



Neutral Citation Number: [2021] EWHC 1391 (Comm)

Case No: CL-2019-000440

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 10/06/2021

Before :

MRS JUSTICE MOULDER

Between :

ICTSI MIDDLE EAST DMCC

Claimant

- and -

**THE GOVERNMENT OF THE REPUBLIC OF
SUDAN**

Defendant

Rajesh Pillai QC (instructed by Holman Fenwick Willan LLP) for the Claimant
The Defendant did not appear and was not represented

Hearing date: 18 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 by the judge remotely by circulation to the parties by email and release to BAILII. The date and time for hand-down is deemed to be 10.00 am on 10 June 2021.

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MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the judgment on the Claimant’s application for summary judgment (the “Application”). The hearing of the Application was adjourned on 23 February 2021 at the request of the Defendant (“Sudan”), at the original hearing on that date and the revised hearing date of 18 May 2021 was fixed.
2. The Application is supported by a witness statement of Mr Hans-Ole Madsen a Director of the Claimant dated 31 July 2020 and two witness statements from Mr Andrew Williams of Holman Fenwick Willan LLP solicitors acting for the Claimant dated 1 February 2021 and 7 May 2021 (“Williams 3” and “Williams 4”).
3. Sudan has not filed any evidence in response or any cross applications to challenge service or jurisdiction.

Background

4. The Application relates to monies said to be due under a refund bond dated 8 January 2019 (the “Refund Bond”) between the Claimant and Sudan as amended by a Deed of Amendment dated 28 February 2019. The Refund Bond relates to a concession agreement dated 27 December 2018 (the “Concession Agreement”) between the Claimant and Sea Ports Corporation of Sudan (“SPC”) relating to the operation of the terminal at Port Sudan through a Sudanese subsidiary of the Claimant incorporated for this purpose (the “Company”).
5. Clause 11.1 of the Concession Agreement required the Company to make an upfront payment, the first instalment of which amounted to €410 million and was expressed to be subject to receipt of an indemnity from Sudan.
6. On 13 January 2019 the Claimant made the first instalment of the upfront payment of €410 million to SPC (the “Upfront Payment”).
7. It is the Claimant’s case that it is entitled to a refund of that payment under the Refund Bond in accordance with its terms.
8. Sudan appears to have made two repayments to the Claimant in a total amount of approximately €222 million. The first payment of approximately €195 million was made in July 2019 and a second payment of approximately €27 million was made in December 2019. The amount of principal claimed as currently outstanding is approximately €188 million.
9. In addition the Claimant seeks a sum of approximately €91 million under the Refund Bond as amended by the Deed of Amendment as its costs of funding. The total claimed by the Application is therefore approximately €279 million.

Chronology

10. The claim was issued on 12 July 2019.
11. By an order dated 3 July 2020 Jacobs J confirmed that Sudan had been validly served with the documents instituting the claim.

12. In accordance with the extension of time granted for service of the claim, the deadline for service of the defence was 6 July 2020.
13. The Application was issued on 31 July 2020.
14. The Application was originally due to be heard on 23 February 2021. On 22 February 2021 Sudan made an application to adjourn the hearing for three months.
15. At the hearing on 23 February 2021 the Deputy Judge granted the adjournment. The Deputy Judge further directed (inter alia) that Sudan should pay €7 million into court and set out directions for Sudan to file any challenge to jurisdiction/order relating to service/response of evidence by 30 March 2021. Sudan has not complied with those directions.
16. It is also relevant to note the following by way of background events in Sudan during the relevant period, taken from submissions made by counsel for Sudan at the hearing on 23 February 2021:
 - i) President al-Bashir was removed from office in April 2019 following a popular uprising, which began in December 2018, but the military retained power until August 2019 at which point a power sharing agreement was entered into with the pro-democracy movement.
 - ii) Since August 2019, Sudan has been governed by a transitional regime made up of a mixture of ministers from the previous regime and ministers from a pro-democracy background. In early February 2021 a new cabinet was appointed with additional ministers from rebel groups but pursuant to a peace deal which was brokered in October 2020.

Absence of the Defendant

17. The preliminary issue to note is that Sudan did not attend the adjourned hearing on 18 May 2021 but the court determined to proceed in its absence under CPR 23.11.
18. The court was referred to the factors taken into account by Henshaw J in *HC Trading Malta Ltd v Savannah Cement Ltd* [2020] EWHC 2144 at [4].
19. By an order dated 3 July 2020 Jacobs J confirmed that Sudan had been validly served with the documents instituting the claim.
20. I am of the view on the evidence of Mr Williams (paragraphs 15-17 of Williams 3) that the Application has been duly served on Sudan.
21. I also note the evidence (paragraph 45 of Williams 4) that supporting documents were served by email and courier on 3 February 2021 on the Sudanese Embassy in London. I note that the response by email that day was that Sudan indicated that it wished the matter to go to arbitration and then by email on 15 February 2021 sought a stay of the proceedings.
22. However at the hearing on 23 February 2021 Sudan was represented by counsel and the revised hearing date of 18 May 2021 was fixed following its request for an adjournment.

23. Notwithstanding this, Sudan has not complied with the terms of the order made on 23 February 2021 for a payment into court and in relation to costs, and has made no apparent efforts to engage in the proceedings since that date, having filed no evidence in response to the Application. The solicitors representing Sudan at the last hearing came off the record, having ceased to act on 16 March 2021. However according to the evidence of the letter on the court file dated 21 April 2021, the previous solicitor, Mr Dovey, met with Sudan on 17 March and 20 April 2021.
24. As referred to above, this is a claim under the Refund Bond and there is express provision in that Refund Bond for English law and the jurisdiction of the English courts.
25. Having regard to all these matters I am satisfied that it is appropriate in the circumstances for the court to proceed to hear this Application in the absence of the Defendant.

COVID

26. In the light of the current pandemic the hearing on 18 May 2021 was held remotely but Sudan were notified of the remote hearing and sent details of the link to enable Sudan to participate using the email addresses which it had previously used to communicate with the Claimant.

Permission for the Application

27. The first issue to address is the requirement for permission for the Application pursuant to CPR 24.4(b)(i) in circumstances where Sudan has filed no acknowledgement of service and no defence.
28. The court was referred to the guidance referred to by Cockerill J in *Valla PTC Ltd v Faiman* [2020] EWHC 1819 (Comm) at [16]. Cockerill J cited part of the judgment of Henshaw J in *DVB Bank SE v Vega Marine Ltd* [2020] EWHC 1494 (Comm). I note in particular the following passage of the judgment of Henshaw J by reference to the *European Union v Syria* [2018] EWHC 1712 (Comm):

“[58.] Bryan J summarised the principles relevant to the exercise of the court's discretion under CPR 24.4(1) in *European Union v Syria* :

'(1) The purpose of the rule are to ensure that no application for summary judgment is made before a Defendant has had an opportunity to participate in the proceedings and to protect a Defendant who wishes to challenge the Court's jurisdiction from having to engage on the merits pending such application.

(2) Generally, permission should be granted only where the Court is satisfied that the claim has been validly served and that the Court has jurisdiction to hear it. Once those conditions are met there is generally no reason why the Court should prevent a Claimant with a legitimate claim from seeking summary judgment.

(3) The fact that a summary judgment may be more readily enforced in other jurisdictions than a default judgment is a proper reason for seeking permission under CPR 24.4(1) . ' (§ 61)”

29. I turn then to consider the preconditions referred to above.

Was the claim validly served?

30. I have regard to the Order of Jacobs J of 3 July 2020 that there has been good service of the claim form. That order has not been formally challenged.

“The Claim Form, Particulars of Claim and all other documents required to be served to institute this claim were validly served on the Defendant on 14 April 2020 via the Foreign & Commonwealth Office pursuant to CPR 6.44”

31. I note that since that order was made, the response pack and a certificate of service has been received by letter dated 27 October 2020, which also enclosed the FCO confirmation stating that the documents were served upon the Ministry of Foreign Affairs on 10 April 2020. The order of Jacobs J was served on 9 December 2020 through the British Embassy in Khartoum on the Ministry of Foreign Affairs.

Does the court have jurisdiction?

32. Clause 11 of the Refund Bond provides for English law and jurisdiction and although there was correspondence in February 2021 from Sudan which indicated that Sudan sought a stay of the proceedings and wanted to go to arbitration, there is no apparent basis for a stay in favour of arbitration.

33. I was referred to the authority of *European Union v Syria* [2018] EWHC 1712 (Comm) at [23] – [31].

34. I note that under Section 2 of the State Immunity Act 1978 a state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of United Kingdom.

35. Clause 11 of the Refund Bond states:

“this Bond...shall be governed by and construed in accordance with English law and any dispute under or arising out of or in connection with it shall be submitted to the exclusive jurisdiction of the English courts...”

36. Pursuant to Clause 12 of the Refund Bond Sudan irrevocably waved any right of immunity, whether sovereign or state or otherwise.

37. I am therefore satisfied that this court has jurisdiction.

Has the Defendant had an opportunity to participate and to challenge the jurisdiction

38. The purpose of the rule is to ensure that no application for summary judgment is made before a Defendant has had an opportunity to participate in the proceedings and protect

a Defendant who wishes to challenge the court's jurisdiction from having to engage on the merits pending such application.

39. In this case Sudan has had ample opportunity to participate in the proceedings or to pursue a challenge to the jurisdiction. At the hearing on 23 February 2021 Sudan was represented by counsel and solicitors, Peter Dovey and Co Solicitors. Although Peter Dovey subsequently came off the record, Sudan was represented at the time that the directions in the order of 23 February 2021 were given and it is to be inferred that Sudan would have been advised in relation to that order and could have instructed legal representatives to challenge the proceedings. There was no indication at the hearing in February that Sudan would not participate and would not comply with the directions for the adjourned hearing which was fixed at their request.

Reason for seeking summary judgment

40. The Claimant seeks summary judgment rather than a default judgment to ensure that any judgment is fully enforceable (paragraph 14 of Williams 3). I also note that Cockerill J in *Valla* having referred to the authorities added at [16]:

“I would add, in relation to (3), that it would in my view be sufficient that the Claimant has a reasonable belief that a summary judgment may be more readily enforced than a default judgment. There is no justification for the court subjecting any such belief to minute examination, when the permission the Claimant is seeking is in reality no more than the opportunity to obtain a reasoned judgment on the merits of its claim.”

Conclusion on permission

41. In the circumstances I am satisfied that permission for summary judgment should be granted and I proceed to consider the substantive application.

Summary judgment

Relevant law

42. CPR 24.2 provides that:

“The court may give summary judgment against a Claimant or Defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) ...

(ii) that Defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

43. The test for summary judgment is well established as set down by Lewison J in *Easyair v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

“i) The court must consider whether the Claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a Claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;...”

Refund Bond and Deed of Amendment

44. The recitals to the Refund Bond referred to the Concession Agreement and record that under the Concession Agreement the Claimant has agreed to pay to SPC €410 million which is defined as the First Instalment of the Upfront Payment. The recitals further recorded that the payment is subject to an indemnity from Sudan in the form of the Refund Bond whereby Sudan agrees to refund the First Instalment in the event that the company has been unable to take over the operation of the Terminal before the handover date in February 2019 or any of the conditions precedent in Clause 5 of the Concession Agreement have not been satisfied before the handover date. The recitals also record

that the Claimant has agreed to pay the first instalment to SPC on behalf of the Company and that SPC and Sudan “have agreed to accept such payment in exchange for which [Sudan] issues this Bond in favour of [the Claimant]”.

45. The relevant operative provisions of the Refund Bond are as follows:

“2. [Sudan] hereby,... unconditionally and irrevocably undertakes to the [Claimant] that upon receipt of the Concessionaire’s first written demand, [Sudan] shall, provided that the demand complies with Clause 3, but otherwise without proof or condition, pay to the Concessionaire in full and without any deductions whatsoever the sum stated in the demand not exceeding in total, or when aggregated with previous such demands, the sum of €410 million. Concessionaire may make any number of demands under this Bond up to the maximum stated above.

3. The demand referred to in clause 2 must:

3.1 specify the amount demanded in euros; and

3.2 state that either

3.2.1 the Company has been unable to take over the operation of the Terminal on or before 28 February 2019 (the “Handover Date”)...

4. The making of a demand complying with Clauses 2 and 3 shall be conclusive of Obligor’s obligation to pay the amount demanded. Obligor’s obligations under this Bond are primary, and independent of the relationship between the Concessionaire and the Company on the one hand and SPC on the other, and of any obligations owed between them, and are not subject to any claim, objection or defence, whether arising from the relationship between the Concessionaire and the company on the one hand and SPC on the other, or otherwise, and are not conditional on the existence of any default by SPC and, in particular, can be made:

4.1 regardless of the reason for the Company being unable to take over the operation of the Terminal in accordance with the Concession Agreement on or before 28 February 2019... ”.

46. The Claimant made the Upfront Payment of €410 million to the Defendant’s foreign currency Sudanese central bank account held at Abu Dhabi Islamic Bank (paragraph 36 of Mr Madsen’s witness statement). The evidence of Mr Madsen (paragraph 29 of his witness statement) is that payment of an upfront payment was:

“normal practice within the ports/terminals industry when the operation of an existing asset is being granted to a private operator ”.

47. Mr Madsen’s evidence is that the parties agreed to extend the handover date to 7 April 2019 and that this became necessary because the Claimant was informed that discussions with local labour unions were being dragged out and he states that he was generally aware by February 2019 that civil unrest in Sudan was increasing.
48. The Deed of Amendment amended Clause 3.2 (and Clause 4.1) of the Refund Bond by changing the handover date to 7 April 2019 (the “Revised Handover Date”). Clause 1 of the Deed of Amendment states that it “amends and forms part of the Bond and shall be read as one with it”.
49. Clause 4 of the Deed of Amendment stated:

“The Obligor further guarantees and undertakes for good and valuable consideration, receipt and the sufficiency of which are acknowledged, as follows:

4.1 to ensure that SPC indemnifies the Concessionaire for its costs of funding the First Instalment together with any and all other costs and expenses incurred or suffered by the concessionaire for the period from and including 1 March 2019 until and including the date when Handover has taken place and the conditions precedent set forth in clause 5 of the Concession Agreement have been completed to the satisfaction of the Concessionaire or waived by the Concessionaire

4.2 the liability for indemnification referred to in clause 4.1 shall be quantified as an amount equal to €3.5 million per month (and pro-rata for any period of less than one month) which the Obligor agrees is a reasonable calculation of the costs of funding and other costs incurred or suffered by the Concessionaire and the Company and shall ensure that SPC agrees with such calculation; and

4.3 to ensure that SPC allows the Concessionaire and the Company to deduct such amounts from payments of the Fixed Monthly Fee due by the concessionaire or the company to SPC under the concession agreement until the total amount of the indemnification calculated in accordance with this clause 4 is fully paid, failing which the Obligor shall pay such amount to the Concessionaire and the Company within 90 days of their first written demand to the Obligor.” [emphasis added]

50. In the Deed of Amendment Sudan is defined as “the Obligor” and the Claimant is defined as the “Concessionaire”.

Evidence

51. On the evidence before this court, no handover of the terminal took place. The evidence of Mr Madsen (paragraph 46 of his witness statement) is that a reason communicated to the Claimant by SPC was that the Concession Agreement had been declared null and void because the conditions precedent were not satisfied within the contractual

timeframe and the military council had ordered the Concession Agreement to be cancelled. The evidence of Mr Madsen is that the Claimant had fulfilled its obligations “in so far as possible”.

52. On 11 April 2019 the Claimant made a demand for payment on Sudan of €410 million pursuant to the Refund Bond (as amended) on the grounds that the company had been unable to take over the operation of the terminal on or before the Revised Handover Date. A version of that demand apparently countersigned by Sudan appears in the evidence before the court. The letter stated (so far as material):

“...we hereby demand immediate payment from you of the sum of €410 million on the grounds the Company has been unable to take over the operation of the Terminal on or before the Revised Handover Date ”

53. On 3 May 2019 the Claimant received a letter from SPC (referring to a decision of the military council dated 1 May 2019 concerning the termination of the contract (and Clause 5.6 of that agreement) and that the Concession Agreement is regarded as null and void (paragraph 53 of Mr Madsen’s witness statement).

54. Further correspondence between the Claimant and SPC took place. On 12 May 2019 the Claimant sent a further letter to SPC requesting confirmation of repayment of the Upfront Payment together with the costs of funding.

55. On 13 May 2019 the Claimant sent a letter to the transitional military council. It referred to the decision of the transitional military council and the correspondence and stated:

“while we are awaiting clarification from the transitional military council and SPC we need to remind you about the urgent matter of the return of the upfront payment €410 million + cost made by ICTSI. We refer to our demand dated April 11, 2019 (attachment 3) requesting immediate repayment of the upfront fee amounting to €410 million + cost, in accordance with the terms of the refund Bond issued by the Republic of Sudan. Please note that the cost is escalating by €3.5 million per month.

We request your urgent attention to this matter...” [emphasis added]

56. In July 2019 the Claimant received a payment of approximately €195 million which would appear to be in part repayment of the Upfront Payment. Mr Madsen’s evidence (paragraph 59 of his witness statement) is that this followed a meeting by one of his colleagues with the then Undersecretary at the Ministry of Finance in which the Undersecretary confirmed that Sudan would pay half the Upfront Payment.

57. Mr Madsen’s evidence (paragraph 63 of his witness statement) is that on 17 July 2019 he attended a meeting at the Ministry of Finance at which the representatives confirmed that the state’s obligation to make repayment of the Upfront Payment was not in dispute but that due to a shortage of funds Sudan proposed paying the outstanding amount in instalments and would send the Claimant a proposal for a repayment schedule. Mr Madsen’s evidence is that he did not agree any alternative schedule but awaited a further

communication. In an email of 22 July 2019 Mr Madsen referred to the meeting and to a subsequent meeting with the governor of the central bank stating:

“the governor informed me that the central bank and the Ministry of finance is in the process of preparing a repayment proposal for ICTSI

we look very much forward to receiving this proposal at the earliest, as we are facing significant pressure from shareholders, bankers and auditors.” [emphasis added]

58. In a letter of 30 July 2019 Mr Madsen wrote to the Undersecretary in relation to the meeting on 17 July 2019:

“...we appreciate your assurances that the refund of ICTSI’s upfront fee will be done in full and we look forward to the next steps towards this end”

“after my meetings in Khartoum ICTSI was expecting to receive a repayment schedule proposal from the government of Sudan. However we are yet to see such a proposal or receive any other communication regarding the repayment.” [emphasis added]

59. By a letter of 7 August 2019 from an Under Secretary at the Ministry of Finance and Economic Planning who wrote to the Claimant in the following terms:

“Reference is made to our meeting on 17 July 2019 and your letter of 30 July 2019.

In accordance with the articles of Refund Bond (dated 8 January 2019) and the Amendment to the Refund Bond (dated 28 February 2019), the Government of Sudan is proceeding with repayment of the Upfront Fee.

An amount of €195.2 million was recently remitted and confirmed to have been received by your Company.

We further confirm that the remaining amount will be scheduled to be remitted to your company as soon as possible. [emphasis added]

60. In November 2019 the Minister of Finance and Economic Planning sent a letter to the Claimant referring to a partial repayment of the upfront fee in the sum of €195 million (rounded) and stated that:

“The Government of Sudan is proceeding with the repayment of the remaining principal amount of the Upfront Fee of [€214.7 million (rounded)] to [the Claimant] in accordance with the following repayment schedule...”

The letter then provided for eight monthly repayments between 30 November 2019 and 30 July 2020.

61. The Claimant responded by letter of 21 November 2019:

“we hereby confirm receipt of your letter dated 19 November 2019 concerning “repayment of upfront fee” which includes the repayment schedule the outstanding principal amount of the upfront fee.

We look forward to payments into the following account...
[emphasis added]

However payments were not made in accordance with this letter. Sudan made one further payment of approximately €26.7 million on 14 December 2019.

62. On 25 June 2020 a further letter was sent by a representative of the Under Secretary for Finance of Sudan. The letter stated in reference to the Refund Bond, as amended that:

“...the Government of the Sudan are still committed to fulfil to pay the remaining of the upfront fees.

Having said that due to the current COVID-19 pandemic in worldwide numerously affected the entire economic (sic) especially in Sudan, therefore, we have faced a lot of difficulties in obtaining revenues in this period, due to that we are unable to proceed as scheduled to pay the remaining of the upfront fees.

“[The Claimant] has supported, as all along this way and we would like to request to have more patient (sic) with us particularly during this pandemic.” [emphasis added]

63. Most recently on 16 February 2021 the Ministry of Finance wrote to the Claimant in the following terms:

“we refer to the refund Bond dated 8 January 2019 the deed of amendment to refund Bond dated 20 February 2019 we the government of Sudan are still committed to fulfil to pay the remaining of the upfront fees.

Despite the above and due to covid 19 pandemic numerously affected our economy we are unable to fulfil and to complete the agreed schedule for the remaining of the upfront payments.”

The esteemed ICTSI has supported as (sic) all along to this date and we would like to kindly request to have a bit more patient (sic) with us particularly new cabinet has been announced recently this week...” [emphasis added]

64. Although this letter was dated 16 February 2021 it was only collected by the Claimant’s agent in Khartoum on 22 February 2021 and only provided to the Claimant the following evening. It was not brought to the attention of the court by the Defendant during the hearing on 23 February 2021.

65. The Claimant responded by letter of 10 March 2021 stating, so far as material:

“Thank you for your reassurance that the Government of Sudan is committed to the full reimbursement of money due to ICTSI as per the Refund Bond... and the Deed of Amendment...”

Discussion

66. Counsel for the Claimant accepted that the principles of construction which the court should apply are as set out in *Wood v Capita Insurance Services Limited* [2017] UKSC 24. I note the following passage at [10]:

“The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...”

67. Counsel for the Claimant also relied on the decision in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Limited* [2010] EWHC 2443 (Ch) at [28] a decision dealing with the construction of guarantees and indemnities. Counsel accepted that each case depends upon the actual words used and I derive no particular assistance from the *Vossloh* case.

68. In my view the language of the Refund Bond in relation to the upfront payment is clear and unambiguous. Clause 2 of the Refund Bond is an undertaking upon receipt of a demand “*but otherwise without proof or condition*” to pay the sums stated in the demand not exceeding €410 million. The only conditions relate to the form of the demand which again are clear and unambiguous: Clause 3 (as amended by the Deed of Amendment) requires that the demand must specify the amount demanded in Euros and state that the company has been unable to take over the operation of the terminal before the revised handover date. Clause 4 is also clear that the obligations of Sudan under the bond are primary obligations and thus not ones of surety or guarantee.

69. The objective meaning of the language is in my view the natural meaning of the words and there is no ambiguity which needs to be resolved by reference to the wider context. However the objective meaning is confirmed by the language of the recitals referred to above and the terms of the Concession Agreement.

70. As to the form of the demand which was made, Counsel for the Claimant referred the court to *Financial Institutions Services Limited v (1) Negril Negril Holdings Ltd. and (2) Negril Investment Company Ltd.* [2004] UKPC 40 at [40]:

“The demand did not have to be (as the judge's order put it) "a formal demand" but it did have to be clear and unconditional. As was said in *Re Colonial Finance Mortgage Investment & Guarantee Corporation Ltd* (1905) 6 SR NSW 6, 9,

"... there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect."

71. The demand on 11 April 2019 appears to be in compliance with the provisions of the Refund Bond and thus to be a valid demand for payment of the principal amount.
72. Further, as referred to above, there is correspondence with the Defendant in which it appears to acknowledge the principal debt, notably the letters of 7 August 2019, 25 June 2020 and 16 February 2021 and there have been significant repayments of approximately €222 million.
73. As to whether the Concession Agreement had been declared null and void as suggested in the correspondence referred to in Mr. Madsen's witness statement, in my view given the terms of Clause 4 of the Refund Bond the obligations under the Refund Bond are primary obligations irrespective of the relationship between the Claimant and SPC and independent of any obligations owed between them. Further this objection does not appear to have been raised in the subsequent correspondence and payments have in fact been made.

Potential defences

74. In the light of the failure by Sudan to attend the hearing and/or to raise any potential defences since the last hearing before the Deputy Judge, it was submitted by counsel for the Claimant that the court should infer that Sudan has no defence to the claim.
75. Whilst I can see force in this submission, it seems to me that the court must be satisfied that Sudan has no real prospect of successfully defending the claim and therefore the court should address potential defences which are apparent to the court.
76. The first issue is whether the Claimant had granted some form of waiver or time for payment. The evidence of Mr Madsen is that no agreement was reached on an alternative repayment schedule. I note however the documentary evidence notably the exchange of correspondence in November 2019 (referred to above) and the response of the Claimant in its letter of 21 November 2019 which made reference to the repayment schedule and states "*we look forward to payments into the following account...*". I note also the letter of 16 February 2021 from the Ministry of Finance made reference to "*the agreed schedule*".
77. It seems to me that the court cannot resolve this issue on this interlocutory application. However even if agreement had been reached on the alternative repayment schedule, that schedule was for monthly repayments ending on 30 July 2020. The monthly repayments set out in the letter in November 2019 were not made in accordance with the schedule and repayment in full had not been made by 30 July 2020.
78. Further Sudan has not sought to deny its liability for the principal amount: in its most recent letter dated 16 February 2021 (quoted above) the Ministry of Finance stated that:

“we the government of Sudan are still committed to fulfil to pay the remaining of the upfront fees”

79. In my view therefore there is no realistic defence based on any agreed schedule of payments.
80. Although he stated that he had no instructions on the merits of the application, a further matter was mentioned by counsel for Sudan before the Deputy Judge in that he observed that the Upfront Payment was to an offshore account.
81. I cannot see that this affords a realistic defence in circumstances where the evidence before the court is that the Upfront Payment was paid to a bank account in the name of the Bank of Sudan and there is a letter from the Government of Sudan dated 15 January 2019 acknowledging receipt of the payment. Further there has been no suggestion in correspondence that Sudan did not receive the money; to the contrary there has been an express acknowledgement in the correspondence that Sudan is committed to pay the outstanding amount of the upfront fees.
82. Finally I note that the Concession Agreement provides for arbitration in the event of a dispute between the parties but Sudan is not a party to the Concession Agreement and Clause 11 of the Refund Bond is clear in providing for the jurisdiction of the English courts. There is no realistic defence in this regard.

Conclusion as to whether there is a realistic prospect of defending the claim for the Upfront Payment

83. Despite the indications at the last hearing before the Deputy Judge that it would investigate the matter, Sudan has not raised any potential defences in the intervening period.
84. The correspondence before the court and the fact of the partial payments support a conclusion that there is no defence to the claim which Sudan can or wishes to advance. There has been no indication that Sudan requires more time to investigate the matter or any basis in the contracts or the correspondence for any inference that further or fuller investigation at trial is required or likely to affect the outcome.
85. For the reasons discussed above I find that the Defendant has no real prospect of successfully defending the claim for repayment of the outstanding amount of the Upfront Payment paid by the Claimant and there is no other reason for the issue to be disposed of at trial.

Costs of funding

86. As to the claim for the costs of funding the relevant provision is Clause 4 and in particular Clause 4.3 of the Deed of Amendment:

“4.3 to ensure that SPC allows the concessionaire and the company to deduct such amounts from payments of the Fixed Monthly Fee due by the concessionaire or the company to SPC under the concession agreement until the total amount of the indemnification calculated in accordance with this clause 4 is

fully paid, failing which the Obligor shall pay such amount to the Concessionaire and the Company within 90 days of their first written demand to the obligor.” [emphasis added]

87. It was submitted by counsel for the Claimant that there was “no way” for the Claimant to be indemnified through SPC (as provided in Clause 4.1).
88. Although Clause 4 is constructed on the assumption that the Concession Agreement will be in place and operative such that SPC would indemnify the Claimant for its costs of funding and that the Claimant would be able to deduct amounts due from the monthly fees payable by it/the Company, the language “*failing which the Obligor shall pay such amount*” is in my view clear and unambiguous. Whilst this is a secondary rather than a primary obligation, Clause 6 of the Refund Bond, which as noted above is to be read with the Deed of Amendment, provides as follows:
- “For the avoidance of doubt, and without affecting the primary nature of the Obligor’s obligations under this Bond, it is agreed that the Obligor shall not in any way be released or discharged or otherwise absolved of liability hereunder by reason of any of the following...:
- 6.3 any change in the relationship between the Obligor and SPC or dispute or disagreement between them under or in relation to the Concession agreement or otherwise;
- 6.4 any disability or incapacity or change in status or constitution of SPC or the Obligor or the Concessionaire or the Company
- ...”
89. In my view therefore the objective meaning of Clause 4 is that Sudan is liable to pay the costs of funding where SPC has failed to do so. These costs are quantified expressly as €3.5 million per month pursuant to Clause 4.2.
90. The next issue to consider is whether there been “clear intimation that payment is required” to constitute a demand. The 28 April 2019 letter to the Transitional Military Council made no reference to the additional costs of funding. The 13 May 2019 letter, as set out above, stated “*we need to remind you about the urgent matter of the return of the upfront payment €410 million plus cost*” but then cross referred to the demand of April 11 2019 incorrectly stating that letter requested repayment of the upfront fee “+ cost”. The 13 May 2019 letter did state that “*the cost is escalating by €3.5 million per month*”.
91. It was submitted for the Claimant that this was a “polite but insistent” demand for both the principal and the funding costs.
92. In my view there is a real prospect that Sudan will establish at trial that this letter of 13 May 2019 does not amount to a valid demand. The letter of 11 April 2019 did not include a demand for costs. In considering whether a valid demand has been made I note that the letters relied upon as admissions by Sudan as to liability for the principal amount of the fee do not extend to an admission of liability for the cost of funds. The

Claimant's letter of 10 March 2021, in response to the letter of 16 February 2021 (quoted above) from Sudan, insofar as it purported to broaden the acceptance of liability cannot create an admission where there was none.

93. Counsel for the Claimant submitted (paragraph 82.7 of skeleton) that even if not admitted, all sums are due. This in my view can only be the case if there has been a valid demand. Even if there has been a valid demand, the court has to consider whether or not the costs of funding could be cut down as a penalty and whether this amounts to a realistic defence.
94. It was submitted for the Claimant (paragraph 75 of its skeleton) that there was "no question" of the costs of funding being cut down as a penalty in circumstances where the clause was agreed as constituting a reasonable calculation by Sudan. It was submitted that it reflected the circumstances where the Claimant had incurred costs and Sudan had not handed over to the Claimant the means of generating income against those costs.
95. The test as to whether the provision for the payment of the amount of €3.5 million per month amounts to a penalty will be judged according to the principles set out in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67. The test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.
96. I note that the evidence of Mr Madsen (paragraph 43 of his witness statement) is that the Claimant had incurred significant funding costs in making the upfront payment but he provides no details as to the actual funding costs incurred. Whilst the contract states that the monthly payments were a reasonable calculation of the costs of funding, there is no evidence before the court which enables the court to conclude that there is no realistic prospect of the Defendant succeeding in a defence in relation to the funding costs based on the amount being a "penalty". I note that the total funding costs claimed for the period 1 March 2019 – 1 May 2021 amount to €91 million, that this equates to an interest rate of 10.24% and that this sum is said to accrue without regard to any reduction for the partial payments that have been made in respect of the principal. These factors support an inference that there is a realistic prospect of a defence on this basis.

Conclusion on cost of funding

97. For the reasons discussed above I am not satisfied that the Defendant has no real prospect of successfully defending the claim for payment of the costs of funding pursuant to Clause 4 of the Deed of Amendment. This is a case where the court takes into account not only the evidence before it but the evidence that can reasonably be expected to be available at trial in relation to the actual costs of funding incurred by the Claimant. I therefore refuse the application for summary judgment on this issue.

Interest on the outstanding amount of the Upfront Payment

98. In the light of the conclusions above, the Claimant is entitled to summary judgment in the principal sum of EUR 187,978,102.34 in relation to its claim for the outstanding amount of the Upfront Payment and is also entitled to payment of interest on that sum, calculated per annum (as reduced by payments from Sudan over the relevant period).

99. The Claimant submitted that the rate of interest for the period from the date of the demand to judgment should either reflect the contractual rate or be fixed by the court as a commercial rate.
100. Given the matters raised as to whether the funding costs constitute a penalty and the absence of any specific evidence as to the Claimant's costs of funding, I do not accept that it is appropriate to take the implicit contractual rate of 10.24%. In my view since judgment is sought in Euro in respect of a Euro debt, and having regard to Euro interest rates generally but without having specific evidence, the rate of interest should be 2% per annum on the outstanding principal amount.

Judgment accordingly