Clause**"):

> "(a) This Loan Agreement shall be governed by and construed and enforced in accordance with the laws of the [sic] England and Wales, without regard to principles of conflict of laws.
>
> (b) The jurisdiction and venue in any action brought by any party hereto pursuant to this Loan Agreement shall properly lie in any applicable court located in the [sic] London, England. By execution and delivery of this Loan Agreement, each party hereto irrevocably submits to the jurisdiction of such courts for himself or itself and in respect of his or its property with respect to such action. The parties irrevocably agree that venue would be proper in such court, and hereby waive any objection that such court is an improper or inconvenient forum for the resolution of such action. The parties further agree that the mailing by certified or registered mail, return receipt requested, of any process required by any such court shall constitute valid and lawful service of process against them, without necessity for service by any other means provided by statute or rule of court.
>
> (c) WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY, UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS LOAN AGREEMENT, ANY OF THE OTHER AGREEMENTS OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF THE INVESTORS."

3. The context in which these declarations sought is the failure of investments in medical products and R & D and proceedings brought by the Applicants in Israel against Defendants 6-9. The vehicle for the investment was Echosense.

4. Echosense is registered in Jersey with corporate service directors, but no employees and

its controlling shareholders are Defendants 6 – 9. Its purpose appears to be to hold investments and intellectual property rights ("**the Intellectual Property**") in medical products through research, development, and commercialisation of medical products ("**the Business**") are conducted through an Israeli subsidiary, Echosense Limited ("**Echosense Israel**"). Echosense Israel is incorporated in and operates from Israel.

5. The Applicants are resident in the USA and Japan and, it is said, invested in the Business under the Investment Agreements with Echosense following discussions with Defendants 6 and 7, and principally relying on D 6, who is well-known in the field of medical research and development ("R&D") and was known personally to D 5. Defendants 1, 3 and 5 invested after meeting D 6 in Israel. Defendants 2 and 4 invested after introductions by Defendants 1 and 5. The Applicants have no material connections with this jurisdiction and nor do the events which led to the Investment Agreements.

6. The Business was not a success and despite proposals to restructure, which came to nothing, there was a resolution in August 2021 to wind up Echosense. This has not yet occurred and while Echosense may not be insolvent, it does not appear to be worth anything. The Applicants allege that they invested in the Business in reliance on the Defendants 6-9's reputation and, when the business failed to progress, consider that they had deliberately misstated aspects of the business including the stage of development of certain medical products.

7. Pre-action correspondence in Israel was issued against Defendants 6-9 and not against Echosense nor was it suggested that any claim would be brought against Echosense. The letter before action dated 28.4.22 sent by Goldfarb Seligman in Israel ("**the GS letter**") was addressed to Defendants 6-9 only, began (after setting out certain formal matters):

> "As set forth in the non-exhaustive list below, by purposely distorting information and misrepresenting facts in order to induce investment by the Investors in the Company to fund the operations of its wholly owned Israeli subsidiary Echosense Ltd. ("ESL"), Yoram Palti, MD, Ph.D. as Co-Founder, Chairman and CEO of the Company, Lennart Perlhagen as Co-Founder and Chairman of the Company, Richard Perlhagen as Director of the Company and Alon Palti as Director and CFO of the Company, have personally breached their fiduciary duties to the Investors and have personally deceived them. To this day, the Investors have not received any explanation as to how the Company consumed USD 10M in five years with nothing to show for its efforts, despite having a product that Yoram Palti described to the Investors prior to their investment in the Company as a technological breakthrough already in promising clinical trials in the U.S."

8. It ended:

> "In view of the multiple misrepresentations and acts of civil fraud perpetrated by the Paltis and the Perlhagens, the Investors hold them personally liable for

> their losses and demand receipt of the following within 14 days of your receipt of this letter by e-mail: (a) full refund of their investments in the Company plus that amount multiplied by the increase in the S&P 500 from the date of each tranche of their investments in the Company until actual payment and (b) payment of their legal fees."

9. Although Mr Michael Olley in his witness statement on behalf of Echosense points out that at various points in the GS letter Defendants 6-9 are described as being officers of Echosense (as can be seen from the passages I have quoted) rather than suggesting individual liability, it seems reasonably clear that the liability that is being claimed is personal liability, not liability acting in their capacity as representatives of Echosense.

10. That conclusion is fortified by the proceedings subsequently issued in the District Court in Tel-Aviv on 23 April 2023 and notified to Echosense by letter dated 15 May 2023 which seek remedies against Defendants 6 and 7 only (the Paltis). Mr Colton KC, for Echosense, objects to Mr Dracos' late submissions (not reflected in any amendment to the notice of application) regarding to conflict with the Israeli proceedings which postdate the proceedings in this Court and points to the omission of Defendants 8 and 9 and the issue of whether these have been drafted to avoid jurisdiction since those Defendants are resident in England. However, for reasons given below, I do not consider it necessary to consider this as part of the submissions relating to paras. 26(1) and (3) of the PoC.

11. The scope of the remedies can be seen from Section B in the filed Complaint ("The Defendants' Personal Liability"), which includes allegations of tortious misstatements involving negligence and fraud, and the prayers for relief in Sections A and B which state:

> "6. The Court is asked to order the Defendants, jointly and severally, to compensate the Plaintiffs by paying each of the Plaintiffs a sum equal to the amount that same Plaintiff invested in the Echosense Business, plus interest, as well as to impose on the Defendants the Plaintiffs' reasonable costs for the filing of this lawsuit, plus VAT, plus interest and linkage differentials."

> "137. Due to the Defendants' negligent misstatements and fraudulent actions against the Plaintiffs over the course of the years, starting in 2015 and until the date of the resolution to liquidate Echosense Israel and shut down the Echosense Business, and the resulting eradication in full of the value of their investments in the Echosense Business, all as set forth in this complaint, the Court is asked to order the Defendants, jointly and severally, to compensate the Plaintiffs by paying each of the Plaintiffs an amount equal to the amount that same Plaintiff invested in the Echosense Business plus statutory interest accrued from the date of investment until April 18, 2023"

12. However, Mr Olley also contends at para. 12 of his witness statement that the target is clearly the investment in Echosense, though the GS letter is said to have "chosen

deliberately to exclude Echosense" (which would be the case, of course, if liability was only alleged against Defendants 6-9 personally) so as to circumvent the jurisdiction clause. That paragraph concludes with the following:

> "(7) Echosense was concerned that if it did not take steps to commence proceedings for a negative declaration in England, the Investors could begin proceedings elsewhere in the world, which could lead to Echosense having to litigate in some foreign jurisdiction. Even if the claim were notionally brought only against the Echosense representatives, Echosense itself would be directly or indirectly affected by such proceedings – if Echosense were brought in as a third party; reputationally; and/or if some disclosure order were sought against it in support of such proceedings, for example. Echosense is also in the process of winding down its operations and desired certainty as to whether it has any liability to the Investors.
>
> (8) Accordingly, on 27 June 2022, the Directors of Echosense resolved to indemnify and hold harmless each of the Echosense representatives in connection with any matters related to and/or arising from their actions on behalf of Echosense: [pages 10 to 20]. As recited in the written resolution of Echosense of that date, Echosense considered there was no basis for the allegations arising under the GS Letter; that the Echosense representatives had acted for and on behalf of Echosense; and the Echosense directors considered it to be in the best interests of Echosense to indemnify and hold each of the Echosense representatives harmless in connection with any matters related to and/or arising from their actions on behalf of Echosense."

The Application

13. The Applicants, Defendants 1-5, who were the investors in Echosense, challenge the Court's jurisdiction to determine the claim and apply to set aside service of process outside the jurisdiction or to strike out or stay the claim against them. As drafted, the Application raises two questions:

(1) Whether the claims made in these proceedings fall within the scope of the Jurisdiction Clause; and

(2) On the assumption that these proceedings fall within the scope of the Jurisdiction Clause, whether the Court should nonetheless stay or strike out these proceedings on a summary basis.

14. At the hearing Mr Dracos KC, for the Applicants, contended:

(1) service should be set aside because the claim was improperly served outside the jurisdiction without the Court's permission; and/or

(2) the claim should be struck out (or alternatively stayed) because there is no real and

present dispute between Echosense and the Applicants, and the claim is an abuse of the process of the Court.

15. Although Mr Colton complains of this change, it appears to me that the points taken relate directly to the two questions in the application set out above and this was made sufficiently clear in the first witness statement of Lydia Miriam Danon dated 22 September 2022 at paras. 46-55. Echosense also points to what is said to be a "dramatic change" in the Applicants' case and submits that not only do the Applicants concede that two of the four declarations sought fall within the ambit of the Jurisdiction Clause but that they also in effect accept that judgment should be given on those declarations on the basis that "*by their conduct and repeated statements they have affirmed the Investment Agreements (which are not therefore liable to be set aside for misrepresentation)*". Nonetheless, no application has been made by Echosense for summary judgment at least in respect of the matters covered by the Jurisdiction Clause.

16. The Applicant also express themselves "*ready to offer an undertaking to the Court to the effect that they will not seek a refund or damages (in the sense of a return of the money they have invested in the Claimant under the Investment Agreements) from the Claimant on the basis of the conduct set out in the Israeli LBA or the Israeli Claim*". A draft undertaking was submitted to the Court following the hearing, and has been the subject of written submissions, and I will return to this and its significance.

17. The Applicants submit that the aim of this claim is to frustrate tortious claims (including for deceit) made in proceedings commenced by the Applicants in Israel against Defendants 6-9 and which were issued on 23 April 2023.

18. The Applicants submit that there is no real and present dispute (as opposed to a theoretical one) between Echosense and the Applicants and point to the indemnity of 27 June 2022 as in substance an attempt to provide a link with C's contention that there is, pointing out that the indemnity is not worth anything given as Echosense itself points out it is winding down its operations and no evidence has been adduced to contradict the Applicants' contention that it does not have substantial assets out of which it could meet a claim under the indemnity. Mr Dracos submitted that the obvious approach would be for Echosense to await the outcome of the claim between the Applicants and Defendants 6-9.

19. Echosense in para. 26(1) and (3) of the PoC, having pleaded Echosense's liability to indemnify Defendants 6-9 at para. 25, though without reference to its agreement to indemnify, seeks declarations that Defendants 6-9:

(1) made no misrepresentation nor misstatement in connection with the Applicants' investment in Echosense; and

(2) have no liability, in damages or otherwise, to the Applicants.

20. Para. 26(2) and (4) of the PoC (described as "**the Echosense Jersey Claims**") pleads:

(1) The Investment Agreements remain valid and binding and are not liable to be avoided on grounds of misrepresentation; and

(2) Echosense has no liability to the Applicants either to refund the investments or in damages.

21. Mr Dracos submits:

(1) The claims in para 26(1) and (3) ("**the Third Party Claims**") do not represent a real and present dispute and in any event are not particularised properly, making it very difficult to plead to. It is also noted that the indemnity given has not been pleaded and this was only given after the GS letter was sent and 2 days before the PoC was filed on 29 June 2022. The Applicants were only notified of the indemnity agreement in Mr Olley's witness statement in October 2022;

(2) Defendants 6-9 have filed a Defence which admits almost all of the claim and demonstrating that they and Echosense are on the same side and these proceedings are contrived;

(3) The declarations are problematic since they are negative in form and the courts are generally resistant to such forms of declaration. See ***Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd*** [2012] 2 CLC 279 at [37-[38] and [51];

(4) In the case of the Echosense Jersey Claims, the Applicants have no intention to avoid the Investment Agreements or seek damages against Echosense. That has been known since 28 April 2022 when the GS letter was sent and an undertaking has now been offered to provide protection to the C;

(5) If there was any misunderstanding by Echosense concerning the Applicants' intentions, clarification could have been sought to the GS letter but all that was done was to send holding letters from Defendants 6 and 7's Israeli lawyers in May and June 2022;

(6) In any event, Ms Danon's witness statement made clear those intentions on 22 September 2022 including at para. 39 -

> "39. The Applicants have no interest in pursuing the Claimant, a company in which they have invested their money and which they understand is in financial difficulties, in respect of these claims. The Applicants personally relied upon the Palti Parties and believe that those Palti Parties have caused them loss and damages. The Applicants' claims are against those Palti Parties individually, and not

> against the Claimant. They are concerned with statements made by or conduct of those individuals, which the Applicants allege induced them to enter into the Investment Agreements and caused them losses thereby.";

(7) The Third Party Claims interfere with the Israeli claim which are the substance of the dispute rather than the relief sought in the Third Party Claims.

22. Mr Dracos not only relies on the evidence filed on behalf of the Applicants to show a lack of intention to sue Echosense but offers an undertaking not to pursue Echosense (see below) which is focused on the Echosense Jersey Claims.

23. Mr Colton for Echosense submits:

(1) It is not contended that the Echosense Jersey Claims fall outside the Jurisdiction Clause;

(2) It is accepted that if the Third Party Claims are for the benefit of third parties, then they do fall outside the Jurisdiction Clause;

(3) However, the Third Party Claims are not third party claims at all but claims sought for Echosense's own benefit in respect of its own potential liability;

(4) It is accepted that if a fraud was committed then those making the representations will be personally liable as company directors in addition to any corporate liability;

(5) On any view, the claim should not be struck out even if I find that there was not good service out in respect of the Third Party Claims.

24. He submitted that the GS letter made it clear if read as a whole that the claim was a corporate issue and submitted that it was sufficiently clear that Echosense has genuine concerns about its own liability. For example, in the GS letter the corporate nature of the issues, and the fact that the Defendants were acting on behalf of Echosense, was clear from paras. 17-22 (original emphasis):

> "17. When advisors and shareholders made it clear in early 2020 to the Paltis that to attract additional investment and strategic partners the Company needed to be domiciled in Israel instead of Jersey, Yoram and Alon Palti promised shareholders to redomicile the Company to Israel and subsequently had them sign a consent and acknowledgement to the Israel Tax Authority. Yoram Palti's April 26, 2021 email states: "We have incorporated a new Israeli company, named EchoLogic Medical LTD, that will replace EchoSense, all holding in EchoLogic Medical LTD. will remain the same as in EchoSense."
>
> 18. As part of this relocation process, Yoram Palti announced the hiring of a new CEO, Gilad Hizkiyahu, who presented a new plan to bring the invention to market. The plan stated that new clinical trials were required in order to obtain FDA approval, an additional investment of USD 10 million would be required for this, and the process would take over five years.

19. Hizkiyahu's plan contradicts Yoram Palti's repeated representations to the Investors over the course of five years commencing in 2016 and even as late as March 2020 regarding the maturity of the Company's product, its success in clinical trials and expected FDA approval. In July 2021 the Paltis inexplicably ceased the relocation process and on August 3, 2021 set in motion the process to shut down the Company, including an unlawful attempt to amend the 2020 Convertible Loan Agreement to force an immediate, premature conversion of the Company's outstanding debt under this agreement to capital.

20. The Company's technology and product had been presented by Yoram Palti to the Investors, before and after they invested in the Company, as a state-of-the-art technological breakthrough that as of 2018 was expected to receive FDA approval. Despite this, as late as the summer of 2021, when the Company was supposed to be moving forward with the relocation to Israel, Yoram Palti refused to support business development liaison Masao Konomi who solicited doctors and ultrasound manufacturers in Japan that expressed serious interest in partnering with the Company based on the aforesaid representations. Following Mr. Konomi's request in July 2021 for more information on the COPD clinical trials, Yoram Palti, in an attempt to justify the shutdown of the Company after the fact, responded in August 2021 that the COPD "clinical trials" were actually only "**pilot trials**" and that the results would be difficult to verify because the trials were performed years ago by a doctor that had since moved on.

21. Presenting trials that are no more than a "pilot trials" to the Investors as successfully concluded "clinical trials" that would lead to FDA approval is at a minimum negligent misrepresentation and actually appears to constitute **civil fraud** and **fraudulent inducement** on the part of the Paltis and Perlhagen.

Misrepresentation regarding ownership of patents

22. The Investors' initial investment was based on Section 3.6 of the Series A SPA and its IP Disclosure Schedule 3.6 which represented the listed patents as Company assets. However, despite those warranties and representations and despite Yoram Palti's personal written undertakings in the matter, by Palti's own admission some of these patents have not been assigned to the Company to this day. An email dated June 28, 2021 sent by Alon Palti states that "[Echosense] Jersey is the owner on a contractual basis" and a letter from Yoram Palti sent by Alon Palti on July 6, 2021 confirms that he is still the registered holder of the patents. These admissions confirm that the Company did not have title to the patents when it took monies from the Investors and as of mid- 2021 it had not acquired title to the patents in question. Alon Palti also stated in his email that the Company lacked funDefendants to maintain the patents past the end of 2021. The current ownership status of the patents is unknown, despite subsequent requests for updates regarding their status. The Investors can only assume that Yoram Palti intenDefendants to retain control of the patents and use them after the Company is wound up."

25. Attention was also drawn to Echosense branded documentations e.g., the Echosense Executive Summary concerning the "Transthoracic Parametric Doppler" at p. 50 of the

Hearing Bundle, which includes the company's corporate history at pp. 60-61, referred to at para. 4 of the GS letter. Reference is also made to paras. 11-13 (relating to Echosense's investor deck), and unequivocal company representations and warranties found at Article III of the purchase agreement for Series A Preferred Shares 10 March 2016.

26. A number of other passages in the GS letter are relied upon in the submission that, read as a whole, the GS letter is consistent with allegations of corporate liability e.g., paras. 25 ("*the Company was required to disclose*"), and the company's failure to make adequate financial disclosure at paras. 27, 28 and 31. The Applicants also suggest corporate liability to the extent that they deem Defendants 6-9:

> "personally liable for the Company's failure to meet the requirements of the CJL in this matter and for depriving them of their right to monitor the Company's performance and financial condition."

27. Mr Colton submits that this supports the PoC at paras. 22 and 23 that there was an intention to hold Echosense liable for the actions of Defendants 6-9 as its representatives.

28. When approaching the authorities, Mr Colton submitted caution was required where the cases dealt with the Court's discretion with regard to service out rather than striking out. He also emphasised that the Court should be satisfied that there was no realistic prospect of success in seeking the declarations. He relied on *Dicey, Morris & Collins* at §12-106:

> "*Choice of English jurisdiction*. The approach of the court to jurisdiction agreements does not in principle draw significant distinctions according to whether they relate to the English court or to a foreign court. In each case a strong case will be required to justify the grant of relief which has the effect of allowing a party to a contract to resile from its terms. In practice, however, a contractual submission to the jurisdiction of the English court will almost invariably be upheld and enforced. If the English court is the chosen forum, the jurisdiction clause will be effective to confer jurisdiction on the English court, and it is 'most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction clause.' That is no doubt why several decisions require 'overwhelming' reasons for a stay of English proceedings where there is a jurisdiction clause (even a non-exclusive jurisdiction clause) conferring jurisdiction on the English court. In particular, where (as is frequently the case) the English court is chosen as a neutral forum, it is most unlikely that the English court will override the choice. Nevertheless, where the parties have conferred jurisdiction (even exclusive jurisdiction) on the English court, the court may exercise its case management powers to stay English proceedings pending the outcome of related foreign proceedings."

29. He also submitted that:

(1) There is a degree of circumspection in the way the Applicants expressed their intentions with regard to making a claim against Echosense since all that has been expressed is a present intention not to issue proceedings against Echosense. For example, Ms Danon stated at para. 12 of her first statement (emphasis added): -

> "12. Considering the financial situation of the Claimant, the Applicants *do not (at present) have any commercial interest in pursuing any proceedings* against it. Similarly, it is unclear what commercial interest the Claimant could have in pursuing these proceedings, given the above circumstances. However, as is clear below, the Applicants understand that the Palti Parties have significant funds in which to pay damages."

(2) It remains open to the Applicants to pursue Echosense especially since Echosense is solvent despite, it is submitted, statements of subjective intention in, e.g., Ms Danon's second statement at para. 6 -

> "6. Paragraph 7 of Olley-1 disputes the Applicants' position that Echosense is a mere holding company, and claims that while the Israeli Subsidiary "is the research and development centre of the Business, the intention was that the Business itself would be conducted by Echosense". I do not understand that contention in the context of a medical device business whose entire purpose is to develop new technology through research and development, especially in circumstances where Echosense appears to have no staff (according to its latest unaudited accounts) [LMD-2/11] and what appear to be only corporate service provider directors. It is also inconsistent with the fact that, until the decision was taken to wind up Echosense and the Subsidiary, plans were in place to transfer all of the Business to EchoLogic Limited [LMD-1/1]. As noted in my first witness statement, the Applicants understand that Echosense is practically insolvent; this is essentially what they were told by both Alon Palti and Echosense's Israeli lawyers at the Extraordinary General Meeting of Echosense held on 16 August 2021, and I exhibit the letter sent by CYK to W Legal on 30 September 2022 setting out the reasons why the Applicants hold these concerns, and why they are seeking security for their costs of the Application [LMD-2/18-22]. In short, its financial statements show it has been consistently loss-making, and statements made by Stuart McInnes (of CS Directors Limited), Dr Palti, Alon Palti, and its Israeli lawyers have consistently emphasised its inability to continue to fund the business from mid-2021. Through its solicitors, Echosense has not provided any information or evidence as to its financial position in response to those concerns. This lends credence to the Applicants' position that it is futile to bring a claim against Echosense. Such concerns are only exacerbated by the terms of the indemnity exhibited at [MSO-1/24-30], which has clearly been carefully drafted in a manner which seeks to overcome these clearly very real concerns as to Echosense's solvency."

The scope of the jurisdiction clause

30. In ***BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA*** [2019] 2 Lloyd's Rep,

which concerned two competing jurisdiction clauses in different contracts, Hamblen LJ (as he then was) held:

> "56. The interpretation of the scope of a jurisdiction clause falls to be considered at the time that jurisdiction agreement is made, at which time there will be no "dispute" unless, which is not this case, it is an ad hoc agreement relating to existing disputes.
>
> 57. Save in relation to such ad hoc agreements, the interpretation of the scope of a jurisdiction clause is therefore necessarily forward looking and looks towards the general nature of dispute or disputes that would fall within the clause.
>
> 58. As Rix LJ stated in *Ryanair Ltd v Esso Italiana* Srl [2013] EWCA Civ 1450, at [34], the scope of a jurisdiction clause "has to be capable of being answered at the date of the contract" and the clause is not to be interpreted "on the basis of post-contract events".
>
> 59. Where proceedings are commenced in this country in reliance on an English jurisdiction clause and a jurisdictional challenge is raised, the issue of whether the clause may be so relied upon is to be answered by reference to the claim in relation to which those proceedings have been issued.
>
> 60. As Thomas LJ stated in *Sebastian Holdings*[1] at [62]:
>
> > "…the question as to whether a claim falls within the jurisdiction clause is an issue that has to be determined at the time the proceedings are issued"
>
> 61. The answer to this question cannot change by reason of subsequent events, such as a defence raised or a subsequent set of proceedings, like the Italian Claim. As Rix LJ observed in *Ryanair*, the issue of interpretation must not be confused with "the adventitious circumstances of a defendant's reaction to a particular claim" (at [34])...
>
> …
> 68. In the light of the guidance provided by these authorities, so far as relevant to the present case I would summarise the approach to be as follows:
> …
> > (2) A broad, purposive and commercially-minded approach is to be followed - *Trust Risk Group* at [48]; *Sebastian Holdings* at [39] and [50].

31. Mr Dracos submits that:

(1) The Third Party Claims fall outside the scope of the Jurisdiction Clause, construed as a whole and in a flexible manner, which are connected third party claims at best, but permission was not sought or obtained for service out.

(2) There is no proper basis for construing the clause as being intended to cover third party claims and in any event the Third Party Claims are claims in tort and not "pursuant to

[1] ***Sebastian Holdings Inc v Deutsche Bank*** [2011] 1 Lloyd's Rep 106.

this Loan Agreement", being founded on circumstances that preceded the entry into the Investment Agreements and not upon them;

(3) The Courts have generally rejected giving jurisdiction clauses a wide scope to include third party claims e.g. ***Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd*** [2012] 2 CLC 263 at [23]-[29] and ***Citgroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd*** [2012] 2 CLC 279 at [55]. In particular, in this case the Third Party claims purport not to establish Echosense's position, as between the contracting parties, but seek to establish claims outside the agreements in tort. In contrast to the present, in ***Citigroup*** the claimant sought declarations for the benefit of its affiliates which arose from its own contractual rights (see the judgment at [53]-[55])

(4) Moreover, the only rights of Echosense which may be affected are those under the indemnity agreement which was entered into a number of years after the Investment Agreements were signed, which of itself supports the view that the jurisdiction clause is not intended to be construed to include it and which in any event means that any claim would be pursuant to the indemnity agreement and not the Investment Agreements.

32. Mr Colton resists the application regarding service out and submits that the Third Party Claims do fall within the Jurisdiction Clause given a broad, commercial approach to construction. He accepts that it should be construed as at the time (or times) it was entered into. He relies on ***Trattamento*** and ***Fiona Trust v Privalov*** [2008] 1 Lloyd's Rep 254 where Lord Hoffman held at [13]:

> "13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

See also Lord Hope at [26]-[28].

33. However, ***Fiona Trust*** concerned a claim as to the validity of the contract (a claim for rescission for bribery) not as to liability by individuals for separate tortious acts which induced the contract but where there is no challenge to the validity of the contract.

34. In my judgment, the Jurisdiction Clause read in a broad, purposive and commercial manner, did not include as a matter of language or intention claims against third parties which were claims in tort, including fraud, claims that arise from circumstances leading

up to the agreements and not themselves arising out of the agreements to which that clause related. I do not consider that in agreeing to the clause even in respect of matters arising "in connection with" the Investment Agreements was intended by the parties to deal with claims of tortious, possibly fraudulent conduct, which induced the Applicants to enter into the agreements in the first place, but a range of possible commercial disputes arising out of the agreements on the basis that they had been validly entered into. Jurisdiction clauses, as the Court of Appeal held in ***Trattamento***, are essentially forward-looking and this precludes, without the use of clear language, conduct prior to the creation of the agreement. The starting point in ***Fiona Trust*** does not, in my judgment, apply where, as here, the issue is not the validity of the contract but the personal liabilities of those who induced the Investment Agreements. It is a matter for the Applicant whether they elect to rescind for misrepresentation or to sue in tort and leave the Investment Agreements in place. It does not appear to me to be a ground of criticism that they have taken a view based on the unlikely utility of suing the investment vehicle itself.

35. Whether those claims trigger the indemnity given *ex post facto* by Echosense in June 2022 and thus create some theoretical liability by Echosense to Defendants 6-9 is not in my view relevant to ascertaining the scope of the clause: see ***Trattamento*** at [58]. The indemnities were not given at the same time as the Investment Agreements were entered into but only after litigation was threatened by the GS letter in April 2022 which supports the view that it was not in contemplation at the time the Jurisdiction Clause was drafted and included in the agreements.

Service out of the jurisdiction

36. The Claim Form and PoC were served out of the jurisdiction on the Applicants in reliance on the Jurisdiction Clause pursuant to CPR Part 6.33(2B)(b):

> "(2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form—
> …
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim…"

37. It is contended by the Applicants that service out here was impermissible since the Third Party Claims did not fall within the Jurisdiction Clause (see above) and that the Echosense Jersey Claims should be struck out as an abuse of process. I will deal with the abuse claim separately.

38. In my judgment, since the scope of the Jurisdiction Clause did not extend to the Third Party Claims for the reasons given earlier, I do not consider there to be a good arguable

case that the Third Party Claims fall within the scope of r. 6.33(2B)(b) and it follows that I accept the Applicants' submissions that the claim was impermissibly served out of the jurisdiction with regard to the Third Party Claims only and I set aside service insofar as it relates to the claims set out in para. 26(1) and (3) of the PoC and referred in the para (1) of the Prayer for Relief and strike them out.

39. Mr Colton submits that there is no justification for striking out the whole claim since r 6.33(2B) refers to "each claim made against the defendant". See also ***The Volvox Hollandia*** [1988] 2 Lloyd's Rep 361 at pp 371-2 referring to claims which was bad in part, though this related to former RSC Order 11 where leave was required. He submitted that there was no basis in policy, or in the language or purpose of r. 6.33 (which was to provide certainty and eliminate costs and delay) to strike out a whole claim where there had been service out, but part was bad. He also draws attention to the requirement to demonstrate a good arguable case that the court has jurisdiction: ***Brownlie v Four Seasons Holding Inc*** [2018] 2 WLR 192 at [4]-[7], [33], [56] and [68].

40. Following the hearing, my attention was drawn by email dated 22.8.23 to the judgment of Master Stevens given on 28.7.23 in ***Pantheon International Advisors Limited v Co-Diagnostics, Inc*** [2023] EWHC 1984 at [15]-[21] and [59]-[60]. That was a claim where part of the proceedings involved a contractual claim said to be validly served out of the jurisdiction (and determined to have been) and an unjust enrichment claim where it appeared the claim was not validly served but the Court was asked, if permission to serve out should have been obtained, to grant permission or to dispense with service retrospectively. See the judgment at [15]. The claim for unjust enrichment was conceded at the hearing and at [104] the Master concluded:

> "iii) The claim for restitution in respect of quantum meruit claims should not have been served without the court's permission, as the civil procedure rules were drafted at the material time, but it was conceded in any event during the course of the hearing.
>
> iv) The fact that one claim in contract was validly served out of jurisdiction without the court's permission, but the claim in quantum meruit required permission that was not obtained, did not invalidate service of the accompanying contractual claim, although this ceased to be a material point following the claimant's concession.
>
> v) That, in any event, (i) the good arguable case test that the gateway in PD 6B paragraph 3.1(6) applies and that test, (ii) the merits threshold and (iii) appropriate forum tests would all have been satisfied for the claim in contract if permission of the court had been sought.
>
> vi) That it is appropriate pursuant to my inherent discretion and CPR 3.10 to permit retrospective service out of jurisdiction of the claims made.
>
> vii) That there is no need to revisit methods of service under CPR 6.15 or to dispense with service under CPR 6.16 as the claim was brought to the defendant's attention in good time."

41. The facts there were clearly of considerable relevance to the decision as was the concession made regarding the quantum meruit claim. Echosense here has not made submissions that permission should be granted, retrospectively or otherwise, to serve out in respect of the Third Party Claims, no submissions have been presented to satisfy the requirements of R 6.37(1)-(3) nor, in particular, has it been contended that England and Wales is the forum conveniens to resolve the tortious disputes currently proceeding in Israel.

42. It has not been argued before me that I should nonetheless grant permission retrospectively, or otherwise validate the service of the Third Party Claims should I find them to fall outside r. 6.33(2B)(b). In any event, given the respective countries of residence of the parties and the facts such as they currently appear in the hearing bundle regarding the nature of the claims and how they arose, I doubt that the requirement of demonstrating that England and Wales is the proper place for bringing these proceedings is met.

43. I agree with Mr Colton that this does not justify setting aside service of, or striking out, the whole claim on the basis of the service out provisions. I will deal next with the abuse of process claim.

Striking out for abuse of process: no real and present dispute

44. In light of my conclusion as to the issue of service out, the issue remaining is much narrower since it relates largely to the declarations sought in paras. 26(2) and (4) of the PoC which do fall within the jurisdiction clause and in respect of which, in principle, the Court should allow the proceedings to take their course in this jurisdiction absent demonstration of an abuse of process.

45. The principles upon which declarations are made were summarised by Aitkens LJ in ***Rolls-Royce plc v Unite the Union*** [2010] 1 W.L.R. 318 at [120] and the specific issue of negative declarations was considered by Andrew Smith J in ***Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd*** [2012] 2 CLC 279 at [37]-[38] and [51]:

> "38. The power of the court to grant negative declarations in the exercise of the exorbitant jurisdiction has been beyond dispute at least since the decision of the Court of Appeal in *New Hampshire Insurance Co v Philips Electronics North America Corp* [1998] CLC 1062. The principles governing its exercise which Rix J identified in that case and which the Court of Appeal approved (at p. 1066) include these:
>
> > '1. There is power to grant a negative declaration in an appropriate case, the fundamental test being whether it would be useful.
> >
> > 2. However, careful scrutiny will be exercised not only to test the utility, or on the other hand the futility, of seeking to determine the claim by means of a

> negative declaration in England, but also to ensure that inappropriate forum shopping is not allowed, let alone encouraged.
>
> 3. A negative declaration will not be appropriate where it is premature or hypothetical, viz where no claim has been made or threatened against the plaintiff.
>
> 4. The existence of imminent or a fortiori current foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also so as to having (sic) in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings.'

I would also cite the statement of principle of Mustill LJ in *Insurance Corp of Ireland v Strombus International Insurance Co* [1985] 2 Ll Rep 138, 144, 'the Court should be careful not to bring a foreigner here, unless it can be shown that a solid practical benefit would ensue'. These principles are still observed – Cheshire, North & Fawcett, *Private International Law* (14th edn, 2008), states (at p. 408):

> 'Careful scrutiny must be exercised not only to test utility but also to ensure that inappropriate forum shopping is not allowed. If the possibility exists that the claimant in the English proceedings will be sued by the defendant in an alternative forum abroad, the English court must be particularly careful to ensure that the negative declaration is sought for a valid and valuable purpose and not in an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved.'

…

51. Mr Picken argued in support of the jurisdictional challenge of the corporate defendants that CGML have no 'standing' to seek relief by way of the affiliate declarations because they do not satisfy the necessary requirements for declaratory relief. He cited the judgment of Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387 at para. 120 (as well as *Gouriet v Union of Post Office Workers* [1978] AC 435 esp. at p. 501 per Lord Diplock, *Ainsbury v Millington* [1987] 1 WLR 379 at p. 381, and *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 at esp. pp. 21–23) in support of his submission that these principles (among others) govern the exercise of the court's jurisdiction to grant declaratory relief:

> (i) there should be a real and present dispute between the parties as to the existence of a legal right;
>
> (ii) each of the parties would be affected by the determination of the issue;
>
> (iii) the court can be satisfied that all sides of the argument have been fully and properly presented by ensuring that all those affected either appear or will have their arguments presented by someone else; and
>
> (iv) a claim for declaratory relief is the most effective way of resolving the issues raised.

I accept these statements of principles (although Aikens LJ qualified his statement in the *Rolls-Royce* case as being a summary for the purposes of the very different case before the Court of Appeal)."

46. While the Echosense Jersey Claims in para 26(2) and (4) may appear not to be in issue since the Applicants have repeatedly stated their intention is only to pursue Defendants

6 to 9 personally, I do note that at no point have the Applicants offered to submit to judgment on those elements of the claim while nonetheless protesting that they do not dispute them in substance. There is no basis for suggesting that England is not the forum conveniens for the Echosense Jersey Claims and there is no basis for interfering due to the Israel proceedings since, apart from the fact that they postdate the claim in this case, they concern claims within the Jurisdiction Clause rather than proceedings begun to establish the personal liability of certain Defendants, as the Applicants have been at pains to point out in other respects.

47. I do not consider the pleading criticisms to be insuperable and could easily be met, if required, by a request for further information (which has not been made since proceedings were issued) though it seems clear what the issue is i.e. whether Echosense retains some form of residual liability to which the Applicants might have recourse if they fail against Defendants 6-9 in their personal capacity.

48. In my view the claims for declarations in the Echosense Jersey Claims have an air of artificiality about them since they are not disputed and it will be very difficult for the Applicants under English Law to elect to terminate at this stage or to rescind the Agreements having apparently (albeit in Israel and presumably under Israeli law) elected to affirm the contract but to seek damages for misrepresentation and having maintained for some time that they do not dispute the continued existence of the Investment Agreements or that the liability which they are pursuing is the personal liability of Defendants 6 to 9 and not that of Echosense.

49. Echosense's concern with regard to residual liability is tempered by the fact that even on its own case, it is winding down its operations and there appears to be no dispute that even if solvent, it is not likely to be worth suing, and that the company whilst not a mere shell, is not far from it with no employees and no apparent commercial activity.

50. In approaching the question of whether there is an abuse of process and/or no real dispute is I necessary to consider the principles set out by Peter Jackson LJ in ***Tinkler v Ferguson*** [2021] 4 WLR 27 at [26]-[35] where he concluded:

> "35. In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act."

51. Peter Jackson LJ referred in his summary of the law to ***Jameel (Yousef) v Dow Jones & Co Inc*** [2005] QB 946, a defamation case which is far removed in terms of its facts and context, but where the Court of Appeal rejected as abusive a claim that lacked substance, would not promote protection of the claimant and which was not founded on a real and substantial allegation.

52. In ***Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See*** [2022] 1 WLR 4570 the Court of Appeal considered the granting of negative declarations:

> "**Negative declarations**
>
> 60. The English courts have always been cautious about granting negative declarations (i e declarations that the claimant is not under any liability) because of concern about possible abuse and the need to ensure that such declarations serve a useful purpose. When they do serve such a purpose, however, there is no reason why they should not be granted. Thus the court has jurisdiction to grant a negative declaration, adopting as a matter of discretion a pragmatic approach to the question of utility, as explained by Lord Woolf MR (with whom Hale LJ and Lord Mustill agreed) in *Messier-Dowty Ltd v Sabena SA* [2000] 1 WLR 2040 … Lord Woolf said:
>
> > "41. Lord Wilberforce and Lord Denning MR differed in the circumstances of that case as to whether the declaration would serve a useful purpose. However, if it would, that it would then be appropriate to grant a declaration was agreed. The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice … So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the courts' discretion.
> >
> > "42. While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling 'defendant'. This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to there being granted when it is useful to do so."
> >
> > …
>
> 62. Reference was also made to the points collected by Cockerill J in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) at [78] , emphasising the importance of utility:
>
> > "(i) The touchstone is utility;
> >
> > "(ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

> "(iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Ltd* [2020] FSR 10, para 37. 'Justice' includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co Ltd v Abb Vie Biotechnology Ltd* [2018] Bus LR 228 ('Fujifilm') at para 60;
>
> "(iv) The court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318, para 120. In answering that question, the court should consider what other options are available to resolve the issue;
>
> "(v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus: (a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: Zamir & Woolf, [The Declaratory Judgment, 4th ed (2011)], para 4-036 and *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289, 344. (b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls-Royce* at para 120. (c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as 'the missing element which makes a case hypothetical': see Zamir & Woolf at para 4–59.
>
> "(vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir & Woolf note that the latter 'can take different forms and can be lacking to differing degrees.' However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile but may create confusion."

63. These principles demonstrate, to my mind, that the critical question in this appeal is whether the judge's conclusion that the Secretariat has adopted a position of neutrality is tenable. It was only because of that conclusion that he decided that the declarations sought by Athena Capital lacked any useful purpose. I turn, therefore, to that question.

53. In the light of that guidance, adopting a pragmatic approach and considering fairness to all parties, I am left in considerable doubt as to the utility of the negative declarations especially since they relate to matters apparently not in dispute and it is difficult to understand the genuine utility of them other than to meet a remote, theoretical possibility that Echosense, lacking in substantial finances and activity as it is, may be sued for substantial damages if the claims against Defendants 6 to 9 fail. Since Echosense's case turns on pointing out the possibility of such a risk in the language used in the GS letter, it appears to me that if the claims of tortious conduct fail against Defendants 6 to 9 not much of a threat will remain to Echosense since the Applicants have firmly nailed their colours to the mast of personal liability in tort with regard to their failed investments. It is apparent from the Israeli proceedings that these have not been brought against Echosense but Defendants 6 and 7 personally as threatened in the

letter before claim, though omitting any claims against Defendants 8 and 9.

54. There seems to me to be considerable force in the Applicants' submissions that the claim is hypothetical and not genuine and that it had little if any utility. I remain marginally concerned given the stance of the Applicants and their unwillingness to submit to judgment that there may be something left in the residual claim, notwithstanding the other matters I have referred to concerning the status of Echosense and given that in para 12 of Ms Danon's first statement she stated:

> "Applicants do not (at present) have any commercial interest in pursuing any proceedings against it. Similarly,"

55. However, that is not consistent with the position adopted generally or at the hearing and the Applicants have stated in para 52 of their skeleton argument:

> "52. Accordingly, there is, and there never was, any real and present dispute between the Claimant and the Applicants regarding the Echosense Jersey Claims. The Claimant is a failed commercial project. The dispute is between the persons who stepped forward and pitched the Business and the project persuading the Applicants to put their money into the Claimant. However, and to put the matter beyond doubt:
>
> (1) the Applicants confirm that they accept that by their conduct and repeated statements they have affirmed the Investment Agreements (which are not therefore liable to be set aside for misrepresentation); and
>
> (2) they are ready to offer an undertaking to the Court to the effect that they will not seek a refund or damages (in the sense of a return of the money they have invested in the Claimant under the Investment Agreements) from the Claimant on the basis of the conduct set out in the Israeli LBA or the Israeli Claim."

56. After the conclusion of the hearing, an amended undertaking was offered by the Applicants in these terms:

> "In addition to the statement made in paragraph 52(1) of the Applicants' skeleton argument dated 9 June 2023, the Applicants further undertake that they will not:
>
> (a) rescind or terminate the Investment Agreements; and/or
>
> (b) claim or seek a refund or damages from, or commence or pursue any legal proceedings against, the Claimant:
>
> (i) on the basis of the conduct set out in the Israeli LBA or the Israeli Claim; and/or
>
> (ii) arising out of or in connection with the inducement or making of the Applicants' investment in the Claimant.

57. Further written submissions were made by both parties.

58. Mr Colton submits that while the breadth of the amended undertaking is sufficient the mechanism of the undertaking is not satisfactory since an undertaking to the Court in

this jurisdiction would not provide the certainty that Echosense seeks.

(1) Unlike a declaration of the English court, an undertaking would not give rise to any issue estoppel or res judicata;

(2) Nor, even, would an undertaking give rise to any personal right or remedy for Echosense: ***Re Hudson*** [1966] Ch 209. All that is offered is an undertaking to the court; and

(3) A breach of the undertaking would not be readily enforceable by the English court, whether to deter or prevent such breach, in circumstances where none of the Applicants are present in the jurisdiction and it does not appear that the Applicants submit to the jurisdiction even for the purposes of giving the undertaking.

59. Mr Dracos responds that the amended undertakings should be read with the totality of the evidence that there is no real and present dispute on the Echosense Jersey Claims and as a further reinforcement of that evidence. Moreover:

(1) An undertaking is a serious commitment and breach of it amounts to contempt of court;

(2) No jurisdictional issues arise. The Undertaking and the Amended Undertaking are material to the strike out limb of the Applicants' application, which is on the assumption that this Court has determined it has jurisdiction under the Jurisdiction Clause for at least the Echosense Jersey Claims to which the Amended Undertaking directly relates;

(3) An undertaking is a very strong form of commitment towards the court, backed by quasi criminal sanctions. The only alternative advanced by Echosense has been the Applicants' submission to declaratory judgments. However

(a) Echosense's proposed terms go beyond the Echosense Jersey Claims, and in any event

(b) a claimant is not entitled to commence proceedings where there is no real and present dispute and demand the submission to judgment of its counterparty. Such a demand disregards the fundamental requirement of real and present dispute and is inconsistent with authorities which have struck out such claims.

60. In my judgment, the claims in respect of which the undertakings have been offered are those undoubtedly falling within the Jurisdiction Clause and so any claim subsequently brought against Echosense would be subject to English law and the jurisdiction of the English courts. It appears to me that as Mr Dracos submits the amended undertaking (which is of appropriate breadth as Echosense concedes) reinforces his submissions as to the absence of a real and present dispute in circumstances where if there were to be any dispute would fall within the jurisdiction of the English courts.

61. Whilst I therefore provisionally conclude I should stay or strike out the Echosense Jersey Claims, nonetheless, it remains far less satisfactory to stay or strike them out in

circumstances where it would be more proportionate to bring them to a final conclusion if that were possible. If they were stayed or struck out, this would of necessity leave the undertaking in force and might then require the future intervention of the Court. However, as Mr Dracos submits, the Echosense Jersey Claims are pleaded in terms that are potentially wider in scope than the dispute now being litigated in Israel.

62. Echosense has not to date suggested it should amend its prayer for relief in this respect though it might seem obvious that if this would enable the result Echosense prefers to be achieved it ought to be considered.

63. In those circumstances, and taking a pragmatic approach, having regard to the overriding objective and seeking to avoid the unnecessary continuation of proceedings, I therefore invite the parties to consider and seek to agree:

(1) an amendment to the relief sought in para. 26(2) and (4) of the PoC to relate it more closely to the allegations made and proceeding brought in Israel against Defendants 6 to 9; and

(2) a form of order which would dispose of these proceedings completely.

64. For the reasons I have given, I will set aside the service of the proceedings on Defendants 1 to 5 and strike out that aspect of the relief sought in PoC para. 26(1) and (3).

65. I will then determine how to resolve the remaining aspects of the claim relating to the Echosense Jersey Claims in the light of the response to my invitation to the parties - including staying or to striking out the remainder of the proceedings if agreement cannot be reached as to a final order. I will give the parties 14 days from the date of handing down of this judgment to agree an order or, if not, to draft an order which sets out the area of disagreement and which can be accompanied by short written submissions as to the areas of disagreement. This is not to be taken as an invitation to reopen the question of abuse of process and whether there is a real dispute. I will also receive written costs submissions within the same timescale.