Neutral citation number: [2024] EWHC 1785 (Comm)

Case No: CC-2023-MAN-000046

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester, M60 9DJ

Date: Friday, 24 May 2024

Before:
HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

- -

Between:

BRITISH INTERNATIONAL INVESTMENT PLC

Claimant

- and -
(1)
(2) SUNNY VARKEY
(3) VARKEY GROUP LIMITED

Defendants

- -
- -

MR ALFRED WEISS (instructed by **Addleshaw Goddard LLP**) appeared for the **Claimant/Applicant**
The Defendants/Respondents were not present or represented

- -

APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HODGE KC:

1. This is my extemporary judgment on the hearing of an application for summary judgment brought by British International Investments Plc ('**BII**'), as claimant (and applicant), against both defendants, Mr Sunny Varkey, who is an Indian national resident in the United Arab Emirates, and Varkey Group Limited, which is a company incorporated in the British Virgin Islands. I shall refer to the second defendant as '**VGL**'.

2. On this application, Mr Alfred Weiss (of counsel) appears for the claimant (and applicant). There is no attendance by or on behalf of either of the two defendants. Neither defendant has acknowledged service, appointed solicitors, or served any defence to the claim. Mr Weiss has told me that at no time have the defendants given any indication of any intention to attend this summary judgment hearing. I have checked the CE-File for this case before coming into court at 10.30 this morning and there is no relevant filing by or on behalf of either defendant. They have simply not engaged with these proceedings.

3. The Part 7 claim form was issued on 4 July 2023. The particulars of claim bear the same date. In summary, the first defendant has failed to meet his payment obligations pursuant to an agreement for the sale and purchase of shares and certain loan notes in GEMS Africa Limited, dated 18 February 2021, as amended by a deed of amendment dated 30 June 2021.

4. The claimant seeks to recover the outstanding sums due to it pursuant to that agreement for sale. The claimant (formerly known as CDC Group Plc, which is the name it bore at the date of the agreement) is the United Kingdom's development finance institution investing in businesses in Africa and Asia. GEMS Africa Limited is a private company incorporated at the Dubai International Finance Centre. The claimant was the seller, the first defendant the purchaser, and VGL the guarantor of the performance of Mr Varkey's obligations under the agreement for the sale and purchase of shares and loan notes in GEMS Africa. As I have indicated, no defence to the claim has ever been advanced.

5. Pursuant to the agreement, the first defendant agreed to pay a little over USD 500,000 to the claimant on 18 February 2021 as consideration for 500,000 unsecured convertible loan notes issues by GEMS Africa and held by the claimant. The first defendant agreed to pay a further sum of just over USD 1.5 million to the claimant on 31 August 2021 as consideration for 1.5 million convertible loan notes issued by GEMS Africa and held by the claimant. Those sums were duly paid in February and August 2021.

6. Under the terms of the agreement, the first defendant also agreed to pay an aggregate sum of just under USD 31.5 million plus interest, accruing at a fixed rate of 3.5% per annum from 1 January 2021 to the third completion date, as defined in clause 1 of the agreement, as consideration for just under 13,050,000 shares in the capital of GEMS Africa held by the claimant, and almost 13.75 million unsecured unconvertible loan notes issued by GEMS Africa and held by BII. Under the agreement, this consideration was left outstanding at the third completion date, with that amount constituting a loan deemed to be advanced to the first defendant by the claimant under the agreement, and subject to the terms set out in Schedule 1 to the agreement.

7. Under that schedule, the first defendant was obliged to make repayments of the loan in yearly instalments of around 20% of the commitment, plus interest, on certain specified dates, being 31 December in each of the years 2021 through to 2025. Pursuant to clause 21 of the agreement, the agreement and any non-contractual obligations arising out of or in connection with it are governed by English law. Pursuant to clause 22.1, the courts of England and Wales have non-exclusive jurisdiction to settle any dispute or claim arising out of or in connection with the agreement.

8. As I have indicated, both the first and second completion considerations were paid in February and August 2021. However, in breach of the agreement, the first defendant then failed to pay the first repayment instalment of the third completion consideration that was due on 31 December 2021. Schedule 1 of the agreement provided, at paragraph 10, that non-payment of any amount payable by the first defendant pursuant to any finance document (as defined), which included the loan, amounted to an event of default. However, under paragraph 10.3(b), no event of default was to occur if the failure to comply was capable of remedy, and was remedied within five business days of the lender giving notice to the first defendant.

9. The claimant wrote to the first defendant on 4 January 2022 indicating that the failure to pay the first repayment instalment of the third completion consideration was an event of default. The claimant asked for repayment of the amount due plus default interest by 11 January 2022. Payment was not made; and on 14 January 2022 the claimant wrote to the first defendant indicating that the full loan amount was accelerated. That made the full remaining loan amount, and all accrued interest, payable on demand. That was the effect of paragraph 10.14 of Schedule 1 to the loan agreement.

10. On 30 March 2023 the claimant sent the first defendant a formal demand notice pursuant to paragraph 10.14 of Schedule 1 to the agreement indicating that all outstanding sums due under the loan, together with both accrued and default interest, were immediately due and payable, with default interest continuing to accrue. A similar demand notice was sent to VGL on 14 April 2023. At that time, the total amount due and outstanding to the claimant was a shade under USD 32 million. In addition, the claimant was entitled to interest at the rate of 3.5% per annum, and also default interest at the rate of 8.5% per annum following the acceleration of the loan pursuant to paragraphs 6.2(a) and 6.3 of the loan agreement. No payment has been made directly by either the first defendant or VGL to the claimant following these demand notices.

11. As I have mentioned, pursuant to clause 22.1 of the agreement the claimant's right to take proceedings against either defendant in any other court of competent jurisdiction had not been precluded or limited to the extent permitted by the law of such other jurisdiction. Upon completion of the agreement, the first defendant had delivered to the claimant certain post-dated cheques by way of security in the event of non-repayment of the loan. In light of the first defendant's failure to repay the loan, the claimant sought to cash in those post-dated cheques, but these were not honoured. This led the claimant to commence enforcement proceedings against the first defendant in respect of those cheques in the United Arab Emirates.

12. As explained in one of the witness statements through those enforcement proceedings in respect of the cheques, the claimant has recovered a sum of Dirhams of the United Arab Emirates for which it gives credit in these proceedings.

13. As of December 2023, the claimant had recovered a total of just under AED 15 million (Emirati Dirhams) in respect of the cheques. Further sums were paid in December 2023; and the claimant is prepared to give credit for the sums recovered in respect of the cheques. The amount is a little over AED 48.5 million that was recovered in respect of the principal amount, equivalent to some USD 13.226 million.

14. The claimant seeks judgment against the first defendant for the total commitment of just under USD 32 million, less the sums recovered in respect of the cheques. It calculates the amount due as USD 18,731,857.81. It also seeks to recover interest pursuant to paragraph 6.2(a) of Schedule 1 to the agreement, calculated in the sum of USD 1,454,118.13. In addition, it claims to recover default interest pursuant to paragraph 6.3 of Schedule 1 to the agreement, calculated in the sum of USD 3,614,092.99 up to today, 24 May 2024.

15. Pursuant to clauses 10.1 and 10.2 of the agreements, VGL, the second defendant, provided a guarantee and indemnity to the claimant. The claimant claims to be entitled to judgment against VGL in respect of those sums pursuant to the guarantee and indemnity. Pursuant to clause 8.1 of the agreement, the first defendant was to procure that the guarantor would, within ten business days of demand, indemnify the lender (the claimant) against any cost, loss or liability incurred by the lender as a result of: (a) the occurrence of any event of default; (b) any failure by an obligor to pay any amount due under a finance document on its due date; or (c) the loan, or part of a loan, not being repaid in accordance with the notice of repayment given by the first defendant.

16. The claimant sent both defendants a letter dated 14 January 2022, headed "Notice of loan acceleration", that, amongst other things, gave notice of a demand for indemnification by both defendants pursuant to that provision. Further or in the alternative, the claimant says that the letter before claim dated 16 May 2023, sent to both defendants, also constituted a demand for indemnification within the meaning of clause 8.1. In addition to the money judgment which it seeks to recover, the claimant invites the court to declare that, pursuant to clause 8.1 of the agreement for the sale and purchase of the shares and loan notes, the first defendant shall, or shall procure that VGL shall, indemnify the claimant against any cost, loss or liability it incurs as a result of the failure to pay the first loan repayment instalment due on 30 December 2021 and/or the failure to remedy the non-payment by 11 January 2022.

17. Since the costs of enforcing the judgment sought by these proceedings are not yet ascertained, the court is invited to order that the determination of the amount of the indemnity is to be deferred, with ongoing permission for the claimant to apply for such a determination.

18. The matter comes before the court today on the claimant's application, issued on 22 September 2023, for summary judgment in the amounts, and for the relief, that I have identified.

19. The history of the proceedings is as follows: Having issued the claim form on 4 July 2023, the claimant secured an order of His Honour Judge Pearce on 17 July 2023 permitting service of the claim form and particulars of claim by the alternative method set out in that order. In summary, the agreement had provided for the defendants to appoint a service agent within this jurisdiction, but, in breach of the terms of the agreement, the defendants had failed to do so. It was on that basis that Judge Pearce made the order for service by an alternative method; namely, by sending the documents by email to two specified email addresses.

20. I am satisfied that the claim form and particulars of claim have been validly served on both defendants in accordance with the terms of that order. Although the order gave notice on its face, in bold type, of the right of any party affected to apply to vary or set aside the order by no later than 4.00 pm seven days after service of the order on the party making the application, no application to vary or set aside Judge Pearce's first order has ever been made.

21. Appreciating that a default judgment might be more difficult of enforcement in a relevant overseas jurisdiction, the claimant issued its present summary judgment application on 22 September 2023. In anticipation of that application being made, on 11th September 2023 the claimant had applied for, and obtained from Judge Pearce, a further order permitting service of its intended summary judgment application and supporting evidence by the same alternative method of serving them by email upon the two specified email addresses. Again, I am satisfied that service has been validly effected in accordance with the terms of that further order for service by an alternative method.

22. On 22 September 2023, the hearing of the summary judgment application was listed for hearing on 19 December 2023. However, shortly before that hearing, the parties agreed the terms of a consent order providing for the hearing to be adjourned, and the proceedings to be stayed, until 29 February 2024 to enable the parties to negotiate and try to settle the dispute by other means. That consent order was approved and reflected in an order of Judge Halliwell made on 19 December 2023 (and sealed on 13 January 2024). The hearing on 19 December 2023 in respect of the summary judgment application was vacated and was to be relisted as appropriate. The proceedings were stayed until 29 February 2024 so as to enable the parties to negotiate and try to settle the dispute by other means.

23. Paragraph 3 of the order provided that if no final agreement or settlement was reached, the claimant was to notify the court of the outcome no later than seven days after 29 February 2024, and to apply to the Listing Office to have the adjourned hearing re-listed for the first available date. In the event, no settlement was achieved; and, on 28 March 2024, on the claimant's application, the hearing of the claimant's summary judgment application was relisted for today, 24 May 2024. As I have mentioned, no-one has attended today on behalf of either of the two defendants.

24. I am satisfied that both defendants have been notified of this relisted hearing by way of a letter from the claimant's solicitors, Addleshaw Goddard LLP, sent by email to the two email addresses specified in each of Judge Pearce's orders, and also at two further email addresses, the significance of which is explained in the third of Mr Ashcroft's witness statements.

25. The original application for service of the claim form and particulars of claim by an alternative method was supported by the first witness statement of Mr Nicholas Mark Ashcroft, dated 12 July 2023. He is a solicitor and partner with Addleshaw Goddard LLP who are the solicitors representing the claimant. That witness statement is relied upon in support of the summary judgment application.

26. In addition, the claimant also relies upon a second witness statement of Mr Ashcroft, dated 25 September 2023, and a third witness statement of Mr Ashcroft, dated 8 December 2023 updating his earlier evidence and correcting certain errors contained within it. The claimant also relies upon the first witness statement of Ms Hannah Louise Nelson, dated 20 May 2024. She is a solicitor and managing associate with Addleshaw Goddard LLP. I have pre-read the evidence contained within all of those witness statements.

27. The test on an application for summary judgment is non-controversial. Pursuant to the Part 24 of the Civil Procedure Rules, the court may give summary judgment against a defendant on the whole of a claim or an issue if it considers that the defendant has no real prospect of succeeding on any defence, and there is no other compelling reason why the case or issue should be disposed of at a trial. I am satisfied in the present case that that test has been satisfied. I am satisfied that the claimant is entitled to judgment against each of the two defendants for the sums claimed in respect of both principal, interest, and default interest, on the basis that neither defendant has any real prospect of successfully defending the claim, and there is no other compelling reason why the claim should be disposed of at trial.

28. Mr Weiss has rightly raised a preliminary point that, pursuant to CPR 24.4, a claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgment of service or a defence, unless the court gives permission.

29. Mr Weiss has referred me to the commentary in the *White Book* at paragraph 24.4.3, which refers to a decision of Sir Francis Ferris, sitting as a deputy judge of the High Court, in the case of *Phillips v. Avena* [2005] EWHC 3333 (Ch). One of the points that the judge had to address in that case was the fact that there was no acknowledgment of service that had been filed. This was addressed at paragraphs 21 – 23 of the judgment. Sir Francis acknowledged that the applicants recognised that the time for acknowledging service was still running, and so the claimants might not apply for summary judgment unless the court gave permission. Sir Francis had no hesitation in giving such permission because it was clear that the respondent to the application had indicated that she had no intention of taking any further part in the proceedings. In those circumstances, Sir Francis took the view that there would be no benefit whatsoever, apart from inflicting delay on the personal representatives, if he were to decide to postpone the matter whilst the time for acknowledgment of service ran. He therefore exercised his discretion to proceed with the summary judgment application, notwithstanding that the time for filing an acknowledgment of service had not expired, and no such acknowledgment had been filed.

30. I am satisfied that that case provides authority for the court to give permission to proceed with an application for summary judgment even though the application has already been issued, as was the position in *Phillips v. Avena*. Although the point was not expressly addressed in that case, it seems to me that Sir Francis clearly rejected

any suggestion that might be made that permission to make an application for summary judgment needs to be given before the application is issued. In *Phillips v. Avena*, there was an extant application for summary judgment; and Sir Francis Ferris proceeded to determine that application even though time was still running for acknowledgment of service to be filed.

31. I consider it appropriate in the present case to give permission. It is clear that the defendants had no intention at any time of engaging with these proceedings. I am satisfied, on the evidence, that enforcement of any default judgment in any relevant overseas jurisdiction may be more difficult than enforcement of a judgment obtained on an application, such as the present, for summary judgment, which involves consideration of the merits of the claim. In those circumstances, I give permission to make this application. I have already indicated that I am satisfied, on the evidence, that the claimant is entitled to summary judgment against each defendant in the sums claimed.

32. So far as the application for declaratory relief is concerned, Mr Weiss has taken me to the helpful summary of the principles governing the court's exercise of its jurisdiction to grant declaratory relief provided by Foxton J in the case of *MMD Mining Machinery Developments Limited v. Lang* [2021] EWHC 3264 (Comm) at paragraphs 67 – 69.

33. I am satisfied that, in accordance with those principles, it is appropriate to grant the declaration sought. I am satisfied that the declaration will serve a useful purpose, and that there are special reasons why the declaration should be granted. I am satisfied that the legal basis for the declaration sought is present on the facts and law of the present case; and, in all the circumstances, it is appropriate to grant the declaratory relief sought.

34. There has so far been no challenge to either of Judge Pearce's orders providing for service of the claim form and particulars of claim, and then of a summary judgment application, by an alternative means. Mr Weiss has taken me to a number of authorities, beginning with the decision of Gross J in the case of *The Society of Lloyd's v. Tropp* [2004] EWHC 33 (Comm), which emphasise the centrality of the parties' bargain concerning the appointment of service agents.

35. I am satisfied that the method of service by email that was provided in each of Judge Pearce's orders, but supplemented by the addition of the two email addresses to which Mr Ashcroft has spoken in his third witness statement, have brought, and will bring, the contents of the documents that fall to be served to the attention of the defendant. I am satisfied that the defendants have not only been validly served, but that they are aware of both this claim, and the application.

36. Mr Ashcroft's third witness statement evidences that either the first defendant, or a user operating his email address, has even gone to the extent of downloading the application documents from Addleshaw Goddard's share-file site. The defendants have previously retained reputable City of London solicitors, Herbert Smith Freehills, to act on their behalf, although they have not placed themselves on the court record, and they have declined to accept service of any proceedings. The defendants have, on the evidence, also had the benefit of advice from an in-house lawyer.

37. I am satisfied, on the evidence, that the decision to file no acknowledgment of service or defence has been a deliberate decision taken for the defendants' perceived tactical advantage. I am satisfied that it is just to grant, not only permission to apply for summary judgment in the absence of the defendants filing any acknowledgment of service or defence, but that it is also appropriate to enter summary judgment; and also to provide, in the court's order, that the judgment should be served by an alternative method of service; namely, by email to the four relevant email addresses.

38. I am satisfied that it is appropriate to grant summary judgment so that enforcement of the judgment may take place, not only in the United Kingdom, but also in the United Arab Emirates and in the British Virgin Islands.

39. I am satisfied that there is no substantive defence whatsoever that has been advanced to this claim. The most that has been said in correspondence is that the defendants lack the liquidity to meet their payment obligations; but that is no good reason for the failure to pay; nor does it constitute a valid defence to the claim. The failure to repay the claimant the sums due to it has meant that those funds have not been available to invest in other development projects. There is clearly an event of default. The first defendant has been given an opportunity to remedy the default and has not done so. The claimant is clearly entitled to treat the entire loan as accelerated, which it has done. As guarantor of the first defendant's obligations, VGL is equally liable with it.

40. I am satisfied that the defendants have no real prospect of successfully defending the claim. I am also satisfied that there is no other reason, still less any compelling reason, why the claim needs to be disposed of at trial. I am satisfied that the terms of the revised order sought by the claimant are appropriate. I am satisfied that it is appropriate to grant the declaration sought, and to defer the determination of the amount of the indemnity, with ongoing permission for the claimant to apply for such a determination.

41. I am satisfied that it is just and expedient to grant permission, both retrospective and prospective, for all further documents to be served by the same alternative means as those in respect of which permission was granted in Judge Pearce's orders of July and September of last year, subject to the addition of the two further email addresses as indicated in Mr Ashcroft's third witness statement.

42. The defendants plainly consented to being served within this jurisdiction. It is wrong that they should be allowed to frustrate their agreement by their failure to appoint service agents, as they had agreed to do. There is very good reason for authorising service by an alternative means. I am satisfied that such service has resulted, and will continue to result, in the documents so served coming to the attention of the defendants.

43. So, for those reasons, I will make an order in the terms of the revised draft that appears at pages 238 – 240 of the hearing bundle. The amount of the default interest will be that set out at paragraph 31.3 of Mr Weiss's skeleton argument. That does, however, leave the question of costs. Subject to that, that concludes this extemporary judgment.

JUDGE HODGE: Yes, Mr Weiss.

MR WEISS: My Lord, I invite you to order that the defendants pay the claimant's costs of these proceedings; and, given the hearing has taken now one day or less than one day, to summarily assess those today.

JUDGE HODGE: Well I have seen the statement of costs. Let me just try and get that up.

The statement of costs is in the quite staggering sum of over £280,000. That is for a claim in which we have not even had an acknowledgment of service filed. I also note that the hourly rates are way in excess of the guideline hourly rates. In all those circumstances, it seems to me that it is an appropriate case to order a detailed assessment of the costs, with an interim payment on account.

MR WEISS: My Lord, yes. Can I just take instructions on the interim payment – what I would be invited to request?

JUDGE HODGE: Yes.

MR WEISS: My Lord, can I invite you to order that a payment on account, or an interim payment on account, be made of 60% of the costs? I would remind you when — All your observations were noted. This assessment will be proceeding under CPR 44.5, so it will be indemnity, presumption of **(inaudible)**.

JUDGE HODGE: Well I have not yet ordered that the costs should be paid on the indemnity, rather than the standard, basis.

MR WEISS: Oh, yes, my Lord. What I meant was you have granted the declaration ----

JUDGE HODGE: Yes.

MR WEISS: - that we are entitled to our costs, to indemnity in respect of our costs.

JUDGE HODGE: Yes.

MR WEISS: My understanding, therefore, is that CPR 44.5 would come into play. Perhaps I could just take you to it, my Lord.

JUDGE HODGE: Yes, of course.

MR WEISS: I will let you read it, my Lord; but you can see that there is a rebuttable presumption that they are payable on the indemnity basis. My Lord, you are right that you have not ordered that yet. That was going to be my next submission: that, given that rebuttable presumption, and, in fact, the circumstances of the case, where, for their own perceived tactical reasons, the defendants have chosen not to engage in the process, those costs should be payable on the indemnity basis.

If you are with me on that, then that would be something I would pray in aid for the figure of 60% for a payment on account of costs.

JUDGE HODGE: Yes. I am still concerned both at the hourly rates and the amount of time that has been spent on this. To some extent, I suspect that this is academic because if

you can recover back the full amount that is due, I think you will probably be lucky. What I am going to do is to order an interim payment on account of £100,000.

MR WEISS: Thank you, my Lord. And the basis ----

JUDGE HODGE: And that will be 14 days.

MR WEISS: Thank you, my Lord. And the basis of costs? In my submission, they should be on the indemnity basis for **(inaudible)**.

JUDGE HODGE: Well, again to some extent this may be academic because you will no doubt say that, to the extent that you do not recover the costs on a detailed assessment, you will be seeking to recover them under the indemnity.

MR WEISS: Yes, that will probably be our position.

JUDGE HODGE: Certainly the behaviour of both defendants in the present case has been outside the norm for litigation of this kind. In particular, there was an express agreement to appoint service agents with which the defendants have failed to comply; and that has resulted in additional costs being incurred in the matter. So I think that, even apart from the additional consideration that there is a contractual indemnity, it is appropriate to order the costs to be assessed on the indemnity basis here. There has simply been no proper engagement by the defendants with the claimant, even though they chose to appoint reputable City of London solicitors. As a result, additional costs have been incurred unnecessarily; and so I will direct that the costs be assessed on the indemnity basis.

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(This Judgment has been approved by HHJ Hodge KC)

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com