Neutral Citation Number: [2021] EWHC 925 (Comm)

Case No: CL-2021-000051

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: 16/04/2021

Before :

THE HONOURABLE MRS JUSTICE MOULDER

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Between :

THE CLAIMANTS SET OUT IN SCHEDULE 1 TO THE CLAIM FORM	**Claimants/ Respondents**
- and -	
(1) NICHOLAS SPENCE **(2) DEREK KEWLEY** **(3) ANDREW CRUMP** **(4) EMERGING PROPERTY INVESTMENTS LIMITED (IN LIQUIDATION)** **(5) EMERGING PROPERTY LIMITED** **(6) GREEN PARK HOLDINGS (ILFRACOMBE) LIMITED** **(7) GP ILFRACOMBE MANAGEMENT COMPANY LIMITED** **(8) GREEN PARKS (WESTWARD HO!) MANAGEMENT COMPANY LIMITED** **(9) ALPHA PROPERTIES (BRADFORD) LIMITED** **(10) A1 PROPERTIES (SUNDERLAND) LIMITED**	**Defendants/ Applicants**

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Bobby Friedman (instructed by **Darbys GE Limited**) for the **Applicants**
Daniel Saoul QC and Matthieu Gregoire (instructed by **Trowers & Hamlins LLP**) for the **Respondents**

Hearing date: 29 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the hearing of an application (the "Application") by Mr Nicholas Spence, the First Defendant, and Mr Derek Kewley, the Second Defendant, to vary the level of fortification provided by the Claimants in the context of a worldwide freezing injunction granted against the First, Second, and Third Defendants without notice by Calver J on 4 February 2021 and maintained by Cockerill J on 12 March 2021 (the "Freezing Order").

2. The so-called "GAC Applicants", who are the eight Claimants who (apparently) give instructions to the Claimants' solicitors, Trowers & Hamlins LLP ("Trowers"), have provided fortification of £500,000 through the provision of an insurance policy. That sum is, however, said to be insufficient. The Defendant asserts there is a very substantial risk that Mr Spence will suffer loss of (at least) £2 million as a result of the Freezing Order.

Evidence

3. In support of the application I have two witness statements from Mr Spence dated 19 March 2021 and 25 March 2021.

4. In response I have an affidavit from Miss Helen Briant, a partner in Trowers dated 22 March 2021.

Background

5. The claim relates to the sale of student accommodation and holiday accommodation. Mr Spence and Mr Kewley were directors and/or shareholders in a number of companies that were involved in the sale, leasing and management of the properties.

6. Whilst it is not necessary to set out the details here, it is sufficient to note that there are allegations of fraud against the First and Second Defendants.

Relevant Legal Principles

7. There was largely common ground between the parties on the relevant legal principles. I was referred to *Gee on Commercial Injunctions* at 11-029. The decision whether to order fortification is a matter of discretion.

8. The principles were set out in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 W.L.R. 2309 at [52]-[54]. Whilst references were made to other passages in the judgment, in my view the relevant passages which clearly set out the test are as follows:

> "[52] …since the Claimant has obtained a Freezing Order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the Order, it should equally be protected…
>
> [53] …In my judgment Briggs J was correct in *Jirehouse* to summarise the principles as he did at paragraph 26:—

> "Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction."
>
> …In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific…
>
> [54] …At the stage of considering whether fortification of the undertaking is required, the proposition could be restated as it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered [emphasis added]…"

9. I was also referred to the case of *Brainbox Digital v Blackboard Media* [2017] EWHC 2465 at [30] to illustrate that there must be an evidential foundation for the case for fortification.

The First Defendant's Submissions

10. The background to the Application now before the court is that Mr Spence currently holds a US dollar loan with the bank Coutts of $9,292,719 (the "dollar loan"), which is secured against his sterling deposits (which are in excess of £8 million) that he holds with Coutts. This arrangement was put in place because Mr Spence moved to the United States at a time when the rate of sterling against the dollar was historically low. The loan arrangement allows Mr Spence to hold and spend dollars, but without having to exchange his pounds at an adverse interest rate. It is the First Defendant's evidence that he intends to exchange his sterling to dollars when the rate reaches $1.55.

11. It was submitted for Mr Spence that there is a very substantial risk that Coutts will call in the lending and/or enforce the charge, as a result of the Freezing Order. If it does, Mr Spence's pounds will be forcibly exchanged at whatever the prevailing exchange rate happens to be (plus fees). That rate will therefore be lower than the rate that Mr Spence would otherwise have obtained when exchanging at a time of his choosing i.e. when the exchange rate has reached $1.55.

12. The difference between $1.55 and the lowest exchange rate within the 12 months prior to the Freezing Order (of $1.15) is $0.40. This leads to a potential loss of in excess of £2 million, even before fees are taken into account.

The Claimants' Submissions

13. It was submitted for the Claimants that there is nothing in the loan documentation to support a good arguable case of risk of loss by reason of the Freezing Order. If anything, it is the litigation itself that could give rise to an Event of Default (and even

then, only where it would affect Mr Spence's ability to satisfy his obligations under the relevant agreements or Mr Spence or Coutts' reputation).

14. It was further submitted for the Claimants that:

    i) The lack of any possible causative connection between the Freezing Order and the alleged risk of loss has been confirmed as a matter of fact: despite statements to the contrary in correspondence from the Defendants' solicitors, when Coutts was notified of the Freezing Order on 4 March 2021 it did not terminate nor has it taken any steps to terminate the loan facility.

    ii) There would be no commercial reason for Coutts to terminate the loan facility. Coutts is, it appears, fully secured in respect of its loan and charges interest at 1.5% per annum. Provided that the First Defendant continues to meet those payments (which the Freezing Order permits him to do), it would make no commercial sense for Coutts to terminate the agreements.

    iii) The First Defendant has not provided an intelligent estimate of loss and is unable to demonstrate any loss at all. The premise of the latest estimate is the difference in the lowest GBP/USD exchange rate in recent years (USD 1.15 / GBP 1) and the rate that the First Defendant hopes one day will be reached (USD 1.55 / GBP 1) at which point he states that he will convert his Sterling reserves and repay the USD loan. The First Defendant's assertion that he has always harboured a plan to convert at that rate is bare assertion and not supported by any of the documentation he has provided.

Relevant Provisions of the Loan Agreement

15. In the 2019 loan agreement the key provisions are as follows in my view (the 2018 agreement contains similar provisions):

    i) Clause 1.6.1 states, *"We may ask you at any time and for any reason to repay the Facility. We may exercise this right at a time when you are doing everything that you are obliged to do under this Agreement."* There is thus a right for Coutts to take action and demand repayment without notice, though Clause 1.6.1 provides that whenever practicable Coutts will try to give the client notice in advance.

    ii) Clause 1.6.4 states that if an Event of Default occurs, Coutts can terminate the agreement and demand repayment and/or sell any assets provided by way of security.

    iii) Clause 11.1.2 states, *"We may demand repayment of the balance on your Overdraft Facility and/or terminate the Overdraft Facility at any time by giving you notice."*

    iv) Clause 11.3.1 states that if an Event of Default occurs, Coutts can demand immediate repayment and convert the outstanding balance to GBP.

    v) The Events of Default include litigation and a material adverse change (Clause 11.3.2(i) and (m)) as follows:

> *"(i) any litigation or other proceedings are threatened or commenced against you which might adversely affect your ability to meet the obligations under this Agreement or which might adversely affect our or your reputation".*
>
> *"(m) any other circumstances arise which may reasonably lead us to believe that your obligations to us under this Agreement will not be met".*

Discussion

16. The test which must be met is whether the First Defendant can show that he has a good arguable case that he will suffer loss in consequence of the making of the Order. The test is not that the First Defendant should establish on a balance of probabilities that he will suffer loss in consequence of the making of the Order.

17. I note however the statement in *Gee* on which the Claimants relied which indicates that:

> *"Assertion of risk is insufficient, there must be some real evidence, which objectively establishes that risk."*

18. Addressing first the submission of the Claimants that Coutts has not terminated nor taken any steps to terminate the loan facility even though Coutts is aware of the Freezing Order, I note the evidence of the correspondence that Coutts were notified of the Freezing Order on 4 March 2021 and it would appear that it has not terminated the facility.

19. However, it remains open to Coutts to terminate the facility and demand repayment. As noted in the course of the hearing, in my view it is not necessary under the terms of the on demand facility (as referred to above) that the bank would notify the First Defendant of its intention to call in the facility prior to demanding repayment. It is difficult therefore to conceive of what "real evidence" which objectively establishes that risk, could have been advanced in this case over and above the clear terms of the facility.

20. Under the terms of facility, it is envisaged that notice will be given "wherever practicable" but this does not apply where an Event of Default has occurred and in my view there is an arguable case that an Event of Default has occurred.

21. I do not therefore regard it as significant that Coutts have not given any indication that they would call in the facility.

22. I have considered whether the lapse of time since Coutts was notified on 4 March 2021 means that Coutts are unlikely to call in the facility. In my view the risk that Coutts might decide to call in the facility remains. Although one might incline to the view that Coutts would call in the facility immediately should they be concerned about a Worldwide Freezing Order equally Coutts may be considering its position or keeping the matter under review. Whilst I doubt that Coutts would wait to consider the position until the regular annual review of the facility, equally there is no evidence to suggest that Coutts has waived its right to demand repayment.

23. There was a meeting on 1 March 2021 between Mr Spence and Coutts but that was before the notice of the Freezing Order was given by the Claimant's solicitors on 4 March 2021.

24. It was submitted for the Claimants that the First Defendant has not shown that the loss is likely to be caused by the granting of the Freezing Order. It was submitted that it was the litigation itself rather than anything in the Freezing Order which would cause Coutts to call in the facility or in the alternative, that as it was an on demand facility it could be called in at any time.

25. In relation to the latter submission, in my view it is common in commercial business for overdrafts and similar facilities to be on terms that they are repayable on demand but nevertheless for there to be an expectation that they will not be terminated without some cause.

26. As to whether it was the result of the litigation rather than the Freezing Order, I note the statement in *Energy Venture* at [50]:

> *"At the stage of considering whether fortification is required, however, it may, to paraphrase Gibbs J, be difficult "to disentangle any damage arising [or which may arise] from the [mere existence or continuation of] the litigation from that which was [or may be] caused by the making of the order."*

27. Although it was submitted for the Claimants that the Events of Default had not been triggered in this case, it seems to me that there is a good arguable case that the grant of the Freezing Order is litigation which might adversely affect the reputation of Coutts or the First Defendant.

28. It seems to me reasonable to infer that a bank would be concerned that not only is there litigation in the sense of proceedings being brought against the First Defendant but that a court has now held that there is a good arguable case and a risk of dissipation of assets such as to warrant the grant of a freezing injunction, bearing in mind Clauses 11.3.2(i) and (m) of the loan agreement at paragraph 15(v) above, dealing with proceedings which might affect the First Defendant's or Coutt's reputation or lead the bank to believe that the obligations will not be met.

29. It was submitted for the Claimants that it would make no commercial sense for Coutts to terminate the agreements because it was fully secured and paying interest. I accept the submission for the First Defendant that a bank's decision to lend and to continue lending is based not only on the amount of any security which it holds but also other considerations which inform its willingness to lend to the particular borrower, as the reference to litigation adversely affecting the borrower's reputation in the Events of Default would tend to illustrate and confirm.

30. It was not clear to me whether the Claimants pursued the submission that the court should take account of the absence of signed loan documents. In his third witness statement , Mr Spence has confirmed that he did in fact enter into these documents and that the documents provided are a complete suite of the loan and security documents. His evidence was (paragraph 2 of his witness statement)

"I confirm that all of the documents from and agreements with Coutts which were exhibited to my 3rd statement within exhibit NS3 are the exact documents and agreements which I signed. I also confirm that the documents comprise a full suite of the loan and security agreements relating to the borrowing. The second loan offer of £8M dated 1 July 2019 superseded, and in effect included, the original loan offer of £3M dated 16 February 2018…"

31. On an interlocutory application of this nature, and without any evidence to contradict such evidence, in my view the court is entitled to accept Mr Spence's evidence on this point.

32. It was submitted for the Claimants that the First Defendant could "bank his gain" today given that exchange rates have moved in his favour since he entered into the facility. In my view this does not address the risk of loss which would be suffered by the First Defendant but merely seeks to address ways in which he could mitigate his loss.

33. The evidence of Mr Spence as to the risk of loss (paragraph 7 of his witness statement) was that even if the security was not enforced, if loans were called in he would have to convert sterling assets into dollars.

34. Mr Spence's case is dependent on his evidence that he intended to keep the facility outstanding until rates recovered to a level of $1.55. Although there is an absence of any evidence to support his assertion that he intended to keep the facility outstanding until rates recovered to a level of $1.55, I accept the argument that if the facility is called in as a result of the Freezing Order, he will be obliged to convert sterling to dollars at the then prevailing rate and that may well be lower than the rate he would otherwise have chosen to convert sterling into dollars.

35. Accordingly, in my view this amounts to a good arguable case that he will suffer loss if the facility is called in although the court then has to consider whether the First Defendant has provided an intelligent estimate of loss.

36. *Energy Venture* at [53] states that:

"In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.[emphasis added]*"*

37. In a letter from the First Defendant's solicitors dated 25 February 2021, the estimate of loss was said to be £800,000. Mr Spence now seeks to depart from that estimate on the basis that insufficient consideration was given to that estimate when he was dealing with the requirements of the Freezing Order and that there is a very substantial risk that sterling will drop to $1.15 or lower. The basis for this assertion is said to be that within the year prior to the application for fortification, the rate was as low as $1.15 and sterling could fall further. Based on a forced exchange rate of $1.15 the losses are estimated to be £2.08 million.

38. Counsel for the Claimants in response to questions from the court provided various pieces of information about past and future interest rates. Even without evidence to this effect, the court does have evidence from Mr Spence that the rate prior to the

referendum in June 2016 was $1.45 (although he does note that it had been as high as $1.70) and at 19th March 2021 was $1.39.

39. The loss which Mr Spence estimates is based on the difference between the possible rate prevailing at the date on which the facility might be called in and his stated intention to wait until rates recovered to $1.55.

40. The court needs to make an informed and realistic estimate. I note that the requirement as set out in *Energy Venture* is for an estimate of the likely loss and this is not the same as an assessment of damages. In my view an intelligent "estimate" will by its nature be imprecise.

41. I note that the current exchange rate is around $1.38. In my view, the court is able to take judicial notice of the events in the past year concerning COVID-19 and the imposition of lockdown which may well account for the drop in sterling to the lowest rate identified by Mr Spence of $1.15 in March 2020.

42. In his witness statement, Mr Spence said that £800,000 is not sufficient because that was based only on the exchange rate as at the date that his solicitors sent the 25 February letter. His evidence was:

> "As I do not know when the loan will be called in, there is a very high risk that the sum will be much higher. Sterling has already fallen since 25 February and, of course, is likely to fluctuate very substantially, as currencies do."

43. I have referred above to the lack of evidence concerning Mr Spence's intention to wait until the dollar-sterling exchange rate recovered to $1.55. Even if I take this evidence at face value the court has been given no evidence as to how long such a recovery could take, if indeed that rate will be reached in the coming years at all, and I note the Claimants' submission that for so long as the facility is outstanding a significant amount of interest is payable which reduces the amount of any loss.

44. Weighing the matters referred to above, I am not persuaded that the estimate of loss is as high as Mr Spence asserts. Whilst I accept that currencies fluctuate and are unpredictable, I am not persuaded that the estimate should be on the basis of the very low level reached in March 2020 and any loss will be reduced by the fact that Mr Spence would no longer be paying interest.

Conclusion on additional fortification

45. For the reasons discussed above I am satisfied that the First Defendant has shown a good arguable case that he will suffer loss in consequence of the making of the Freezing Order. For the purposes of fortification, I estimate the likely amount of loss to be the sum of £800,000.

The additional fortification should be in addition to the £500,000 insurance policy

46. The First Defendant submitted that Calver J considered that £500,000 was necessary by way of fortification even without any evidence of specific losses, let alone of the quantum explained by Mr Spence. It was therefore submitted that the additional fortification, directly referable to the dollar loan, should be provided in addition to the

fortification already provided; otherwise Mr Spence would not be properly protected. The existing £500,000 insurance policy will be required to cover losses suffered both by the other respondents, and by third parties. Mr Crump has already stated at the return date that he has concerns about whether it would be sufficient. In addition, Mr Spence's wife says she is suffering loss because her joint account, which she uses for business purposes, is frozen.

47. I accept these submissions and direct that the amount ordered should be in addition to the current amount of £500,000.

Form of the additional fortification and timing

48. As to the form of the additional fortification, the First Defendant has seen the form of the insurance policy. It should be capable of agreement between the parties. Ms Briant says it will take 6 weeks to obtain this based on information from the broker. There is no evidence to substantiate this and I see no good reason why it should take this length of time. A period of 2 weeks seems adequate in my view.

49. I trust that the parties will be able to agree a way forward on the basis of this judgment. Any matters arising which are not agreed can be referred to the court for determination at the consequential hearing following hand down of this judgment.