Neutral Citation Number: [2022] EWHC 1669 (Ch)

Claim No: BL-2021-002142

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Thursday, 9th June 2022

Before:

MASTER PESTER
(Remotely via Teams)

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Between:

GREENOV8 GLOBAL PLATFORMS LIMITED **Claimant**

- and -

JONATHAN GREEN **Defendant**

- -
- -

MR. TOLU ATANDA appeared for the Claimant

MR. JOSEPH RIGLEY Counsel, appeared for the Defendant

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APPROVED JUDGMENT

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MASTER PESTER :

1. This is an application dated 8 June 2022 for permission to rely on a further, a sixth, witness statement of Mr. Ekwuyasi. It is a very short witness statement. It is three pages and it exhibits some bank statements, which we will be looking at.

2. It is a question for the court as to whether or not to grant this application. It seems to me that it is not actually opposed by the defendant, who essentially tells me that it is a matter for me, which I take into account. It is certainly late, but there is an explanation given as to why this evidence has been tendered late, and it is often better for the court to see the full picture rather than making a judgment on a false basis.

3. For all these reasons it seems to me appropriate, as a matter of my discretion, to simply admit the sixth witness statement of Mr. Ekwuyasi, together with the accompanying exhibit.

(***Proceedings continued , please see separate transcript***)

4. This is my judgment on the application for security. I have before me an application dated 19 May 2022 for an order pursuant to CPR Part 25.12 that the claimant give security for the defendant's costs of these proceedings, up to and including the exchange of witness statements, in the sum of £180,000.

5. The claimant "Greenov8" is a Nigerian company and I understand it is an IT company. The defendant Mr. Green is an individual resident in England who is a director of an English-registered company "JFNX". He is also a 1% shareholder in JFNX.

6. Greenov8's claim was issued on 22 November 2021. It seeks damages against Mr. Green for US$1 million plus interest and costs (or the English sterling equivalent). The claim relates to a foreign currency exchange transaction that was entered into by the parties (when I say "the parties" I mean Greenov8 and JFNX) on or around 31 August 2021 to exchange Nigerian naira for US dollars.

7. Very much by way of summary, Greenov8 says that Mr. Green fraudulently represented to it that JFNX had US$1.1 million that it would immediately remit to in exchange for 522 million naira. The claim, as I have said, is that the representation was made fraudulently.

8. In his defence, and again this is very much by way of summary only, Mr. Green denies making the alleged representation. In any event, he says that there could have been any reliance by Greenov8 on the alleged representation is entirely fanciful.

9. In terms of procedure steps, Greenov8 applied for and obtained an interim freezing injunction without notice on 24 November 2021. On 20 December 2021 the freezing injunction was discharged, albeit on terms that Mr. Green provided various undertakings.

10. A Costs and Case Management Conference was heard before me on 7 June 2022. There was insufficient time to hear the application for security for costs, and so the application is being heard today.

11. In addition to the parties' statements of case and the evidence in relation to the freezing injunction, I have the following evidence before me: that which is set out in part C to the application for security for costs, a fifth witness statement of Mr. Femi Ekwuyasi, who is the CEO of Greenov8, dated 31 May 2022, and a sixth witness statement of Mr. Ekwuyasi exhibiting certain bank statements. I should say that the sixth witness statement was obviously served late and out of time and I required an application to be made for the court's permission to rely on it. That application, whilst not consented to, was not opposed by Mr. Green and it seemed to me it was sensible to allow the application and allow the sixth witness statement of Mr. Ekwuaysi to be in.

12. In terms of representation, the defendant is represented by counsel. Greenov8 is technically in person. I was addressed today, with great courtesy and considerable skill, by Mr. Tolu Atanda, who is the company secretary and a Nigerian (albeit not English) qualified lawyer. He is authorised to appear on behalf of the company. I am allowing him to address not because he is a Nigerian lawyer, but because he is the company secretary and someone must appear on behalf of the corporate claimant. I believe that a similar course was followed before Bacon J at the without notice hearing, although Greenov8 also had the assistance of a direct access barrister.

13. I should stress that it seems to me that, technically, the claimant is very much in person. The rules of the CPR apply just as much to litigants in person as to any represented litigant. However, the CPR rule 3.1A provides that when the court is exercising any powers of case management it must have regard to the fact that at least one party is unrepresented.

Legal principles

14. The principles governing the grant of security for costs are well-known. CPR Part 25.13(2) sets on the various conditions, which are sometimes referred to as gateways, at least one of which need to be established before the discretion arises as to whether security for costs should be awarded. If one or more of the conditions are established then the court has a discretion which it must exercise, having regard to all the circumstances of the case, and being satisfied that it is just to do so on the particular facts before it.

Analysis

15. On behalf of Mr. Green it was submitted that there were at least two gateways that are established and not seriously disputed on the facts of the present case. First, Greenov8 is out of the jurisdiction. It is a Nigerian company, it is not resident in a state governed by the 2005 Hague Convention, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act. Secondly, Greenov8 is a company and there is "reason to believe that it would be unable to pay Mr. Green's costs if ordered to do so".

16. I have to say it does not seem to me that it is seriously in dispute that either gateway is established. We have here a Nigerian company. It is therefore out of the jurisdiction. Nigeria is not bound by the 2005 Hague Convention. It also seems to me, on the claimant's own statements, that Greenov8 is plainly impecunious. Its own evidence in the form of the recently exhibited bank statements tends to confirm that view, although I do not have the benefit of any actual accounts, which is what one might often like on

this point. It was not seriously challenged by the claimant that it was an impecunious company.

17. It seems to me the much more important question in this case is the question of discretion and how it should be exercised on the facts of this case.

18. I start by noting that both parties spent much of their submissions, both written and oral, seeking to persuade me that the merits pointed either in favour of granting security, or indeed in favour of refusing security, by reference to the merits of the proceedings.

19. I remind myself as to the way it is put in the notes to the White Book:

> "An application for security for costs should not be made the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits the case unless it can be clearly demonstrated one way or another that there is a high degree of possibility of success or failure. …"

20. There are various authorities set out for that proposition including the case of *Al-Koronky and v Time Life Entertainment Group Limited* [2006] EWCA Civ 1123.

21. It is also said that a claimant will not be required to provide security for costs where at the time of the application the claim appears "highly likely" to succeed. Despite the parties' invitation for me to get involved in the merits, I am going to decline this invitation. I hear very much what is said on behalf of Mr. Green as to why it said that it is, frankly, improbable that the representation was ever made. Indeed it is suggested that looking at the pleaded case in many ways it can be said that no proper representation is pleaded at all. It is also said that it is very unlikely that reliance can be established by the company.

22. I hear what is said, but again, I would have to, it seems to me, take into account, as it was pointed out to me, that there has been no application for summary judgment. Also, the view of Mrs Justice Bacon, admittedly on a without notice hearing at an early stage, and only hearing one side of the argument, was there was at least a good arguable case.

23. It does seem to me, without getting too much into the facts on this *ex tempore* judgment that I am now giving, on any view, there is 500 million naira missing. Neither of the parties before me knows quite what has happened to it. Of course, again I am not forgetting that, as the defendant kept repeating, I should not conflate the position between JFNX and Mr. Green. Counsel for Mr Green says this is nothing to the point when it comes to assessing the case against him. However, as I pointed out in argument, ultimately it has not been necessary to evaluate the merits of the overall claim when looking at the defendant's application for security for costs, because what I am considering is whether the claimant's claim appears "highly likely" to succeed, in which case save the claimant would not be required to provide security for costs.

24. Having heard both parties, and what they say on the merits, on no view can it be said the claim is highly likely to succeed. Therefore, I do not think it is necessary to say anything more about the merits.

25. Next, one of the points advanced by Greenov8 is the question of stifling. Again, looking at the notes in the White Book, what is said on that is that if the effect of an order for security for costs would be to prevent the respondent to application from continuing its claim, then security should not be ordered. The authority for that is the Supreme Court decision of *Goldtrail Travel Limited v Aydin* [2017] UKSC 57, per Lord Wilson at [12].

26. However, the burden lies on the respondent to an application for security for costs to show, on the balance of probabilities, that the effect of an order would be to stifle the claim – per Lord Wilson at [15] and [23]. As Lord Wilson said, at [23]:

> "In this context the criterion is: "Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?"

27. To discharge that burden, the claimant needs to show that it cannot provide security and cannot obtain appropriate assistance to do so. The court will expect the claimant to be full and frank in relation to these matters.

28. Turning to the decision in *Al-Koronky and v Time Life Entertainment* [2005] EWHC 1688 (QB), it was said as follows:

> "… it is necessary for the claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it more likely than not." (at [31])

29. I was also taken to the recent authority of *Gama Aviation v Taleveras Petroleum Trading* [2019] Costs Law Reports 497, especially at [45] – [48], where relevant extracts from *Goldtrail*, to which I have referred, were again cited. Particular analysis was given as to the position of a corporate respondent.

30. And what is the evidence? I was taken to some correspondence before the application for security for costs was actually issued. Again having regard to the time and just because of this *ex tempore* judgment, I will just jump to the key correspondence. On 14 April 2022 Stephen Elam, a solicitor acting for the defendant, wrote to Mr. Atanda, stating as follows:

> "Let me address your questions in relation to security for costs. On your first question you appear to be conflating disclosure obligations and information requested in the context of security for costs. I have underlined the word requested as we have not asserted your client is obliged to provide us with copies of its bank statements to show its financial position. If your client does not want to provide that information, that is fine; it is your client's choice. However, if, say, in the context of a security for costs application made by our client your client then sought to argue that an order for security should not be made against it

> because it would operate to stifle its claim, it would be required to provide evidence to prove that. On that point you may wish to look at the *Al-Koronky v Time Life* decision that deals with the evidence claimants facing a security application are required to provide in those circumstances."

31. That was 14 April 2022. I have jumped to that, but there was earlier correspondence of February, March and earlier in April, where the defendant's solicitors were certainly signalling that the claimant, should it wish to raise an argument about stifling, would need to provide evidence. There was no evidence until the late witness statement of Mr. Ekwuyasi, which I have admitted today.

32. If we look at that, he explains that banks statements were initially simply provided to the court on the morning of the hearing of the CCMC, two days ago, but he now provides an explanation for the lateness in his witness statement. He says that since the claimant's initial loss of $US1.1 million, the Nigerian Economic and Financial Crimes Commission has been investigating the circumstances in a criminal probe and, because of that, there was a need to seek police clearance to share the claimant's bank details with the defendant. This clearance was only provided on 6 June 2022, which was Monday this week.

33. He then goes on to exhibit various bank accounts, which show very minimal amounts remaining in the company's accounts, in both naira and US dollars.

34. What he then says at paragraph 14 is this:

> "This is again clear evidence that the claimant's claim would be stifled if an order for security for costs is made. I have also sought other means of funding should the court make this order. There is not any, and in the current circumstances no bank is willing to provide the claimant with a loan, and there are no investors or shareholders willing to provide funding given the situation of the debt owed to existing investors due to the loss of $1 million. As CEO of the claimant, I have had to take a 90% pay cut, reduce staff and overheads and actively pursue outstanding invoices and agree payment plans with creditors. In the circumstances any order for costs will stifle the claim. This is a claim that is currently funded by marginal profits being realised after paying these commitments. It is the reason we have been unable to employ solicitors. We would not want this situation to bar our access to justice and recovery of the damages being pursued and indeed the gradual regrowth of the claimant as a going concern."

35. Then he says that, obviously, if the claimant's money was repaid there would be enough money to meet the defendant's security for costs.

36. I have looked at this. It seems to me that this does not surmount the test as set out in the authorities. It seems to me this is not full, frank, clear and unequivocal evidence. It is an assertion by way of witness statement unsupported by evidence. I do not know what the investors were told. I do not know when they were approached. It seems

somewhat implausible that nothing at all could be raised by way of security. I do not know whether the creditors mentioned were approached to see whether they would put up funds for the action, or whether Mr. Ekwuyasi himself might be willing and have an ability to provide funds. It is one thing to say you have taken a 90% pay cut, but another to say that you have no savings of any sort. There is no evidence before the court on the point.

37. Whenever a claim of stifling is made, the court looks at the matters carefully. It does not seem to me that there is enough here for the court to refuse security for costs on the ground of stifling.

38. Also, I did take note of the fact that Mr. Atanda in submission said that the claimant would not be able to pay anything "immediately". That is a different matter because in this judgment I am only deciding the matter of principle, whether there should be any security for costs. Questions as to quantum and timing will be decided once I have heard matters in a bit more detail from the parties. That is as to stifling.

39. As a separate point, sometimes it is said that if it can be shown that the impecuniosity was actually caused by the defendant's actions then that may be a reason for refusing security for costs. Again, one has to look at that quite carefully because in many cases, where the facts are disputed, that is to assume in the claimant's favour that the claimant will be successful at trial and that one cannot be confident that the impecuniosity was caused by the defendant's actions until the trial has been held. That leads one, it seems to me, straight back into the merits, and I have already said it does not seem to me that this is the sort of case where the claimant is highly likely to succeed.

40. In any event, it seems to me the matter is murkier because the recently produced bank statements appear to show that considerable sums of money float into and out of the claimant's bank accounts in both naira and dollars post the payment of the 520 million naira in August 2021 to JFNX.

41. I hear what Mr. Atanda says, and this is said by way of submission rather than actually being evidence. He says that the fact that a fraud that has been perpetrated on the company (as he would put it) is well-known in Nigeria and that is affecting the reputation of the company and its business prospects. That may be true, but it seems to me I do not have adequate evidence to be confident of that. Again, I am very conscious that the claimant is not represented by English lawyers, but the point was flagged up, and fairly flagged up, by the defendant's solicitors, not least in their email of April 2022, so the point cannot be said to have been completely sprung in surprise on the claimant. Nor does the claimant submit to me that "We have now looked at the authorities. We really do need further time. Could you adjourn this hearing so we can put in further evidence?" Again, that was not the way the matter was put.

42. It seems to me one goes back to what is just in the circumstances. On the one hand, you have a claimant with an arguable claim in relation to a missing US$1.1 million. I take into account the fact that it has a contractual claim against JFNX but that contractual claim would be subject to Nigerian law and a Nigerian arbitration clause. The claimant, as it is entitled to, has asserted that it has another cause of action outside the arbitration agreement which allows it to sue the director Mr. Green directly for what it says is a fraudulent misrepresentation. But if it does that, it appears in the English court and we have our procedural rules, one of which is that impecunious companies

are typically, as a starting point, expected to provide security for costs. On the other hand, you have an individual where, it seems to me, it would be a grossly unfair to him were he to turn out to be successful at trial to have no means of recovering any costs.

43. Again I remind myself that, as is sometimes said, once one is satisfied that the claimant company is insolvent, that there is jurisdiction to order security for costs and that ordering security will not stifle the claim, it is normally appropriate to order security: see *Premier Motorauctions Ltd v PricewaterhouseCoopers LLP* [2018] 1 WLR 2955 (Court of Appeal), at [37]. Here, we have an impecunious company, and for the reasons given, I do not believe that the claimant has begun properly to establish that the giving of security would stifle the claim.

44. For all these reasons, it seems to me appropriate as a matter of principle that I should order security for costs to be paid.

45. I appreciate I have not said very much about the other gateway which is that this is a Nigerian company. I have not said very much about it because it seemed to me that if that was the only gateway that was established we would be in a very different factual position. What often happens in that case is that the additional security that is ordered is calculated by reference to the additional costs of seeking to enforce any eventual English judgment in the foreign jurisdiction. That may be a much more modest sum than all costs of the proceedings and I do not have any evidence as to what the costs of bringing such a claim for enforcement in Nigeria would be. Had that been the only gateway, no doubt the appropriate quantum of security would have been quite different.

46. In conclusion, for all these reasons, it does seem to me that this is a proper case where I should order security for costs, for the reasons I have sought to set out.

(*Proceedings continued, please see separate transcript*)

This judgment has been approved by Master Pester.