Neutral Citation Number: [2019] EWHC 30 (Comm)

Case No: CL-2018-000276

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 15/01/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

- -

Between :

(1) HSBC BANK PLC **(ACTING IN ITS CAPACITY AS AGENT)** **(2) BANCO BRADESCO S.A.** **(ACTING IN ITS CAPACITY AS SECURITY AGENT)** **(3) AB SVENSK EXPORTKREDIT (PUBL)**	**Claimants**
- and –	
(1) RONDÔNIA TRANSPORTES CAYMAN **(2) RONDÔNIA TRANSPORTES LTDA** **(3) INTEGRAÇÃO TRANSPORTES CAYMAN** **(4) INTEGRAÇÃO TRANSPORTES LTDA**	**Defendants**

- -
- -

James Hatt (instructed by **Norton Rose Fulbright**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing date: 5 October 2018
Further application: 12 November 2018

- -

Approved Judgment

.....

Mr Andrew Henshaw QC :

(A) INTRODUCTION

1. The Claimants apply, pursuant to an application notice dated 9 July 2018, for summary judgment in respect of sums said to be due under two Facility Agreements ("***the Facility Agreements***") each dated 13 February 2012, relating respectively to:

    i) a loan facility ("***the Rondônia Loan***") entered into by (among others) the First Claimant and the First and Second Defendants, in respect of which the Claimants claim a principal sum of US$19,307,281.85 together with interest, costs and expenses; and

    ii) a loan facility ("***the Integração Loan***") entered into by (among others) the First Claimant and the Third and Fourth Defendants, in respect of which the Claimants claim a principal sum of US$11,025,335.24 together with interest, costs and expenses.

2. Each of the Facility Agreements, which I shall refer to respectively as "***the Rondônia Facility Agreement"*** and "***the Integração Facility Agreement"***, was amended and restated by an Amendment and Restatement Agreement dated 7 September 2015.

3. The Claimants' application is supported by the first and second witness statements of Charlotte Jane Suzanne Winter, a solicitor in the firm Norton Rose Fulbright LLP who act for the Claimants in this case. Her witness statements dated 9 July 2018 and 1 October 2018 exhibit the relevant documents, explain the facts, and provide details of how the Claimants' claim has been calculated.

4. The Rondônia Loan and the Integração Loan arise out of the award by the Municipality of Manaus, Brazil of concessions for the operation of passenger buses to the Second and Fourth Defendants. The First Defendant is a wholly owned subsidiary of the Second Defendant incorporated for the purpose of purchasing the necessary buses from the Volvo Group and leasing them to the Second Defendant. The Third Defendant is a wholly owned subsidiary of the Fourth Defendant incorporated for the purpose of purchasing the necessary buses from Volvo and leasing them to the Fourth Defendant.

5. Based on the evidence before the court, and in the absence of any engagement by the Defendants with the proceedings, the Claimants seek summary judgment. The test to be applied on an application for summary judgment, so far as relevant to this application, is that:

i) the court may give summary judgment against a defendant where it considers that "*that defendant has no real prospect of successfully defending the claim or issue*", and there is no other compelling reason why the case or issue should be disposed of in a trial: CPR 24.2 (a)(ii);

ii) a "*real prospect*" means something which is less than probable but more than fanciful and more than merely arguable: see *International Finance Corp v Utexafrica Sprl* [2001] C.L.C 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; White Book note 24.2.3; and

iii) although the court will not conduct a mini trial, the claimant's case must carry some degree of conviction; the court is not required to accept without question any assertion a claimant makes and may reject it if it is inherently implausible or not credible: see *Calor Gas Limited v Easygas UK Limited & Another* [2004] EWHC 3041 (Ch) Etherton J, paragraph 25; *National Westminster Bank Plc v Daniel* [1993] 1 WLR 1453, [1994] 1 All ER 156; White Book note 24.2.5.

(B) PROCEDURAL HISTORY

6. The evidence shows that the claim form and Particulars of Claim were issued on 26 April 2018 and served on 27 April 2018, on behalf of the First and Second Claimants. No acknowledgment of service or Defence has ever been filed or served. Although the Defendants have apparently engaged in discussions with the Claimants' representatives since the proceedings were served on them, they have not engaged with the proceedings.

7. At the hearing on 5 October 2018, the First and Second Claimants were represented by counsel and solicitors. The Third Claimant was not yet a party. None of the Defendants was present or represented. I therefore considered whether it was appropriate to proceed with the hearing in their absence, taking account by analogy of the factors identified by the Court of Appeal in *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168, [2001] 2 Cr. App. R. 11 at § 22.5.

8. The evidence presented showed that:

i) the proceedings were served on the Defendants on 27 April 2018 at the address of Law Debenture Corporate Services Limited ("***Law Debenture***"), which was appointed under the Facility Agreements as agent for service of process in relation to any proceedings before the English court in connection with each of the Facility Agreements;

ii) none of the Defendants filed an acknowledgment of service or defence within time, or at all;

iii) the Claimants' application for summary judgment (together with the evidence in support) was on 12 July 2018 served on the Defendants at the address of Law Debenture as agent for service of process under each of the Facility Agreements;

iv) a copy of the application and supporting evidence was also sent by email to email addresses which the Claimants held on file for the First and Second Defendants;

v) notice of the Claimants' plans to fix a summary judgment hearing and inviting the Defendants to liaise in fixing a mutually convenient hearing date were sent on 27 July 2018 by letter to the Defendants at the address of Law Debenture as agent for service of process under each of the Facility Agreements, and by email to email addresses which the Claimants held on file for the First and Second Defendants;

vi) no response having been received from the Defendants, on 31 July 2018 the Claimants proceeded to fix a hearing date of 5 October 2018; and

vii) on 1 August 2018 notification of the hearing date of 5 October 2018 was given to the Defendants by letter at the address of Law Debenture as agent for service of process under each of the Facility Agreements, and by email to email addresses which the Claimants held on file for the First and Second Defendants.

9. At the hearing on 5 October 2018, I asked counsel for the First and Second Claimants whether there had been any more recent contact with the Defendants. Counsel informed me that, whilst there had been some 'without prejudice' correspondence some weeks previously, there had been no indication that the Defendants wished to seek an adjournment of the hearing, nor any open indication of any wish on the part of the Defendants to defend the proceedings.

10. In these circumstances, I was satisfied that:

i) the Defendants had been given sufficient notice of the hearing and had had ample opportunity to attend and/or be represented at it;

ii) there was no reason to believe that an adjournment would be likely to result in the Defendants attending the hearing at a later date;

iii) there was no reason to believe that any of the Defendants wished to be represented at the hearing;

iv) the Defendants had voluntarily waived their right to appear or to be represented at the hearing, and were voluntarily absent; and

v) although the claims are for significant sums of money, there was a public interest in the matter proceeding without further delay.

11. I therefore indicated that I would proceed with the hearing, and asked counsel for the First and Second Claimants to ensure that the court was made aware, so far as possible, of such points as the Defendants might reasonably have been expected to take had they been present or represented at the hearing. I am satisfied that this was done, and at the hearing on 5 October 2018 counsel for the First and Second Claimants also took me carefully through the transaction documents and other relevant evidence.

12. Under CPR 24.4(1) a claimant may not apply for summary judgment until the defendant has filed an acknowledgment of service, or a defence, unless the court gives permission under CPR 24.4(3). White Book Note 24.4.3 indicates that "*If, after service of the particulars of claim, no acknowledgment of service or defence is filed the claimant should, before seeking the court's permission under (3) above…, consider whether they*

can obtain a default judgment (as to which see Pt 12)." The Claimants here have already considered that possibility. They explained in their skeleton argument that, whilst they considered themselves entitled to default judgment, they would nonetheless prefer to obtain a summary judgment (in particular declaratory relief) for the purpose of enforcing their judgment in Brazil. In my judgment this is an appropriate case for consent to be given to an application for summary judgment, and I give such consent.

13. Having reserved judgment following the hearing on 5 October, I invited further submissions on a question relating to the First Claimant's title to sue. This led to the Claimants issuing an application filed and served in November 2018 to add the Third Claimant as a party, with a request that I deal with that application on the papers. I deal with these matters in section (E) below.

(C) THE FACILITY AGREEMENTS

14. The parties to the Rondônia Facility Agreement as originally executed were the First Claimant (as Lender, Arranger and Agent), HSBC Bank Brasil S.A. – Banco Múltiplo (as Security Agent), the First Defendant (as Borrower) and the Second Defendant (as Guarantor).

15. The parties to the Integração Facility Agreement as originally executed were the First Claimant (as Lender, Arranger and Agent), HSBC Bank Brasil S.A. – Banco Múltiplo (as Security Agent), the Third Defendant (as Borrower) and the Fourth Defendant (as Guarantor).

16. The loans were transferred to the Third Claimant, AB Svensk Exportkredit (PUBL) ("***SEK***"), on 28 March 2012, and SEK is stated to be the Lender under the Facility Agreements pursuant to Amendment and Restatement Agreements dated 7 September 2015.

17. The Second Claimant succeeded HSBC Bank Brasil S.A. – Banco Múltiplo as the Security Agent under both Facility Agreements with effect from 1 July 2016, pursuant to clause 26.12 of the Facility Agreements.

18. Each of the Facility Agreements includes the following material terms.

19. Clause 1.1 sets out various relevant definitions, including the terms "*Affiliate*" (i.e. subsidiary or holding company), "*Borrower Account*", "*Business Day*", "*Debt Service Instalment*" (i.e. the amount of principal, interest and other sums due every six months), "*Default*", "*Event of Default*" (defined by reference to clause 23), "*Fixed Rate*" (i.e., the interest rate of 4.26% applicable to all loans outstanding)**,** "*Interest Period*" (in effect, a six month period), "*Obligor*" (i.e., each of the four Defendants), "*SEK Break Costs*", and "*Total Commitments*" (i.e., US$27,930,513.00 in the case of the Rondônia Loan and US$17,509,394.00 in the case of the Integração Loan); as well as the further definitions referred to below.

20. By clause 6.1, the Borrowers were obliged to repay the loan in 18 equal semi-annual instalments.

21. Clause 10.3 provides for interest at the Default Interest Rate to be payable on any unpaid amount payable under a Finance Document. As to the terms used in this clause:

i) the "*Default Interest Rate*" is defined as a rate determined by the Lender as the higher of either LIBOR + 1% or 1% above the rate that would have been payable for a loan made under the Facility Agreements in the currency of the overdue amount;

ii) "*Finance Document*" is defined as including the relevant Facility Agreement itself, the Amendment and Restatement Agreement, the Cash Collateral Account Agreement and any other Security Document; and

iii) the "*Security Documents*" are defined as the Borrower Share Mortgage, the Concessionaire Quota Pledge, the Borrower Account Security, the Cash Collateral Account Agreement, the Fiduciary Assignment Agreement, the Vehicle Mortgage, the Direct Agreement, the Borrower Promissory Note and the Guarantor Promissory Note (each of which is itself defined in clause 1.1, except for Guarantor Promissory Note, which is defined in clause 6.2.2(i)).

22. Clause 17.3 provides that the First and Third Defendant shall pay the amount of all costs and expenses (including legal fees) incurred in connection with the enforcement of or the preservation of any rights under any Finance Document.

23. Clause 18 sets out the Second and Fourth Defendant's guarantee and indemnity. In particular, clause 18.1 provides that:

> "The Guarantor irrevocably and unconditionally:
>
> 18.1.1 guarantees to each Finance Party punctual performance by each Borrower of all that Borrower's obligations under the Finance Documents;
>
> 18.1.2 undertakes with each Finance Party that whenever a Borrower does not pay any amount when due under or in connection with any Finance Document, the Guarantor shall immediately on demand pay that amount as if it was the principal obligor …"

24. "*Finance Party*" is defined as the Agent, the Security Agent, the Arranger or a Lender.

25. Clause 21.3.2 provides that each Defendant shall ensure that the amount standing to the credit of the Borrower Account will be at any time (and in any event no later than three Business Days before the end of an Interest Period) at least equal to the Debt Service Instalment payable on the last day of the Interest Period.

26. Clause 23 sets out the Events of Default. These include failing to pay any amount payable when due (clause 23.1):

> "An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless:
>
> [23.1.1] its failure to pay is caused by:
>
> (i) administrative or technical error; or

> (ii) a Disruption Event; and
>
> [23.1.2] payment is made within three (3) Business Days of its due date"

and failing to remedy a breach of any provision of the Finance Documents within 10 days of notice from the First Claimant (clause 23.3):

> "[23.3.1] An Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause 23.1 (*Non-payment)* and Clause 22.20 *(Insurance)).*
>
> [23.3.2] No Event of Default under Clause 23.3.1 will occur if the failure to comply is capable of remedy and is remedied within ten (10) Business Days of the earlier of (i) the Agent giving notice to the Borrower and (ii) the Borrower becoming aware of the failure to comply."

27. Clause 23.22 provides that on and at any time after the occurrence of an Event of Default:

> [23.22.1] the Agent [the First Claimant] may, and shall if so directed by the Majority Lenders, by notice to the Borrower:
>
> (a) cancel the Total Commitments whereupon they shall immediately be cancelled;
>
> (b) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable;
>
> (c) declare that all or part of the Loans be payable on demand, whereupon they shall immediately become payable on demand by the Agent on the instructions of the Majority Lenders.
>
> [23.22.2] The Security Agent [the Second Claimant] may, and shall if so directed by the Majority Lenders, enforce its rights under the Security Documents."

28. Clause 26.1 of each Facility Agreement provides:

> "**26.1 Appointment of the Agent**
>
> [26.1.1] Each of Finance Party (other than the Security Agent) appoints the Agent to act as its agent under and in connection with the Finance Documents.
>
> [26.1.2] Each other Finance Party (other than the Security Agent) authorises the Agent to exercise the rights, powers, authorities and discretions specifically given to the Agent under

> or in connection with the Finance Documents together with any other incidental rights, powers, authorities and discretions."

29. By clause 26.4 of each Facility Agreement:

> "Each other Finance Party irrevocably appoints the Security Agent as its attorney-in-fact, according to article 684 of the Brazilian Civil Code, with special powers to represent it in the Security Documents, with full power to receive security interest on behalf of the Finance Parties, to execute, deliver and enforce any and all Security Document to which it is a party on behalf of the Finance Parties. The Finance Parties hereby irrevocably authorize the Security Agent to take action on its behalf under the provisions of the Security Documents to which they are a party and any other instruments and agreements referred to therein, and to exercise such powers and to perform such duties thereunder, as are specifically delegated to or required of the Security Agent by the terms thereof and such other powers as are reasonably incidental thereto. The Security Agent may perform any of its duties hereunder by or through its officers, directors, agents or employees."

30. Clause 26.8 is headed "Majority Lenders' instructions", and at 26.8.5 states:

> "Neither the Agent nor the Security Agent is authorised to act on behalf of a Lender (without first obtaining that Lender's consent) in any legal proceedings relating to any Finance Document. This clause 26.8.5 shall not apply to any legal proceeding relating to the perfection, preservation or protection of rights under the Security Documents or enforcement of the Transaction Security or Security Documents."

31. By clause 26.12.1, the Security Agent may appoint one of its Affiliates as successor by giving notice to the other Finance Parties and the Borrower. By clause 26.12.6, any successor and the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

32. Clause 29 is headed "*Payment Mechanics*". Clause 29.1 provides:

> "**29.1 Payments to the Agent**
>
> 29.1.1 On each date on which an Obligor or the Concessionaire or a Lender is required to make a payment under a Finance Documents, that Obligor or Concessionaire or Lender shall make the same available to the Agent (unless a contrary indication appears in a Finance Document) for value on the due date at the time and in such funds specified by the Agent as being customary at the time for settlement of transactions in the relevant currency in the place of payment.

> 29.1.2 Payment shall be made to such account in the principal financial centre of the country of that currency with such bank as the Agent specifies."

33. Clause 38 provides that:

> "The construction, validity and performance of this Agreement and all non-contractual obligations (if any) arising from or connected with this Agreement shall be governed by the laws of England."

34. By clause 39.1, the Defendants irrevocably submitted to the jurisdiction of the English court, and agreed that the Finance Parties may take proceedings against them in the courts of any country which may have jurisdiction to settle any disputes (including claims for set-off and counterclaims) and enforce any rights which may arise under or in connection with the agreement *"including the courts of England and Wales to whose jurisdiction the Borrower irrevocably submits"*; and that the Finance Parties may take concurrent proceedings in any number of jurisdictions.

35. Schedule 2-A clauses 2.3 and 7.14.1 set out conditions precedent for the initial utilisation of the loan, including evidence that the security expressed to be made by the Security Documents had been created and perfected and was in full force and effect.

36. Schedule 8 sets out the Security Agency Provisions. By paragraph 2, it is agreed that the Second Claimant shall hold the Security Property (a term defined in clause 1 as including the benefit of the undertakings in any Security Document) in trust for the benefit of the Finance Parties. By paragraph 8, the Second Claimant shall have all the rights of a gratuitous trustee in England.

37. The evidence shows that the following Security Documents were executed:

Rondônia Loan

Security Document	**Parties**	**Date**
Equitable Mortgage over Shares in the First Defendant (i.e. the Borrower Share Mortgage)	Security Agent, D2	13/2/12
Quota Pledge Agreement (i.e. the Concessionaire Quota Pledge)	Security Agent, D2, Assis Gurgacz, Rondônia Comèrcio e Extração de Minérios Ltda	13/2/12
Charge over Cash Deposit and Deposit Account (i.e. the Borrower Account Security)	Security Agent, D1	7/9/15
Cash Collateral Account Agreement	Security Agent, D2	13/2/12, amended 7/9/15
Fiduciary Assignment Agreement	Security Agent, D1, D2	13/2/12
Fiduciary Property Agreement (i.e. the Vehicle Mortgage)	Security Agent, D1, D2	13/2/12

Direct Agreement	C1, Security Agent, D1, D2, Municipality of Manaus	13/2/12
Borrower Promissory Note	D1, SEK	13/2/12
Guarantor Promissory Note	D2	13.2.12

Integração Loan

Security Document	**Parties**	**Date**
Equitable Mortgage over Shares in the Third Defendant (i.e. the Borrower Share Mortgage)	Security Agent, D4	13/2/12
Quota Pledge Agreement (i.e. the Concessionaire Quota Pledge)	Security Agent, D4, Viação Nova Integração Ltds, Nair Ventorin Gurgacz	13/2/12
Charge over Cash Deposit and Deposit Account (i.e. the Borrower Account Security)	Security Agent, D3	7/9/15
Cash Collateral Account Agreement	Security Agent, D4	13/2/12, amended 7/9/15
Fiduciary Assignment Agreement	Security Agent, D3, D4	13/2/12
Fiduciary Property Agreement (i.e. the Vehicle Mortgage)	Security Agent, D3, D4	13/2/12
Direct Agreement	C1, Security Agent, D3, D4, Municipality of Manaus	13/2/12
Borrower Promissory Note	D3, SEK	13/2/12
Guarantor Promissory Note	D4	13.2.12

(D) DEFAULTS UNDER THE FACILITY AGREEMENTS

38. I am satisfied, based on the documents and witness evidence placed before the court, that the First Defendant defaulted on its obligations under the Rondônia Facility Agreement in that it:

    i) failed to maintain the necessary balances in the Borrower Account for the three Business Days prior to 16 March 2015 and 15 September 2015, and did not remedy those breaches within 10 Business Days of notification by letter;

    ii) failed to pay in full the amounts due on 16 March 2015 and 15 September 2015, paying only US$1,299,193.74; and

    iii) failed to make immediate payment of outstanding sums of US$686,939.87 and US$1,954,918.68 despite written demands.

39. These matters constituted Events of Default under clause 23 of the Rondônia Facility Agreement.

40. On 20 November 2015, the First Claimant sent a Notice of Default Acceleration and Demand (the "***Rondônia Acceleration Notice***") to the First Defendant (copied to the Second Defendant) pursuant to clause 23.22 of the Facility Agreement. This had the effect of rendering all sums outstanding immediately due and payable. At that time, the sums totalled US$19,892,327.46, made up of principal of US$19,307,281.85, costs, fees and expenses of US$8,560.44 and interest of US$576,485.17.

41. On 27 November 2015, the First Claimant made a demand of the Second Defendant (copied to the First Defendant) under the guarantee provisions of the Facility Agreement. The demand referred to the First Defendant's defaults under the Facility Agreement and to the Rondônia Acceleration Notice, and demanded immediate payment of all sums due.

42. Neither the First nor the Second Defendant has paid the sums due and owing under the Rondônia Facility Agreement.

43. I am also satisfied, based on the documents and witness evidence placed before the court, that the Third Defendant defaulted on its obligations under the Facility Agreement, in that it:

    i) failed to maintain the necessary balances in the Borrower Account for the three Business Days prior to 16 March 2015 and 15 September 2015, and did not remedy those breaches within 10 Business Days of notification by letter;

    ii) failed to pay in full the amounts due on 15 September 2015, paying only US$908,931.80 on 19 October 2015; and

    iii) failed to make immediate payment of the outstanding sum of US$330,504.99 despite written demand.

44. These matters constituted Events of Default under clause 23 of the Integração Facility Agreement.

45. On 11 February 2016 the First Claimant sent a Notice of Default Acceleration and Demand (the "***Integração Acceleration Notice***") to the Third Defendant (copied to the Fourth Defendant) pursuant to clause 23.22 of the Facility Agreement. This had the effect of rendering all sums outstanding immediately due and payable. At that time, the sums claimed were US$11,057,127.38, made up of principal of US$11,025,335.24, costs, fees and expenses of US$20,288.21 and default interest of US$11,504.03. (In fact, this total was slightly miscalculated as further explained below.)

46. On 12 February 2016, the First Claimant made a demand of the Fourth Defendant (copied to the Third Defendant) under the guarantee provisions of the Facility Agreement. The demand referred to the Third Defendant's defaults under the Facility Agreement and to the Integração Acceleration Notice, and demanded immediate payment of all sums due.

47. On 1 March 2016, the First Claimant sent a letter correcting the figures in the Integração Acceleration Notice and stating that US$11,055,367.68 was due and owing as of 11 February 2016. The correction made was with regard to fees, which had been miscalculated and should have been US$18,528.41.

48. Neither the Third nor the Fourth Defendant has paid the sums due and owing under the Integração Facility Agreement.

49. On 13 April 2018 the Second Claimant, as the Security Agent under both Facility Agreements, was directed by the Majority Lenders to enforce the Security Documents.

50. There is no indication in the evidence of any of the Defendants having at any stage put forward any arguable defence to the Claimants' claims. I am satisfied that counsel for Claimants has given consideration to whether any such defences might exist, and has not identified any. Nor, aside from the question of title to sue considered below, has the court.

(E) TITLE TO SUE AND THE CLAIMANTS' FURTHER APPLICATION

51. As noted earlier, the original lender under the Facility Agreements was HSBC Bank PLC, but that company on 28 March 2012 transferred the loans to SEK.

52. Following the hearing on 5 October 2018, on 15 October 2018 I invited the Claimants to make further submissions on the question of title to sue, in the light of the following considerations:

    i) Under clause 26.1.1 of the Facility Agreements, each of the other Finance Parties appoints the Agent "*to act as its agent under and in connection with the Finance Documents*".

    ii) The general rule is that in the absence of other indications, when an agent makes a contract purporting to act solely on behalf of a disclosed principal, he cannot sue the third party on it; and an action brought for another by an agent authorised to do so should be brought in the name of the principal (see *Bowstead & Reynolds on Agency*, 21st ed., §§ 9-001 and 9-010).

    iii) The right to sue can be specifically assigned to the agent, and an agent who is a party to a joint or joint and several obligation can sue on it, subject to the technical rules applicable (see *Bowstead & Reynolds* § 9-008).

    iv) In *Perpetual Trustee Company Limited v Nebo Road Pty Ltd & Ors* [2011] QSC 283 (cited in *Bowstead & Reynolds* footnote 50 in the context of joint and several obligations), the Supreme Court of Queensland held that the "*Lender*" there, which was in fact acting as agent, was entitled to sue in circumstances where the facility agreement provided that *"at any time after an Event of Default, the Lender may do any one or more of the following. … Demand and require immediate payment of the Debt <u>and recover the Debt from the Transaction Parties</u>."* (my emphasis)

    v) In the present case, clause 26.4 of the Facility Agreements provides that the Security Agent is empowered, inter alia, *"to … enforce any and all Security Documents to which it is a party on behalf of the Finance Parties"*.

    vi) However, whilst the Facility Agreement is a "*Finance Document*" (as defined), it is not a "*Security Document*" (as defined).

vii) Clause 26.8.5 of the Facility Agreement provides that "*Neither the Agent nor the Security Agent is authorised to act on behalf of a Lender (without first obtaining that Lender's consent) in any legal proceedings relating to any Finance Document. This clause 26.8.5 shall not apply to any legal proceeding relating to the perfection, preservation or protection of rights under the Security Documents or enforcement of the Transaction Security or Security Documents.*"

viii) The Particulars of Claim pleaded that the Security Agent had been directed by the Majority Lenders (by way of the Agent) to enforce the Security Documents. However, there appeared to be no allegation or evidence that SEK as Lender had provided consent or authority for the Agent (or the Security Agent) to take proceedings to enforce the Facility Agreements.

ix) These matters appeared to raise the questions of whether the Agent or Security Agent is entitled to sue under the Facility Agreements to recover the sums due, without the Lender being a party to the claim, either (a) with the consent of the Lender or (b) without the consent of the Lender; and, if (a) were correct, whether such consent had been obtained.

53. Counsel for the Claimants on 31 October 2018 indicated that:

> "The money judgments were sought by the First Claimant (the Agent), not the Second Claimant (the Security Agent), as the Claimants' position was and is that the Facility Agreement provides that the obligation to make payments is an obligation to make payments to the Agent (see clause 29). AB Svensk ExportKredit (PUBL) has authorised the Agent and the Security Agent to commence and pursue the current proceedings. However, out of an abundance of caution and in view of the fact that the Defendants are not represented, the Claimants wish to inform the Court, as a matter of courtesy, that an application will be made to add AB Svensk ExportKredit (PUBL) to the proceedings in order that there might be no doubt as to the issue of title to sue. I understand that such an application will be issued shortly."

54. I have quoted in § 32 above clause 29.1 of the Facility Agreements, to which this response makes reference. It provides that sums due under a Finance Document, including sums due from borrower to lender or from lender to borrower, should be made available to the Agent and paid to an account directed by the Agent unless a contrary indication appears in a Finance Document.

55. It is debatable whether that provision has the effect that the Agent can sue on the relevant payment obligation, or whether the obligation remains an obligation owed to the principal party (here, the Lender) on which only the Lender can sue unless there has been either (a) an assignment to the agent (see § 52.iii) above) or (b) possibly, an authorisation under clause 26.8.6 (see § 52.vii) above) assuming that provision to be broad enough to allow the Lender to authorise the Agent to sue for sums due to the Lender under the Facility Agreement.

56. However, it is unnecessary to decide that question, because as envisaged in the response quoted above from counsel for the Claimants, an application was made to join the current Lender, SEK, to these proceedings as a Claimant.

57. On 12 November 2018, the solicitors for the Claimants provided a notice of an application by the First and Second Claimants and SEK, supported by evidence including SEK's signed written consent to be joined as a claimant, to join SEK as party to the proceedings under CPR 19.2(2)(a) and 19.4. The application notice was also accompanied by a draft order, and a draft Amended Claim Form and draft Amended Particulars of Claim reflecting the addition of SEK as Third Claimant.

58. CPR 19.2(2)(a) provides that the court may order a person to be added as a new party if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings. CPR 19.4 sets out the procedure for making such an application.

59. The third witness statement of the Claimants' solicitor, Ms Winter, dated 30 October 2018 in support of the application stated that SEK had at all material times been aware of the proceedings, had authorised the First and Second Claimants to bring them on its behalf, and had consented to be added as a Claimant to the proceedings.

60. The fourth witness statement of Ms Winter, dated 9 November 2018, confirmed that notice of the application and supporting documents had been served on the Defendants on 1 November 2018, by the same methods as to those to which I refer in § 8.vii) above, and I am satisfied that those documents were served on the Defendants.

61. Ms Winter's fourth witness statement also requested that the application be dealt with on the papers without a hearing, in view of its uncontroversial nature and the Defendants' history of non-engagement with these proceedings, pursuant to paragraph F4.1 of the Commercial Court Guide. The Claimants' solicitors on 22 November 2018 confirmed, attaching a Certificate of Service, that Ms Winter's fourth witness statement had itself also been served on all Defendants on 16 November 2018 via their appointed Process Agent.

62. No response was received from any of the Defendants to the application to join SEK or to any of the evidence in support of the application.

63. CPR 23.8(c) provides that the court may deal with an application without a hearing if "*the court does not consider that a hearing would be appropriate*". Paragraph F4.1(b) of the Guide provides that:

> "… If the applicant considers that the application is suitable for determination on documents, he should ensure before filing the documents with the Court
>
> (i) that the application notice together with any supporting evidence has been served on the respondent;
>
> (ii) that the respondent has been allowed the appropriate period of time in which to serve written submissions and evidence in

> opposition (save in cases of urgency that will ordinarily be at least three clear days);
>
> (iii) that any evidence in reply has been served on the respondent; and
>
> (iv) that there is included in the documents
>
> (1) the written consent of the respondent to the disposal of the application without a hearing; or
>
> (2) a statement by the applicant of the grounds on which he seeks to have the application disposed of without a hearing, together with confirmation that the application and a copy of the grounds for disposing of it without a hearing have been served on the respondent and a statement of when they were served."

64. On 3 December 2018 I granted the application to add SEK as a claimant. In all the circumstances, I was (and remain) satisfied that:

    i) the requirements set out in paragraph F4.1(b) of the Guide had been complied with;

    ii) it was appropriate for the application to be dealt with without a hearing, given its uncontroversial nature, the absence of any response to the application from the Defendants, and the absence of any engagement by the Defendants with these proceedings as a whole; and

    iii) it was desirable to add SEK as a claimant so that the court can resolve all the matters in dispute in these proceedings.

65. The Claimants' solicitors subsequently confirmed that my order giving permission to amend, the Amended Claim Form and the Amended Particulars of Claim were all deemed served on the Defendants on 6 December 2018.

66. Service of amended particulars of claim does not, by itself, cause the period for filing a defence to begin again (White Book Note 15.4.1 citing *Singh v Thoree* [2015] EWHC 1305 (QB) William Davis J). In the present case an Amended Claim Form was also served, adding a new Claimant, with the result that it was arguable that the Defendants were entitled to consider filing an acknowledgment of service indicating an intention to defend what could be regarded as a new claim insofar as it was now also made by a new Claimant. Indeed, the Claimants served a fresh response pack on the Defendants along with the Order adding SEK as a claimant, Amended Claim Form and Amended Particulars of Claim.

67. In these circumstances, I invited any submissions the Claimants might wish to make on the question of whether was appropriate for judgment to be given on the summary judgment application before the defendants had had the opportunity to file a timely acknowledgement of service to the claim as reconstituted, i.e. (on the Claimants' calculation) before 28 December 2018. In the absence of any response, I deferred

handing down judgment until after that date. The Defendants did not file any response by 28 December 2018, nor have they done so subsequently.

68. In these circumstances, I am satisfied that the Claimants have sufficient standing to bring this action, and the present application, to recover (*inter alia*) the sums due from the Defendants under the Facility Agreements.

69. In the light of my earlier findings, it also follows that the Claimants have established their claims, and that the Defendants have no real prospect of successfully defending the claims. Further, there is in my judgment no other compelling reason why the case should be disposed of in a trial. The Claimants are therefore entitled to summary judgment.

(F) RELIEF

70. The evidence establishes that the Claimants are entitled to judgment for the following sums:

    i) The principal sums of US$19,307,281.85 (Rondônia Loan) and US$11,025,335.24 (Integração Loan), being the sums set out in the Rondônia Acceleration Notice and the Integração Acceleration Notice.

    ii) Interest up to the date of this judgment, as to which I shall invite counsel to provide an updated calculation.

    iii) Costs and expenses under clause 17.3 of the Facility Agreements (excluding the legal costs referred to in (iv) below), which the evidence establishes amount in total to US$52,168.39 under the Rondônia Facility Agreement and US$38,428.95 under the Integração Facility Agreement.

    iv) Legal costs and disbursement incurred in the present proceedings, to which Claimants are also entitled under clause 17.3 of the Facility Agreements.

71. As to (iv), the Claimants prepared a statement of their costs of these proceedings, including the present application for summary judgment. Those costs total US$71,822.24 (which approximated to £55,037.38 as at the date of the statement). The costs cover the period up to and including the hearing on 5 October 2018: no further costs are claimed in relation to the subsequent events described above. The Claimants invited me to assess those costs summarily and to appropriate them equally between the two Facility Agreements and the corresponding sets of Defendants.

72. 44PD.9 § 9.1 provides that "*Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs*". Further, CPR 44.6(1) provides that "*Where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise*". The court therefore has the power to make a summary assessment in the present case.

73. I consider it appropriate to assess costs summarily here because:

i) the history of proceedings to date suggests that there is little or no prospect of the Defendants participating in any detailed assessment process or of their complying with an order to make an interim payment;

ii) the total amount sought by way of costs is relatively modest; and

iii) a detailed assessment would give rise to delay and further cost.

74. I have given careful consideration to the Claimants' statement of costs, bearing in mind the degree of complexity of the case and the amount of work likely to have been involved. I am satisfied that the hourly rates, number of hours spent, the division of time between more and less senior staff, and the disbursements, are reasonable. On the basis that there will be no detailed assessment, it would probably not be right to assess the costs at 100% simply on the basis of a broad sense of the reasonableness of the bill. On the other hand, I see no good basis in the present case on which to make any substantial percentage discount to the sums claimed in order to reflect the possible uncertainties involved, and I therefore assess the total costs at US$70,000. Further, I consider it fair to assess those costs as relating in equal shares to the Rondônia Facility Agreement and the Integração Facility Agreement, and hence to the First/Second and the Third/Fourth Defendants.

75. As a result, I summarily assess the Claimants' costs in respect of the claim against the First and Second Defendants at US$35,000, and I summarily assess the Claimants' costs in respect of the claim against the Third and Fourth Defendants at US$35,000.

76. The Claimants also seek declarations that:

> "(a) the Facility Agreements are valid under English law; and
>
> (b) under the terms of the Facility Agreements the Second Claimant (acting as Security Agent) is entitled to enforce the Security Documents to which it is a party on behalf of the Finance Parties (as defined in the Facility Agreements)."

77. As to proposed declaration (a), the Facility Agreements have on their face been executed on behalf of each party, and the evidence indicates that each of them has been partly performed by the respective borrowers (in particular, by part repayment of the loans) with no suggestion having been made that they were not bound by them. The contents of each of the Facility Agreements is such as to create valid rights and obligations under English law. In the circumstances, I consider that a declaration in the form sought would be correct.

78. As to proposed declaration (b), the evidence establishes that the Second Claimant has become the Security Agent under each of the Facility Agreements. The provisions of the Facility Agreement I have already quoted provide that in that capacity the Second Claimant is entitled:

i) at any time after the occurrence of an Event of Default (which I have already found has occurred in relation to both Facility Agreements), to enforce its rights under the Security Documents (clause 23.22.2);

ii) to act as each Finance Party's attorney-in-fact, according to article 684 of the Brazilian Civil Code, with special powers to represent it in the Security Documents, with full power to receive security interest on behalf of the Finance Parties, to execute, deliver and enforce any and all Security Document to which it is a party on behalf of the Finance Parties (clause 26.4); and

iii) to hold the Security Property (including the benefit of the undertakings in any Security Document) in trust for the benefit of the Finance Parties (Schedule 8 paragraph 2).

79. As a result, a declaration in the form of proposed declaration (b) would also be accurate.

80. The Claimants' evidence, which I accept, is that based on advice from Brazilian counsel they consider that such declarations would serve a useful purpose by facilitating the enforcement of their rights in Brazil.

81. In *Financial Services Authority v Rourke* [2002] CP Rep 14, after reviewing the authorities, Neuberger J stated:

> "It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

82. In the present case I am satisfied that the declarations which the Claimants seek would serve a useful purpose, and that there is no reason why the court should not make them. I shall therefore make declarations in the form set out in § 76 above.

83. I shall hear counsel on the appropriate form of order to give effect to this judgment, and in this context will require a further witness statement providing updated calculations of the interest due to date.