Neutral Citation Number: [2020] EWHC 2206 (Comm)

Case No: CL-2016-000282

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: 12/08/2020

Before :

MR CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

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Between :

APOLLO VENTURES CO. LIMITED	**Claimant**
- and –	
SURINDER SINGH MANCHANDA	**Defendants**
GURMUKH SINGH MANCHANDA	
GURBAKSH KAUR MANCHANDA	
GURSEV SINGH MANCHANDA	
SIMRAT KAUR MANCHANDA	
4G PROPERTIES LIMITED	
HKM INVESTMENTS LIMITED	

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Andrew Thomas (instructed by **RadcliffesleBrasseur**) for the **Claimant**
Jeremy Bamford (instructed by **Rubric Lois King Solicitors**) for the **First Defendant**
Thomas Roe QC (instructed by Gresham Legal) for the Second, Third, Fifth, Sixth, Seventh and Eighth Defendants

Hearing date: 27 July 2020

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 12 August 2020 at 10:30 am.

Introduction and factual outline.

1. I have dealt orally with various matters which arose at the CCMC which I heard on 27 July 2020. There are two applications which remain to be dealt with, being the Second to Eighth Defendants' application for security for costs and their application for an increase in the fortification of the undertaking in damages given under the worldwide freezing order ("WFO") granted by HH Judge Waksman (as he then was) in May 2016.

2. The issues are summarised in an agreed Case Memorandum and List of Issues. In very brief terms:

   (1) Apollo is a company incorporated under the laws of Thailand in 2003, of which Surinder Manchanda ("Surinder") and Suhel Manchanda ("Suhel") (Surinder's son by his second wife, Rachpal Kaur Narula ("Rachpal")) are the main shareholders (each having a 49% shareholding). At the time the subject loans were made, Rachpal had a 49% shareholding which has subsequently been transferred to Suhel.

   (2) The claim involves various allegations against Surinder, various members of his family by his first wife Harmeet Kaur Dang, and two companies alleged to have been set up to receive the proceeds of an alleged fraud. The allegations against Surinder include forgery, fraud, conspiracy, breach of his obligations as a director of Apollo, together with other civil wrongs under Thai law.

   (3) It is alleged that in 2013 Surinder, who is the First Defendant, procured that Apollo enter into two loans ("the Loans") with Suchin Worawongvasu, a Thai businessman, under which Apollo borrowed approximately £4.4m and became liable to pay further amounts such that the total amount now owed by Apollo is said by the Claimant to be £5.8m. Apollo alleges that Surinder entered into the Loans in its name without the involvement, knowledge or consent of the other officers or shareholders of Apollo using forged documents. It is alleged that the greater part of the proceeds of the Loans was not paid to or for the benefit of Apollo but to Surinder, his family members or other entities controlled by them. The Claimant admits that part of the proceeds of the Loans was used to repay an existing mortgage held by Apollo and that Suhel, Rachpal and Gurdyal (Surinder's daughter by Rachpal) all received monies from the Loans.

   (4) The claims against the other Defendants in these proceedings are advanced under two main heads:

      (a) A claim of unlawful means conspiracy against the First to Third and Fifth and Sixth Defendants, these unlawful means being the alleged breaches of fiduciary and/or directorial duties, or an alleged equivalent liability under the Thai Civil and Criminal Code.

      (b) Claims based on alleged unconscionable receipt by the Defendants and/or an obligation to account for amounts allegedly received by the Defendants under Thai law and/or on the basis that the Defendants are allegedly constructive trustees of the amounts received by them.

   (5) Surinder denies any liability. His case is that the other directors and shareholders in Apollo were aware of and consented to the making of the Loans and that the subsequent

distribution of the Loan monies was for the benefit of Apollo and the shareholders of Apollo.

(6) The other Defendants also deny liability. They deny involvement in any conspiracy or any knowing receipt of funds. Gurmukh Manchanda's case is that he received money from Surinder by way of a loan at a rate of interest of 18% (a substantial portion of which has been repaid) and that, at the time, he did not know that the funds were proceeds of the Loans. Gursev Manchanda's case is that he received monies from Surinder by way of loans to set up a new business and did not know, at the time, where the money had come from but assumed it was from property investments.

3. The WFO was granted at a hearing without notice to the Defendants on 9 May 2016 by HHJ Waksman QC. At an inter partes return date on 9 June 2016, David Foxton QC (as he then was) was satisfied that there was a seriously arguable case against the Defendants and a real risk of dissipation. He declined to set aside the WFO, and no application was made then for any variation of the amount of the fortification.

4. The Defendants indicated an intention to appeal against the Order of David Foxton QC, but eventually (in November 2016) abandoned their application for permission to appeal. These applications for security for costs and extra fortification were issued in December 2016.

5. During December 2016, default judgments were entered for the Claimant. Those default judgments were set aside by the Court in an Order dated 6 February 2018. The intervening period from December 2016 was the subject of extended negotiations between the parties.

6. An application for permission to amend the Particulars of Claim was issued (and granted) in March 2018. The Second to Eighth Defendants amended their Defence in April 2018. In May 2018, the parties agreed a Consent Order extending time for service of a Reply by 28 days. In July 2018, the parties agreed a further Consent Order, by which the directions were "adjourned" until 23 August 2018. In September 2018, the parties agreed a further Consent Order setting a date of 4 October 2018 for service of the Reply. The Reply was filed and served on 5 October 2018.

7. There have been various parallel proceedings in Thailand, some of which are still on-going.
8. I turn therefore to the first of the two applications, namely that for security for costs by the Second to Eighth Defendants (whom I will henceforth call "the Defendants").

Security for costs.

9. Security for costs is governed by CPR Part 25, which provides as follows:

"25.13
(1) The court may make an order for security for costs under rule 25.12 if –
(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
(b)
(i) one or more of the conditions in paragraph (2) applies, or
(ii) an enactment permits the court to require security for costs.
(2) The conditions are –

(a) the claimant is –
(i) resident out of the jurisdiction; but
(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 [7]*;*
(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;"

10. In this case, the Defendants' application, issued on 1 December 2016, was made on the following grounds:

"because the Claimant is a company incorporated in Thailand and which, on its own evidence, is impecunious, meaning that it is highly unlikely that any order for costs made in the Defendants' favour will ever be recovered"

11. Whilst it might be said that it would have been better if this wording had tracked the wording of the Rule more closely, in my judgment there was no real room for doubt but that the application was made on the basis of ground (a) and ground (c), set out above.

12. The following witness statements were then served over time, as follows:

(1) A statement from Mr Winston, of Squire Patton Boggs (the Defendants' then solicitors), dated 30 November 2016. That statement made reference to statements made in earlier statements by Mr Tossaporn Sumpiputtananadacha on behalf of the Claimant, dated 11 May 2016, Suhel dated 19 May 2016 and Surinder dated 28 May 2016.

(2) A statement from Suhel dated 6 July 2020, served after a debate between the parties' respective solicitors (who were by now different solicitors' firms to those instructed originally) as to timetabling which began at the beginning of June 2020 (when Gresham Legal were instructed on behalf of the Defendants).

(3) A reply statement from Gurmukh Manchanda ("Gurmukh") served on 20 July 2020.

13. I can summarise the parties' respective arguments briefly at the outset:

(1) The Defendants relied on an assertion that the Claimant was impecunious; that there was therefore reason to believe it would unable to pay the Defendants' costs if ordered to do so; and that in these circumstances it would be just to make an order for security for costs. The Claimant responded by saying that the making of such an order would stifle its claim; that its claim was at least arguable; and that it would therefore not be just to make an order.

(2) The Defendants also relied on the fact that the Claimant was resident in Thailand, and produced evidence to show that enforcement in Thailand would be difficult. The Claimant did not produce any evidence on this, but simply argued once again that it would be unjust to make an order which might have the effect of stifling a potentially valid claim.

14. At the outset, I need to deal with a procedural argument raised by the Claimant. This arose out of an assertion in the statement from Gurmukh that the office building which formed the only asset of the Claimant (which I deal with below) was worth far more than the Claimant had said in the past it was; that this meant that the Defendants were now asserting that the Claimant had assets; that this was inconsistent with the Defendants' application notice; and that the application notice therefore had to be varied. Alternatively, at the hearing, the Claimant's counsel contended that I should allow further evidence to be put in to counter the evidence put in by Gurmukh. Counsel outlined what that further evidence would say, and offered an undertaking that it would be provided within 48 hours. There had been no previous indication of the points suggested, which were not set out in the skeleton argument served for the Claimant.

15. Taking each of these points in turn:

    (1) In my judgment, this point is misconceived. It is up to the Defendants to decide what is in their application notice. If the evidence that is relied on is inconsistent with what they argue, then that is a matter that the Claimant can of course, rely on. However, here, what is said by the Claimant (as I note below) is that the evidence relied on by the Defendants is wrong and should be rejected.

    (2) As to allowing further evidence, I note the following:

        (a) First, this hearing has been in the diary for some substantial time.

        (b) Secondly, on being instructed, the solicitors for the Defendants sought to ensure an early and orderly exchange of evidence. It was because of delays on the part of the Claimant in engaging with this question that their evidence was served only 3 weeks prior to the hearing.

        (c) Gurmukh's reply statement was then served two weeks later.

        (d) At that stage, if it wished to put in further evidence, it was open to the Claimant to seek to do so, or to apply to adjourn. It did neither.

        (e) Overall, I take the view that it would be wrong to allow further evidence to be adduced at this very late stage, with the consequent wasted costs. However, I do take note of the explanations given to me on instructions by Counsel, and the fact that Gurmukh's evidence is challenged. I deal with the relevance of this below.

16. Turning from the procedural points to the merits of the argument then, as I have indicated, the Claimant's contention was that I should not order security because this would have the effect of stifling the claim. The general approach that the Court should take where such an argument is raised was considered by Teare J in *Danilina v Chernhukin* [2018] EWHC 2503 (Comm) where he said, at paragraph 29:

    "The burden is on the Claimant to establish the probability that her claim would be stifled if she were ordered to pay more than £1.1 million as further security for costs and her evidence has to be full, frank, clear and unequivocal; see Al-Koronky v Time Life Entertainment Group [2005] EWHC 1688 (QB) at 31. Some of the more recent authorities

to the same effect are noted in Accident Exchange and another v Mclean and others [2018] EWHC 1533 (Comm) at paragraphs 10-13."

17. In addition, I bear in mind the fact that the company may also be expected to look to others to fund its claim, including its backers, bankers and the like. Thus, as was said in *Goldtrail Travel Ltd v Onar Air Tasimacilik AS* [2017] UKSC 57, at paragraph 17:

"17. It is clear that, even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not stifle its appeal if it can raise the required sum. As Brandon LJ said in the Court of Appeal in the Yorke Motors case, cited with approval by Lord Diplock at 449H:
"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.""

18. Finally, I bear in mind what was also said in that case by Lord Wilson JSC, as to the approach that a Court should take to a denial by a party that that party can in fact fund security:

"24. The criterion is simple. Its application is likely to be far from simple. The considerable forensic disadvantage suffered by an appellant which is required, as a condition of the appeal, to pay the judgment sum (or even just part of it) into court is likely to lead the company to dispute its imposition tooth and nail. The company may even have resolved that, were the condition to be imposed, it would, even if able to satisfy it, prefer to breach it and to suffer the dismissal of the appeal than to satisfy it and to continue the appeal. In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

19. I turn to apply the law to the facts in this case.

20. I will divide the evidence into a series of categories.

(1) The first is the evidence of the resources of the company itself. This is scant, to say the least:

(a) I have seen no accounting documents. Thus, I have been given no audited accounts, no management accounts, no balance sheets and no profit and loss accounts.

(b) I have seen no bank documentation of any sort.

(c) Suhel (who is the holder of 49% of the shares in the company) has given evidence as to the income of the company and how it is spent. In his first statement in 2016, read along with that of Mr Sumpiputtananchanda, quoted in Mr Winston's

statement, he says that the company's only income is rental from its office block, which covers its outgoings on staff but little more. The remainder has been spent on legal fees, both in this action and in the related Thai actions. However, there was no detail of these legal fees and the exact amounts paid by the company in each jurisdiction. Of course, to the extent that the same relief is sought in numerous jurisdictions in relation to the same alleged loss, with consequent increases in costs, this must be relevant in relation to the exercise of the Court's discretion.

(d) The company's only capital asset was the land and office block in Bangkok. That land was said to be fully leveraged so that it was in effect worthless. The loans secured on the property were some £5.8m. It is this property which, on the evidence of Gurmukh, was on the market for £17.5m, and which generated the procedural arguments that I have dealt with above. I was told by Counsel for the Claimant that the actual value of the property is much less than £17.5m and that it was being marketed for an artificially high value. In these circumstances, I do not think that I can reliably reach any conclusions as to the actual value of the property, nor as to the amount of loans secured on it.

(e) Finally, there was some evidence to the effect that one reason for the company's impecuniosity was because rental income that should have gone to the company was directed to Suhel and Rachpal instead. This would be another reason for ordering security under CPR Rule 25.13(2)(g).

(2) The next category of available finance would be from those standing behind the company – and in particular Suhel himself and his mother, Rachpal. Again, here, the evidence was extremely unsatisfactory.

(a) Suhel's evidence in his 6 July statement was that he had no shares of any value, no property (most of his property having been pawned), no ownership interest in his house, no income other than his rental income from Apollo (the amount of which is not specified) and no money in the bank. He also stated that he could not borrow money.

(b) His evidence as to Rachpal's financial position was that her position was the same as his – ie no shares, no house, no income other than rental from Apollo, without amounts specified, no property and no money in the bank. Again, his evidence was that she could not borrow money.

(c) He also referred to the fact that both he and Rachpal had pawned a number of items to fund the litigation in 2019 and 2020, and exhibited receipts in this regard. In fact, however, when these receipts were analysed and translated, a number of them predated the litigation; and many were produced twice, with the front and back produced separately.

(d) Finally, there was evidence put in by Gurmukh in reply to the effect that Rachpal had inherited a property from her father. That assertion was challenged by Counsel for the Claimant, but again I had no evidence before me. Again, I do not think I can reach any reliable conclusion on this.

21. The overwhelming impression that I am left with is that there is a real possibility that the company will not be able to meet a costs order made against it; but that I have not been given the full picture in relation to its ability to borrow money or obtain funding to enable it to provide security. In particular, I have been given no satisfactory explanation as to how it is that the company has been able to fund numerous pieces of litigation – 7 in Thailand and this action, involving substantial costs (in this action amounting to £810,000 up to the CCMC) without substantial backing from those who stand behind it.

22. I am not therefore satisfied, applying the test adumbrated in the *Danilina* case, that there has been full and frank disclosure of financial materials, such as to show me that, on the balance of probabilities, the making of an order for security would stifle the claim.

23. This makes it strictly unnecessary for me to consider the alternative ground put forward based on the fact that the Claimant is domiciled in Thailand. Clearly this would give me jurisdiction to order security. The question of stifling would remain. Since, for the reasons I have given, I am not persuaded that the grant of security would stifle the claim, then this objection to the grant of security would also fail.

24. This leaves the issue of quantum. The Defendants sought security up to the exchange of witness statements, in the amount of £500,000. The Claimant took no point on the basis of pure quantum; but did rely on the existence of an ATE insurance policy which provided coverage in respect of opponents' costs up to £400,000. It was therefore submitted that the amount of security to be provided might be reduced to take account of the existence of this policy.

25. My starting point is an acceptance of the Claimant's basic submission, which is that the existence of an ATE insurance policy may be relevant to the exercise of the Court's discretion. That is because, depending on the terms of the insurance, it may in fact provide the Defendants with the security sought: see the cases collected in the White Book at 25.12.9ff.

26. The Defendants made a number of points in this regard, as follows:

    (1) First, the policy expressly excluded costs which had been incurred prior to the period of insurance, defined as 30 November 2017: see exclusion 1. The amount of such costs, I was told, was £283,000.

    (2) Secondly, the insurance would not necessarily be available to the Defendants, because of considerations of privity of contract. The amounts payable by the Claimant to the Defendants would not be ring fenced in any way.

    (3) Thirdly, the policy contained a right to cancel which was very general in its terms. The Claimant submitted that this right must be construed as prospective only, and I would be inclined to accept this submission, although the point is not clear.

    (4) Fourthly, the policy contained a right to avoid in the event that the policy had been procured by fraud. Here, the Defendants submitted, there was a very real possibility of this, because of the nature of the action. Many of the issues in this action turned on questions of credibility, so that it might well be that a finding against the Claimant would involve findings of fraud on the part of its representatives.

27. Overall, on the basis of the evidence as it stands, I am not prepared to make any discount on the quantum of the security to be ordered to take account of the ATE insurance. If insurers agree to enter into some sort of agreement to ensure that problems of privity are overcome, and if there is some agreement in relation to cancellation and avoidance, then in my view the insurance might be used to provide the necessary security up to the sum of £400,000 but not otherwise. In the absence of any agreement, then the full sum of £500,000 must be secured.

Increase in fortification.

28. I turn to the question of fortification. As I have noted, at the hearing before HHJ Waksman QC, the amount ordered by way of fortification was £25,000. At the return date, the WFO was continued, and no application was made to change the amount of fortification. Following the decision not to pursue an application for permission to appeal the decision in relation to the continuance of the WFO, the Seventh Defendant issued the current application for an increase in the amount of fortification in December 2016.

29. I start with the loss which the Seventh Defendant claims it has or will suffer by reason of the imposition of the WFO. The evidence in this regard is not wholly clear, but, after having debated the matter with the Seventh Defendant's Counsel, would appear to be as follows:

    (1) Prior to the imposition of the WFO, the Seventh Defendant had two property transactions in contemplation, in relation to Northwood Works Industrial Estate in Birmingham and a second at Regent's House. One would be a cash purchase; whilst the other required finance.

    (2) The second of these purchases went through. However, when it was realised (in November 2016) that the WFO could not be set aside, then it was also realised that the financing required for the first could not be obtained, since that would have required disclosure of the existence of the WFO, which would have led to the refusal of the financing request and also to the calling in of other loans.

    (3) In December 2016, apart from the request for increased fortification, no attempt was made to vary the terms of the WFO to enable further funding to be obtained.

    (4) The loan was not pursued at that stage. In the event, the financing bank found out about the existence of the WFO in 2018 and called in other loans.

30. These being the facts, the Claimant made two submissions in response to the Seventh Defendant's application:

    (1) The first was that, once again, the making of such an order would stifle its claim;

    (2) The second was that any such application should have been made on the return date.

31. I will deal with these points in reverse order.

32. In relation to their second point, the Claimant relied on the decision in *The Mito* [1987] 2 Lloyd's Rep. 197. In that case, an injunction had been granted and then discharged. Following the discharge of the injunction, an application was made for security for the amount of the cross-undertaking. Hirst J (as he then was) rejected that application. His reasons, as accurately recorded in the head note, were as follows:

    (1) The security could have been sought at the time the injunction was initially sought, and a party could then have chosen not to pursue the injunction;

    (2) The Court had no power to impose such a condition ex post facto since it could not determine what the position would have been at the time the injunction was initially sought and obtained;

    (3) Since the injunction had been discharged, the application in that case was not for fortification at all, but was for security, not the purpose of the fortification in the Mareva context.

33. The Seventh Defendant resisted this submission, on the basis that the initial sum chosen was arbitrary and without consideration of the full picture and that now the full picture was available the Court should revisit the question. It was pointed out that the form of the order sought was that the injunction should be lifted if increased fortification was not granted, so that the Claimant had the choice as to whether or not to put up further monies or simply give up the injunction.

34. I do not consider that *The Mito* is of any real assistance to me. Taking each ground relied on by Hirst J in turn:

    (1) This security could have been sought at the time of the grant of the injunction. However, because of the form of the order sought, the Seventh Defendant is attempting to give the Claimant the right to elect not to keep the freezing order (although no suggestion is made that the grounds for the imposition of such are no longer apposite). That is the choice that Hirst J considered the Claimant in *The Mito* was being deprived of.

    (2) The second point relied on by Hirst J is really a reiteration of the first. I reject it for the same reasons.

    (3) As to the third point, in this case the injunction has not of course been discharged and thus the case is clearly distinguishable.

35. Nevertheless, I have concluded that it would not be appropriate, at this remove, to order further fortification as a condition of continuing the injunction. The appropriate time, in my judgment, for making this application would have been at the time of the return date. Four years have passed since then, and, although an application was issued in December 2016, it has not been pursued in the intervening three years or so.

36. I am reinforced in this conclusion by consideration of the Claimant's first argument, which is again based on the assertion that provision of this further amount would stifle the claim. In effect, the Claimant would be being asked to provide a total of £775,000 in further security and fortification. In my judgment, whilst I am not satisfied on the evidence that

the sum being required by way of security would stifle the claim, then the requirement to provide yet further sums may well have that effect. As a matter of discretion, taking into account all of the circumstances, to require, after this significant delay, a sum of this magnitude to be put up, would not be just.