



Neutral Citation Number: [2023] EWHC 3306 (Comm)

**Claim No: LM-2023-000106**

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

Royal Courts of Justice  
Rolls Building, London, EC4A 1NL  
Date 21<sup>st</sup> December 2023

**Before**

**Philip Marshall KC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**(1) MAGDALENA GALLIANI (DECEASED)**  
**(2) OLIVIER BOUTHILLIER DE BEAUMONT**

**Claimants**

**-and-**

**(1) JUAN SARTORI**  
**(2) UNION GROUP INTERNATIONAL HOLDINGS LIMITED**  
**(3) OSCAR LÉON**

**Defendants**

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Joshua Folkard (instructed by Stevens & Bolton LLP) for the Claimants  
Joseph Steadman (instructed by Teacher Stern LLP) on behalf of the First Defendant

Hearing date: 24 October 2023  
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**APPROVED JUDGMENT**

This judgment was handed down remotely at 9 am on Thursday 21<sup>st</sup> December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

(see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

**I direct that pursuant to CPR rule 39.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic**

**PHILIP MARSHALL KC**

## **PHILIP MARSHALL KC:**

### **Introduction**

1. This judgment addresses two applications by the First Defendant, Mr. Sartori. The first seeks relief from sanction and an extension of time for filing an acknowledgment of service and the second seeks an order setting aside a default judgment.
2. There was a further application that the parties believed was before me, namely that of Mr. Emanuele Ferrero Ventimiglia for an order under CPR rule 19.12 that he be appointed to represent the estate of the First Claimant, who died on 1 June 2023. By this application he also sought a direction that steps taken in the proceedings during the incapacity of the First Claimant, Ms. Galliani, be deemed to be effective despite the absence of the appointment of a representative in accordance with the court rules. However, it transpires that this application had already been addressed on the papers, without argument, by HH Judge Pelling KC by an order dated 23 October 2023. Unfortunately the order only came to the attention of the parties after the hearing before me had concluded and after I had heard argument on the application. By his order HH Judge Pelling granted relief in the terms sought including a provision that *“No step taken by or behalf the First Claimant between the issue of the proceedings and her death shall be ineffective by reason of CPR, r.21.3(4)”*.
3. At the time of making that order the learned Judge did not have the application to set aside default judgment before him. In particular he does not appear to have been informed of the potential effect of the granting of relief on the outstanding applications of Mr. Sartori. In these circumstances I permitted Mr.Sartori to make an application before me to vary the order of 23 October 2023 so as to prevent it having any negative effect on his applications. I did not understand the Claimants to object to this procedure, which seems to me to be expressly provided for by paragraph (4) of the order HH Judge Pelling (permitting an application to vary his order so long as it was made within 7 days of its service).

### **The Claim**

4. The First Claimant, Ms. Galliani, was a resident of Italy. The Second Claimant, Mr. De Beaumont, lives in Egypt.

5. Mr Sartori is the founder and president of the Union Group of companies and a senator in Uruguay.
6. The Second Defendant, Union Group International Holdings Limited ("UGIH") is a company incorporated in the British Virgin Islands.
7. The Third Defendant, Mr. Oscar León, lives in Uruguay and is alleged to have been a member of Mr Sartori's team managing businesses, called collectively, the Union Agriculture Group.
8. No statement of case has yet been served in respect of the claims made in these proceedings. However, in their letter of claim to Mr. Sartori, dated 2 February 2022, the Claimants' solicitors, Stevens & Bolton LLP, set out various details, which have been confirmed and expanded on in the second witness statement of a partner in that firm, Ms. Catherine Rose Penny. In summary the case presented in these documents is as follows.
9. It is alleged that Mr. Sartori founded a Peruvian company, Andean Power Generation Limited ("**Andean**"), to invest in hydropower construction projects in Peru.
10. It is said that Ms. Galliani's son, Mr. Ventimiglia, worked as an intern at Union Group (UK) LLP ("**UGUK**"), a Union Group company based in London. It is then said that in 2013 he was made aware of an opportunity to invest in Andean. The details of the opportunity were set out in a proposal document allegedly prepared in around May 2014 by Mr. Sartori and a Mr. Francisco Roque de Pinho (then a director in UGUK) on behalf of Union Energy Group Corp. ("**UEG**"), a company alleged to be owned by Mr. Sartori. The document is said to have included a statement that UGIH was to invest US\$10,000,000 in Andean.
11. The Claimants invested in Andean, being issued with share certificates signed on 13 January 2015. Ms. Galliani acquired 200,000 common shares and 180,000 Class A preference shares at an aggregate cost of US\$250,000. Mr De Beaumont acquired 300,000 common shares at a cost of US\$105,000.

12. The Claimants allege that they were induced to invest in Andean in this way in reliance on various misrepresentations said to have been made by Mr. Sartori or on his behalf. In the letter of claim it was asserted that “*These representations were made in London through a UK entity [UGUK] on behalf of UEG*”. The Claimants contend that the first set of misrepresentations were made in the proposal document and were as follows:

12.1 First, that the internal rate of return of the common shares in Andean would be at least 16% plus a cash yield of 12% per annum.

12.2 Secondly, if energy prices rose in Peru, the Peruvian government’s power purchase agreements could be terminated and sold on the open market resulting in a possible internal rate of return of 24% per annum plus a yearly cash yield of 12%.

12.3 Thirdly, all class A preference shares were guaranteed to receive an annual cumulative preferential dividend at an annual rate of 10% of the issued share price (being US\$1 per class A preference share).

13. A further representation is said to have been made in conversations with the Claimants and Mr. Ventimiglia and other investors, in particular during a telephone call with Ms. Galliani in about the summer of 2014. It is alleged that it was represented that the only way a lower internal rate of return would be achieved would be if the Peruvian government defaulted on its power purchase agreements, which was effectively impossible.

14. The letter of claim alleges that these representations were false and must have been known by Mr. Sartori to be false. However, no particulars are given of how this allegation, which is necessarily one of fraud, is to be substantiated.

15. The letter of claim goes on to contend that in the three years following purchase of their shares in Andean the Claimants received no or no satisfactory updates on the performance of the company and received neither the annual dividend nor cash yield that had been referred to. This is said to have been contrary to reasonable expectations and despite numerous requests. It is also alleged that the requirements for the Claimants to be invited to annual general meetings were not complied with. These allegations, however, do not appear to be the subject of any claim for relief in the proceedings.

16. It is next alleged that in WhatsApp messages sent by Mr. Sartori in November 2017 he gave the impression that Andean had gone bankrupt after a natural disaster and the value of any shareholding was lost. It is alleged that, despite this, there was an offer to purchase the Claimants' shares for US\$14,000 conveyed by Mr. Léon and that this was followed by an increased offer in an email of 19 January 2018 in which he said "*I have spoken to Juan [said to be a reference to Mr. Sartori] and we can offer to buy the shares in US\$25,000 (sic)*". Both offers were rejected.
17. In the letter of claim there is then reference to the Claimants learning "*through the market*" that on about 30 October 2018 UGIH entered into a sale and purchase agreement with a company called Polaris Infrastructure Inc. ("**Polaris**"). It is said that pursuant to this agreement UGIH agreed to procure the transfer of the Claimants' shares and that, in the event it was unable to do so, the consideration it was due to receive from Polaris would be reduced in value by some US\$500,000. This is relied on for the contention that Mr. Sartori was aware in late 2017 and early 2018 that the investment of the Claimants was in fact worth around US\$500,000 and that the attempts to purchase their shares for US\$14,000 and then US\$25,000 was a "*deceitful attempt by which to procure the Shares at a vast discount*".
18. The witness statement of Ms. Penny adds to what is said to have occurred in connection with the sale and purchase agreement with Polaris. It is alleged that a redacted copy of the agreement was emailed to Mr. Ventimiglia and Mr. Amaury de Beaumont on 15 May 2019 by a Mr. Canadell, who the Claimants believe was a legal adviser to the Union Group and associate of or legal advisor to Mr. Sartori. It is said that this document obscured the clause setting out the adjustment to the consideration payable by Polaris in the event that the Claimants' shares could not be transferred. A further copy of the agreement was, however, obtained by Mr. Ventimiglia on 5 June 2019 which, although also partially redacted, included this clause.
19. The Claimants in fact sold their shares in Andean to Polaris Energy Peru Corp. for US\$220,000 in around 15 April 2020. This is said to have given rise to a loss of US\$135,000 on the amount invested. But this is not the amount sought to be recovered according to the letter of claim. Instead the Claimants, as their principal claim, seek the

difference in value between the amount of return the shares would have produced had the representations allegedly made been true, said to be at US\$742,560 by April 2020, and the price received. So this is said to give rise to a claim for US\$522,560.

20. The claim form refers to and relies on the alleged written and oral misrepresentations I have set out above and states that claims are brought for “*fraudulent and negligent misrepresentation, as well as unlawful means conspiracy*”. Damages are then sought but on a different basis from that stated in the letter of claim. It is now said that had they not been induced by the misrepresentations relied on by them to purchase shares in Andean the Claimants would have made alternative investments which would have generated profitable returns and had they been aware of their Andean shares’ true value they would have sold these shares for more than they did.

### **The Procedural History**

21. The letter of claim and a further letter of 23 September 2022, chasing a response, were received by Mr. Sartori but not replied to. In a witness statement filed in support of his applications Mr. Sartori explains that he discussed the correspondence with his “in-house legal team” and formed the view that the claim was not credible. He says that he did not recall ever having heard of the Claimants before the letter of claim and thought this was an attempt to obtain a nuisance value settlement.

22. Given the absence of a response the Claimants issued their claim form on 20 April 2023 and they had obtained permission to serve it out of the jurisdiction by 14 May 2023.

23. In fact they were able to serve Mr. Sartori personally within the jurisdiction, when he was attending a football match on 16 May 2023. He explains that he misplaced the envelope containing the claim form which led to his then solicitors enquiring on 25 May 2023 as to whether proceedings had begun and then, on 30 May 2023, seeking details of the case. They did not, however, request a further copy of the claim form.

24. On 1 June 2023 time expired for the filing of an acknowledgement of service. On the same day the First Claimant, Ms. Galliani, passed away.

25. On 2<sup>nd</sup> June 2023 an application was made for default judgment to be entered against Mr. Sartori.
26. There was then a period in which Mr. Sartori sought representation from new solicitors. Ultimately his current solicitors, Teacher Stern LLP, were selected and filed an acknowledgement of service on 13 June 2023 at 12.49 pm.
27. On the same day as the acknowledgement was filed, but at an unknown time, the court entered default judgment.
28. On the following day, 14 June 2023, whilst unaware of the default judgment, Mr. Sartori's solicitors applied for an extension of time to file an acknowledgement of service and for relief from sanctions. When the default judgment was drawn to their attention they first sought the advice of counsel and then the present application to set aside judgment was issued on 27 June 2023.

### **Was default judgment entered irregularly?**

29. It has long been the position that there is a significant difference in approach to an application to set aside default judgment which has been entered irregularly as compared with one entered regularly. This is reflected in the provisions of CPR Part 13.
30. Rule 13.12 provides that default judgment must be set aside if certain conditions contained in rule 12 for the entry of default judgment have not been satisfied. Among these conditions is the requirement in rule 12.3(1)(a) that "*at the date judgment is entered*" the defendant has not filed an acknowledgement of service.
31. This wording in rule 12.3(1)(a) was introduced by the Civil Procedure (Amendment) Rules 2020 (SI 2020/82), the explanatory note to which states that this was "*to clarify the meaning of the rule as being that an acknowledgment of service or a defence will be a bar to the entry of judgment in default so long as it is filed before judgment is entered*". This was done to remove an ambiguity in the previous formulation of the rule and to adopt the approach taken in Cunico Resources NV v Daskalakis [2018] EWHC 3382 (Comm) namely that, so long as an acknowledgement of service was filed before default judgment was entered, the

conditions for such a judgment to be obtained would not be satisfied (see FXF v English Karate Federation Limited [2023] EWCA Civ 891, at [89]).

32. As already mentioned, in this case the acknowledgment of service was actually served on the same day that an order was made for default judgment (13 June 2023) but a day before that order was sealed (14 June 2023). This raises the question as to what is meant by the reference to entry of judgment in CPR rule 12.3(1)(a).
33. The meaning accorded to “entry of judgment” prior to the CPR was explained in Holt v Hodgson (1889) 24 QBD 103 by Lord Esher MR at 107 where he stated: “*Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the judge has pronounced is the judgment which is to be entered*”. This approach underlies the analysis in cases such as In re Barrell Enterprises Limited [1973] 1 WLR 19 and (post-CPR) in Stewart v Engel [2000] 1 WLR 2268 and Re L-B (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 63, which explain how the court may revise a judgment between the time at which it is pronounced and the time at which an order is drawn up and sealed.
34. The process of entry of judgment has long been equated with perfecting a judgment which is now carried out by the process of drawing up and sealing as provided for in CPR rule 40.2(2)(b) (see Millenstead v Grosvenor House (Park Lane) Limited [1937] 1 KB 717, at 726, Pittalis v Sherefettin [1986] QB 868 and Paulin v Paulin [2010] 1 WLR 1057, at [30]).
35. Applying this analysis it is evident that the default judgment in this case was irregularly entered. The court should not have drawn up the order and sealed it given that an acknowledgement of service giving notice of an intention to defend had already been filed, albeit that HH Judge Pelling KC had made a decision to grant judgment in default on the same date that this occurred.
36. For this reason the application of Mr. Sartori to set aside judgment must succeed.
37. In these circumstances it is strictly unnecessary to consider the other aspects of the application of Mr. Sartori to set aside judgment but I do so briefly in case for any reason this matter were to go further.



### **Setting aside the judgment if regular**

38. Where a judgment has been entered regularly (in the sense that the specific conditions in Part 12 that are referred to in rule 13.2 are satisfied) then the court has a discretion as to whether to set aside a default judgment. The relevant provisions are contained in CPR rule 13.3 which provides as follows:

*“(1) In any other case, the court may set aside(GL) or vary a judgment entered under Part 12 if—*

*(a) the defendant has a real prospect of successfully defending the claim; or*

*(b) it appears to the court that there is some other good reason why—*

*(i) the judgment should be set aside or varied; or*

*(ii) the defendant should be allowed to defend the claim.*

*(2) In considering whether to set aside(GL) or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.”*

39. In this instance there appears to be a special factor which might constitute “*some other good reason*” warranting an order setting aside the default judgment, namely the fact that the First Claimant, Ms. Galliani, had been incapacitated at the time the proceedings commenced and had died the day before the application for default judgment was made. Before 23 October 2023, no litigation friend under CPR rule 21.2 was in place nor was anyone appointed to represent the estate of Ms. Galliani, under CPR rule 19.12, after her death. Until an order was made by the court regularising the position it could be said that all action taken was without authority and was ineffective (see CPR rule 21.3(4) and *Bowstead Reynolds on Agency* (22<sup>nd</sup> Edn.), Article 117(2)).

40. It is open to the court, when making an order appointing a litigation friend for a protected party under CPR rule 21.2, to direct that steps taken prior to the appointment shall have effect (see rule 21.3(4)) and such an order was made by HH Judge Pelling KC on 23 October 2023.

41. Less clear, however, is whether an order under rule 19.2 (which HH Judge Pelling KC also made) can create authority for a step already taken for a deceased party when none

previously existed. Possibly, however, once a representative was appointed by the court they might be in a position to ratify action previously taken. But generally ratification should not unfairly prejudice third parties (see Article 19 of Bowstead & Reynolds, *supra* and the commentary thereto). In this instance, any retrospective effect granted to the appointment under rule 19.2 would potentially have an unfairly prejudicial effect where it made a default judgment effective that had otherwise been sought on an unauthorised basis.

42. The above point would have required to be considered in conjunction with the merits of the defence to the claim and the other circumstances relevant to the exercise of the court's discretion under CPR rule 13.3. In this instance, however, in my judgment, there was a further feature that meant that any argument based on lack of authority would have had limited weight. Here there was a co-Claimant, Mr. De Beaumont. He was in a position to bring the application for default judgment irrespective of Ms. Galliani or her estate and did so. It could not therefore be contended that the entire application was unauthorised and needed to be ratified for any judgment to stand (compare Amirtharaja v White [2020] EWHC 1507 (Ch)).
43. Turning to the issue of whether Mr. Sartori has a real prospect of success on the merits, the test applied is essentially that used in applications for summary judgment under CPR Part 24 with one difference, namely the burden of proof. This was explained by Potter LJ in ED & F Man Liquid Products v Patel [2003] EWCA Civ 472, at [9]:

*“...the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if they were a defendant advancing a timely round of resistance to summary judgment under CPR 24.2.”*

44. As regards the allegation that misrepresentations were made in writing in the share purchase proposal documents relating to Andean Mr. Sartori has raised a number of points in defence. First, he says these documents did not contain representations made by him or on his behalf but were made by Union Group entities. Secondly, he says they contained a “no representation clause”. Thirdly, he says they had an express exclusion of liability. Fourthly, he says that the statements complained of were believed to be true at the time they were produced. Fifthly, he contends that the claim is barred by limitation.
45. I do not propose to engage with the detail of each defence advanced save to say that it does seem to me that collectively they do raise a defence with a real, as opposed to fanciful, prospect of success. Of particular significance is the fact that the representations said to have been made in the proposal documents were principally forward looking. They provided a forecast of the future income to be derived from investment in Andean. In order to establish misrepresentation it would generally be necessary to show a lack of belief in their truth or a lack of reasonable grounds for such a belief (see, for example, Brown v Raphael [1958] Ch.636). The Claimants’ principal basis for contending there was nevertheless a misrepresentation appears to be an assertion that an infrastructure project in a developing country is inherently risky and there was no basis for expecting the stated rates of return. In my judgment, if this is the principal ground relied on, it provides very limited support, at best, for an allegation of fraudulent representation. Given the limited basis for the allegation, Mr. Sartori’s assertion that the information was believed to be true does, in my judgment, give rise to a defence with real as opposed to fanciful prospects of success. The same, in my judgment, applies to the issues of limitation that arise, given that the relevant cause of action accrued some 10 years prior to the claim form being issued. It may be that some extension of the limitation period could be secured under section 32 of the Limitation Act 1980 but the application of this provision will be heavily dependent upon what the Claimants could have uncovered exercising reasonable diligence. That remains a matter that will require disclosure and witness evidence.
46. As regards the oral misrepresentations alleged to have been made in 2014, Mr. Sartori denies having made any. The issue of whether any relevant statement was actually made will be dependent on oral evidence and cross-examination. There is a real (as opposed to fanciful) prospect of a successful defence on this basis quite apart from other grounds for resisting this claim, such as limitation.

47. The final set of misrepresentations said to have been made in late 2017 and early 2018 in the form of WhatsApp messages of Mr. Sartori and in May 2019, by the provision of a redacted sale and purchase agreement with Polaris, are also ones that, in my judgment, Mr. Sartori has a real prospect of successfully defending. On the Claimants' own case they became aware of the terms of the Polaris sale agreement in June 2019, well before they agreed to sell their shares. There is a more than fanciful prospect of a successful defence that they were therefore well aware that their shares had significant value before that sale took place and that any loss was not caused by reliance on any misrepresentation, even assuming one was made.
48. In the circumstances, I would have concluded that there was a defence to all of the claims advanced that had a real prospect of success.
49. I would also have concluded that the short period between the default judgment coming to Mr. Sartori's attention and the application to set aside that judgment of 13 days was not significant and therefore that the application was made promptly in the terminology of rule 13.3(2).
50. The Claimants rely upon the Court of Appeal decision in FXF v English Karate Federation Limited, *supra*, as imposing a requirement that Mr. Sartori would have to satisfy the three stage test for relief from sanctions expounded in Denton v TH White Limited [2014] EWCA Civ 906. Applying those tests, in my judgment, this was not a case of a serious failure to comply with the rules as to the filing of an acknowledgement of service or one in which there was no excuse for the failure to comply. The delay was a period of some two weeks during which Mr. Sartori was evidently having some difficulty in obtaining representation (one firm McDermott Will & Emery had been unable to act). His present solicitors acted promptly when they were appointed. As regards the overall circumstances and justice of the case I would have concluded, without hesitation, that it warranted the grant of relief from sanctions. The grant of default judgment would be a wholly disproportionate response to any failure involved. In particular the delay in filing an acknowledgment of service seems to have caused little prejudice to the Claimants given that the Second Defendant was only served on 13 October 2023 and the Third Defendant

appears not to have been served as yet. As a result there has been little delay to the overall progress of the claim.

51. For the reasons set out above I shall set aside the default judgment against Mr. Sartori and I shall make no order on the application to vary the order of HH Judge Pelling KC dated 23 October 2023. I am presently unconvinced that any order granting an extension of time for filing an acknowledgement of service or relief from sanction is actually needed but I will hear further submissions in this regard as well on any other consequential matters upon this judgment, unless these can be agreed.