



Neutral Citation Number: [2021] EWHC 1483 (Ch)

Case No: BL-2021-000628

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY DIVISION
BUSINESS LIST

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 02/06/2021

Before :
MR JUSTICE ADAM JOHNSON

Between :

**ADEEM INVESTMENT HOLDING COMPANY
KSCH**

Claimant

- and -

(1) NAJEEB AL-HUMAI DHI
(2) NAMA INVESTMENTS LIMITED
(3) PRIMEWAGON HOLDINGS LIMITED
(4) PRIMEWAGON (JERSEY) LIMITED
(5) JTC (JERSEY) LIMITED

Defendants

Paul Sinclair QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the
Claimant

Alan Gourgey QC (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **1st to
4th Defendants**

Hearing dates: 21 May 2021

Approved Judgment

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

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Mr Justice Adam Johnson :

1. On 15 April Bacon J. made an order for freezing and proprietary relief against the Defendants. The First to Fourth Defendants (for simplicity I will refer to them as “*the Defendants*”) have applied to set aside that order and I have given directions for the determination of their application at a later stage. In the meantime, the Defendants seek an order for fortification of the cross-undertaking in damages given by the Claimant at the time Bacon J.’s order was granted.
2. The background is a dispute about ownership of shares in the well-known and prestigious car company, Aston Martin Lagonda Global Holdings plc (“*AML*”). According to the Claimant, by about October 2018, the Fourth Defendant, Primewagon (Jersey) Limited owned 16.1% of the shares in AML, and a wholly-owned subsidiary of Primewagon (Jersey) Limited known as PWUK, held a further 3%. Via a chain of other companies, including the Third Defendant, Primewagon Holdings Limited, the holdings in AML were ultimately controlled by the First Defendant, Najeeb Al-Humaidhi.
3. The Claimant, Adeem Investment Holding Company KSCH, is a Kuwaiti investment management company, headquartered in Kuwait City. The Claimant’s case, in short, is that Najeeb Al-Humaidhi held the various shareholdings I have mentioned, and therefore (indirectly) the shares in AML, on trust for the Claimant. The Claimant says that in breach of trust the shareholdings in the Third and Fourth Defendants were transferred by Najeeb Al-Humaidhi to the Second Defendant, Nama Investments Limited, a Jersey company of which Najeeb Al-Humaidhi is the sole shareholder. The alleged trust arrangement is denied by the Defendants. (I should add for completeness that the Fifth Defendant, JTC (Jersey) Limited is a Jersey company which has provided corporate services to the Second to Fourth Defendants. It was not a party to the application before me, and so far at any rate, has played no active part in the present proceedings).
4. *Ex parte* relief was sought originally in the Royal Court of Jersey, and interim injunctions were made against the Defendants by the Royal Court on 15 April 2021. The application to Bacon J. followed the making of that Order by the Jersey Court. That gives rise to questions about the inter-relationship of the English and Jersey proceedings, and about the jurisdictional basis on which the English Court was invited to make its order, all of which are matters for the Court to consider on the hearing of the Defendants’ set-aside application. The Defendants’ present application for fortification is made expressly without prejudice to their arguments on jurisdiction. Other complaints are made, including as to non-disclosures, but such matters are not relevant for now.
5. As I have mentioned, in its original formulation Bacon J.’s order included both a freezing order and a proprietary injunction. The freezing order was limited to the Defendants’ assets within the jurisdiction up to the value of £18,035,372, a figure reflecting the maximum value of the disputed shares in AML in the 12 months prior to April 2021. The proprietary injunction restrained any sale or transfer of any shares in AML legally owned by any of the Defendants. I understand that some 785,855 shares are captured by that injunction (“*the AML shares*”), which had a value as at 20 April 2021 of approximately £14,895,881.

6. At the time of making her order, Bacon J. expressed concern about the lack of up-to-date financial information in relation to the Claimant (its last audited accounts are for nearly 18 months ago), and indicated that fortification might be required if more up-to-date information were not produced.
7. By agreement of the parties, the freezing order aspect of Bacon J's order has now been discharged. The proprietary injunction remains, and the Claimant's cross-undertaking of course remains operative in relation to that injunction. That provides the backdrop to the Defendants' application for fortification of the Claimant's cross-undertaking, which arises in the following way. The Defendants say that they are the true owners of the AML shares. While the present injunction remains in place, they are exposed to the risk of losses arising in relation to the AML shares because the injunction inhibits them from dealing in the shares as they would wish. The evidence shows that the share price is volatile. If the share price were to dip, and they were prevented from selling, or delayed in selling, because of the injunction, then they would suffer loss – the loss being the difference between the price they could have sold for absent the injunction, and the price in fact realised on sale in a falling market. They say the risk is a real one. Thus, they seek an order that the Claimant fortify its cross-undertaking by paying the sum of £4m into court within 14 days.
8. The Claimant's response in outline is as follows. It says there is no evidence suggesting the Defendants have any present or expected future intention to sell the AML shares. Further, it says that even if they did, there is no good reason to think that consent for a proposed sale, if requested, would be unreasonably withheld. It says that the issue of volatility of the share price is in any event overstated.
9. The Claimant has now produced draft accounts for 2020, although these are not audited. While accepting that it has no assets within the jurisdiction, it points to the fact that it does have substantial assets overall, including ownership of 100% of the shares in a Jersey company known as Adeem Automotive Manufacturing Company Ltd ("AAMC"), which is said to have net assets of over £70m. Looking at the matter overall, therefore, the Claimant says there is no real risk of loss, or of the Defendants not being compensated if they suffer loss.
10. As to the test to be applied in determining whether to order fortification, the Defendants referred me to the recent judgment of Moulder J in VTB Bank v. Firtash [2021] EWHC 1203 (Comm), where at [60] she quoted the test set out by the Court of Appeal in Energy Venture Partners v. Malabu Oil & Gas Ltd [2014] EWCA Civ 1 295 at [52]-[54]:

“52...it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the order, it should equally be protected...”

53. It is completely contrary to principle to require proof on the balance of probabilities on such an application and so to do would encourage wasteful satellite litigation. In my judgment Briggs J was correct in Jirehouse Capital v Beller [2008] EWHC 725 (Ch) to summarise the principles as he did at para. 26:

“Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction. ”

The three requirements are of course inextricably linked. The principles could equally be summarised, as Hamblen J did at para 31 of his judgment, as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases, the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.

54. As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered, as Gibbs J put it in the High Court of Australia in Air Express Ltd v Ansett Transport Industries (Operations) Pty (1981) 146 CLR 249, 313. That was said in the context of an application to enforce the undertaking. At the stage of considering whether fortification of the undertaking is required, the proposition could be restated as it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. That is the hurdle which the applicant must surmount. It is of course open to the defendant to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question ”

11. The Claimant referred me to the summary in Gee on Commercial Injunctions, now in the 7th Edn. at 11-029, but that summary effectively mirrors the three factors taken from the judgment of Briggs J in Jirehouse Capital v Beller and affirmed by the Court of Appeal in the Venture Partners case, and so in truth there was no real difference between the parties on the legal test, save perhaps a difference of emphasis. The Claimant emphasised that the mere assertion of risk of loss is not sufficient, and instead there must be some real evidence which objectively establishes the risk: see Create Financial Management LLP v. Lee [2021] 1 WLR 78, at [73].
12. I come to state my conclusions. In summary, I am satisfied (1) that there is a sufficient level of risk of loss, corresponding to a good arguable case, to require fortification; (2) that an intelligent estimate of the level of prospective loss justifies an order in the sum of £4m; and (3) that there is a sufficient causal connection between the making of the interim injunction and the prospective loss, in the sense that the making of the injunction is a cause without which the loss would not be suffered.

13. Point (3) I think is obvious, given that the prospective losses identified arise from an inability to sell the AML shares, and that is the result the injunction is intended to achieve. As I understood it, the point was not seriously disputed. As regards points (1) and (2), which to some extent run together, I come to my conclusions for the following reasons.
14. To begin with, I am not satisfied that the draft, unaudited accounts produced by the Claimant address the concern originally addressed by Bacon J. In any event, the Claimant is a Kuwaiti company with no assets in this jurisdiction. I do not regard its claimed interest in AAMC as sufficient protection. The relevant ownership structure is unclear, and the shares in AAMC in fact appear to be owned by a company called Megrit Holdings Limited. Although Mr Sinclair QC submitted in his evidence that there is no difficulty in enforcement of an English High Court order in Jersey, I have no evidence on that point and more specifically no clear evidence which enables me to conclude that an order of this Court against the Claimant could straightforwardly be enforced against the shares in AAMC.
15. Moving on to the main points which occupied the parties' submissions, I accept the basic propositions advanced by Mr Gourgey QC for the Defendants, namely that the AML share price has been volatile for some time and remains at risk of volatility, and that in consequence the Defendants as a commercial matter may wish to sell their holdings (or some part of them) at short notice. In resisting those propositions, Mr Sinclair QC for the Claimants argued that the evidence on both points was inadequate, but I think that is to disregard the commercial realities. I accept that the evidence available to me has some limitations, but I nonetheless consider it justifies the conclusion that the risk of loss is a real one.
16. The Defendants relied on an internet article dated 26 February 2021 entitled "*FTSE 250 stock Aston Martin sees extreme share price volatility. Should I invest?*", and on a graph showing share price movements over the period June 2020 to April 2021 (described in the evidence as: "*Aston Martin Lagonda Global Holdings Plc Share Price (extract from the London Stock Exchange)*." Mr Sinclair QC was critical of both, on the basis that they were too crude a guide to the likely volatility of the AML stock, and were insufficient in the absence of more detailed evidence, including expert evidence, to assist the Court in assessing such volatility. He made the point that as at 15 April 2021 the AML share price was £19.55, and on 14 May 2021 it was £19.57, which was consistent with the idea that there had been little volatility over the last month. On the question whether the Defendants were in fact likely to wish to sell, he said that the evidence of the Defendants' solicitor, Mr Marsh, rather skirted round this point, because it said nothing more than that the Claimant's own case was that the Defendants wished to sell the AML shares, without engaging directly with the question whether the Claimant was right. Indeed, he said that the formulation used by Mr Marsh was altogether too equivocal, because Mr Marsh said only:

"Without commenting on the veracity or otherwise of the Claimant's allegations, it is clear that should [the Defendants] wish to sell these shares, it will take time either to obtain the consent of the Claimant and/or both this Court and the Royal Court."

17. My approach to the evidence is as follows. It seems to me that in assessing whether a sufficient case of risk of loss has been made out, it is appropriate to look at the overall commercial realities. Two points here are relevant. First, one does not need expert evidence to see that the AML share price has been subject to material fluctuations over at least the last 12 months. The point is put bluntly in the internet article relied on by the Defendants as follows:

“The company has only been publicly listed on the FTSE 250 since October 2018. And the trajectory of the Aston Martin share price is a depressing sight indeed. Unfortunately, its share price has come crashing down 94% since initial public offering (IPO). And the Aston Martin share price saw extreme volatility throughout 2020 as the Covid-19 pandemic crushed its revenue streams.”

18. Consistent with this is the accepted fact that the AML shares have fluctuated in value during that same period between a high-point of £18,035,372, and a low point of £5,353,244.26. Moreover, as the same article makes clear, commercial factors remain which may continue to have an impact on volatility:

“The FTSE 250 supercar maker issued close to £250m in shares last year to raise cash, besides raising \$1.1bn at a costly interest rate of 10.5%. I think it’s more likely that the company would further dilute the share price with another share offering before opting for bankruptcy again if times got really tough.

Hopefully, it won’t come to that and it will instead pull off an amazing financial transformation. Nevertheless, I’m not willing to take the risk. Therefore, I won’t be adding Aston Martin shares to my Stocks and Shares ISA anytime soon.”

19. The difficulties affecting AML cannot sensibly be disputed, and indeed are acknowledged by the Claimant itself. In an Affidavit sworn by Mr El Seoud on 12 April 2021, in support of the application made in Jersey, he said as follows at paragraph 62:

“Following the IPO, the shares held by the Primewagon Structure in AML were slightly less than 19% of AML listed shares, worth over £800m. The debt was around \$600m, so overall the net asset value was substantial. However, the AML share price fell sharply from £19 (listing price) in 2018 to below £1 in 2019/2020. Eventually the shares were consolidated (20 old shares replaced by 1 new share), so that the price per new share went back up to £20, but overall the value of AML has fallen massively.”

20. Standing back, if one asks the simple question whether the commercial situation of AML is such that there is a real likelihood of a rationally motivated AML shareholder wishing to sell its shares at short notice, to my mind the answer is plainly yes. One can quite easily envisage a situation arising in which there is a commercial imperative to sell.

21. To my mind, such factors are adequate in and of themselves to justify the conclusion that there is a sufficient level of risk of loss. But one can also add a second point, which is that the Claimant's own evidence is that the First Defendant, Najeeb Al Humaidhi, not only has a past track record of selling AML shares, but moreover is presently affected by personal financial issues which might provide a motivation to sell.

22. On the first of these issues, Mr El Seoud said as follows at paragraph 63 of his Affidavit:

“Following the IPO, Najeeb has been arranging for the sale, at intervals and in chunks, of the AML shares, usually in response to margin calls. All proceeds of the sales that took place while the debts existed was used to settle the bank's long outstanding debts. I recall that he finally managed to repay the bank debt in full in 2019. “

23. As to the First Defendant's personal financial position, Mr El Seoud said as follows at paragraph 57:

“... Najeeb invested almost his entire personal wealth in Lebanon, due to high returns of 7-8%. Since at least the middle of 2020, Lebanon has been grappling with a deep and severe economic crisis; backed by the Lebanese government, banks are only releasing around \$1000 a week to investors, and estimate that in general terms, investors will take up to a 60% haircut in their original investments. I expect that Najeeb's personal finances have been significantly impacted by the Lebanese crash... “

24. It was in light of this evidence that Mr Gourgey QC said it was bizarre for the Claimant to be contesting the proposition that the Defendants might wish to effect a sale of their holdings in AML. In response, Mr Sinclair QC said that that was no more than a forensic point, and that what was required to justify fortification was direct engagement by the Defendants themselves, meaning that they should supply evidence of what their intentions were.

25. With respect, however, it seems to me that Mr Gourgey's submission was more than merely a forensic point. Rather, the basis on which the Claimant has sought injunctions both in Jersey and in England is that there is an imminent risk of sale of the AML shares. It does not really lie in the Claimant's mouth now to say otherwise. To put it another way, I take Mr Sinclair's point about the limitations of Mr Marsh's evidence (above at [16]), but I have to look at the evidence as a whole, and accepting the proposition that there is no real risk of loss arising on sale would involve me effectively ignoring Mr El Seoud's evidence on the risk of dissipation. I do not think it right to do so. The Claimant having obtained an injunction on the basis of a risk that the AML shares are likely to be sold must accept the logical corollary of that, which is that the Defendants are likely to want to sell them.

26. There is a subsidiary point, but one of some importance. It is accepted by the Defendants that, if they wish to sell the AML shares, they could seek consent from the Claimant to do so. The Claimant says there is no evidence that it would delay unduly, at least if sufficient safeguards were in place to ring fence the proceeds of sale.

27. I do not however think that these points eliminate the risk of loss. That is essentially for two reasons. First, I am satisfied on the evidence that there is a risk of delay in the giving of consent. I was told that the parties are in the process of seeking to agree the terms of an escrow arrangement, but none has in fact been agreed. Moreover, the evidence of Mr Marsh in his First Witness Statement was that the Claimant had behaved unreasonably in the Jersey proceedings, by adopting an entirely unrealistic attitude to the Jersey Order, and maintaining that the Defendants would need to make a payment of four times the maximum amount covered by that Order (i.e. 4 x £18,035,372, or approximately £72m) in order for the Jersey Order to be discharged. These points serve to illustrate the fact that this is heavy litigation which is obviously hard fought. Certainly there seems to be a basic lack of trust between the parties, and as a matter of common sense, there is risk that that will lead to delay in taking even straightforward steps. Sale of the shares which form the subject matter of the proceedings is likely not to be regarded as a straightforward step, and on the contrary is likely to be one of real sensitivity on both sides.
28. The second reason is that I am satisfied that even a short delay may lead to a loss arising from a drop in the AML share price. That follows from the risk that the volatility which has been a feature of the AML share price in recent times will continue. I am not persuaded by Mr Sinclair's submission that the share price has stabilised over the last month. Neither am I persuaded by the idea that prices may go up as well as down. Both facts are true, but neither is inconsistent with the idea that there is a risk that the share price may in fact go down at short notice, and urgent action may need to be taken in consequence. It is that risk which I must assess, and I am satisfied it is a sufficiently material one that fortification of the Claimant's undertaking is a justified response.
29. Finally, I must deal with the amount to be provided by way of fortification. The parties are agreed that I must seek to make an intelligent estimate of the prospective losses, which is informed and realistic although not necessarily scientific. Bearing those principles in mind, I propose to order fortification in the amount suggested by the Defendants, i.e. £4m. That seems to me an entirely realistic figure. The AML shares had a value as at 20 April 2021 of £14.9m, but the same number of shares had a low point in terms of value over the last 12 months of just over £5m. It seems to me reasonable to take that fact into account in making an informed and realistic assessment of the present level of risk. It is true that past performance is not necessarily a reliable indicator of future performance, but here is recent evidence of just the type of volatility the Defendants are entitled to be protected against. It would be an error to ignore it. In any event, I do not suggest that security be provided to cover the full amount of the difference between the 20 April value and the earlier, £5m figure, which would be in the region of £10m, but only a proportion of that, i.e., £4m. That £4m figure is close to the £3.1m difference between the 12 month high-point of roughly £18m relied on by the Claimant in formulating its request for freezing relief, and the value of the AML shares as at 20 April, namely £14.9m. Again, I do not say that this point is a scientific one, but the Court does not need to go that far. I say only that that £3.1m difference is a useful indicator of the potential for downward movement in the share price, and a piece of information which it is sensible to take into account in making an informed assessment. I also take into account the fact that the share price appears to have been relatively stable over the last month or so, but I have already made the point that viewed against the longer term history of the stock, and the issues which appear still to be

affecting AML, that is not enough to persuade me that there is no material risk of a significant downward shift in the share price at some near point in the future.

30. In overall conclusion, therefore, I will order fortification by the Claimant to be provided by means of a payment into Court of £4m. I would invite counsel for the parties please to confer with a view to agreeing the mechanics and any other relevant matters to be recorded in a form of order. If any matters remain for determination they can be resolved in a further, short hearing before me, but I hope that will not be necessary.