

# Submission to English Jurisdiction Will Not Always Preclude an Application to Stay Proceedings on Grounds of Forum Non Conveniens

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## INTRODUCTION

In *Apollo Ventures Co Ltd v Manchanda* [2021] EWHC 3210 (Comm), the High Court considered an application to stay proceedings commenced in England on the basis that Thailand was the more appropriate forum for the dispute, in circumstances where Mr Manchanda (the “Defendant”) had already submitted to the jurisdiction of the English Courts.

Under the Civil Procedure Rules (“CPR”), the Defendant was out of time for bringing the application to stay proceedings, and so also sought a retrospective extension of time in which to do so.

## BACKGROUND

Apollo Ventures Co Ltd (the “Claimant”) was a Thai company in which the Defendant was a substantial shareholder. The Claimant alleged that the Defendant caused it to enter into two loans with a Thai businessman without the knowledge of the Claimant’s officers and by the use of forged documents. Accordingly, in May 2016, the Claimant commenced proceedings in England against the Defendant and seven others (the “Other Defendants”). The High Court granted the Claimant a worldwide freezing order and gave the Claimant permission to serve the proceedings on the Defendant out of the jurisdiction.

In June 2016, the Defendant challenged the English Court’s jurisdiction and applied to set aside the order giving permission to serve the proceedings on him in Thailand. That application was dismissed because, *inter alia*, the proceedings had already been served *as of right* on three Other Defendants in England. This had provided a strong reason for England being the appropriate forum, as allowing the claim against the Defendant to proceed in England would “*avoid separate trials in different jurisdictions*”. In April 2018,

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the Defendant served his defence, which amounted to a submission to the jurisdiction of England and Wales.

In October 2018, the Claimant also decided to commence proceedings in Thailand against the Defendant concerning the same loans.

In August 2020, the Claimant was ordered to provide security for the costs of the Other Defendants; the Defendant had not applied for such an order. The Claimant failed to provide such security, and so the Court struck out its claim against the Other Defendants in January 2021. On 6 May 2021, the Defendant issued his application for a stay of the proceedings against him on the grounds of *forum non conveniens*.

## JUDGMENT

### Retrospective Application for an Extension of Time

Under CPR 58.7(2), an application to stay proceedings in the Commercial Court must be made within 28 days after filing an Acknowledgement of Service. This time limit had expired in June 2016, and so the Defendant required an *ex post facto* extension of time in which to make his application for a stay. In deciding whether or not to grant the Defendant the requisite extension of time, Sir Nigel Teare (sitting as a High Court judge) had to apply the three-stage *Denton* test,<sup>1</sup> which requires an assessment of:

- the seriousness and significance of the breach of the CPR;
- why the breach occurred; and
- all the circumstances of the case.

First, the High Court considered that there had been a serious and significant delay on the Defendant's part in seeking the stay. However, the Court reasoned that the Defendant only had grounds (*forum non conveniens*) to seek a stay once the Court had struck out the Other Defendant's claims in January 2021—approximately four months before the Defendant had actually applied to stay. The Court stated that the Defendant would have only required six weeks to prepare his application to stay, and so there was a delay of about two months, which the Court nonetheless considered sufficiently serious and significant. Further, the Court found that there was no evidence to explain the delay and so no good reason for the delay.

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<sup>1</sup> In *Denton v TH White* [2014] 1 W.L.R. 3926, the Court of Appeal provided a three-stage approach to addressing applications for relief from sanctions (i.e. the Defendants' retrospective application for an extension of time to apply to stay proceedings).

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Nonetheless, the Court held that in all the circumstances of the case, an extension of time should be granted. Relevant factors in favour of granting the extension included the following:

- the infancy of the claim in England against the Defendant;
- the Claimant’s partial responsibility for its wasted costs in the English Courts; and
- the existence of foreign parallel proceedings in Thailand.

Notably, the Claimant had argued that long extensions of time had only been granted where there had been no submission to the jurisdiction. However, the Court held that whilst submission to the jurisdiction was a relevant factor, it was not a bar to a successful application.

Further, the Court considered that if exceptional circumstances were required to justify an extension where there has been a submission to the jurisdiction, then the dismissal of the proceedings against the Other Defendants—where the existence of such proceedings was a reason for keeping the claim in this jurisdiction—provided such circumstances.

#### **Application to Stay the Proceedings**

The Court also decided to grant the Defendant a stay finding that Thailand was “*clearly and distinctly the more appropriate forum*” on the basis that:

- the claims arose from transactions between a Thai company and a Thai businessman;
- the relevant transactions allegedly involved unlawful acts under Thai law;
- key witnesses are in Thailand;
- key events involve issues of Thai law; and
- there are proceedings against the Defendants in Thailand concerning the loans.

Notably, the Court also considered that a further reason for granting the stay was the fact that the claims against the Other Defendants had been struck out. Thus, with only the claim against the Defendant remaining in the jurisdiction, there was no longer a risk of foreign parallel proceedings.

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**GOING FORWARD**

A stay of proceedings may be granted even where the proceedings have been ongoing for many years if there is a change in circumstances justifying the late application.

A submission to the jurisdiction of England and Wales will not preclude an application to stay proceedings on grounds of *forum non conveniens*; however, exceptional circumstances may be required to sustain an argument that England is not the most appropriate forum for the resolution of a dispute once a party has submitted to the jurisdiction.

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Please do not hesitate to contact us with any questions.

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