Neutral Citation Number: [2022] EWHC 1387 (Comm)

Case No: CL-2020-000047

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7/6/2022

Before :

Stephen Houseman QC
Sitting as a Deputy Judge of the High Court

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Between :

HC TRADING MALTA LIMITED	**Claimant**
- and -	
(1) K. I. (INTERNATIONAL) LIMITED **(2) DHATU INTERNATIONAL LIMITED** **(3) KAMACHI INDUSTRIES LIMITED**	**Defendants**

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Michael Collett QC & Kishore Sharma (instructed by **Clyde & Co LLP**) for the **Claimant**
Jeremy Richmond QC & Koye Akoni (instructed by **Greenwoods GRM LLP**) for the **Second Defendant**

Hearing date: 11 May 2022
Oral Judgment handed down remotely on 17 May 2022

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Approved Judgment

I direct that 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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STEPHEN HOUSEMAN QC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 07 June 2022 at 15:00.

Mr Stephen Houseman QC sitting as a Deputy Judge of the High Court:

Introduction

1. On Wednesday 11 May 2022, I heard an application in person in the Rolls Building which concluded within the agreed time estimate of three hours. The application is made by D2 by notice dated 15 September 2021 pursuant to CPR Part 11. D2 seeks to challenge the existence or exercise of jurisdiction on the part of this Court in respect of the claim made against it by C.

2. At the conclusion of the hearing I indicated that I would deliver judgment orally and deal with consequential matters by a further short remote hearing. This is my judgment and my decision on the application. Owing to technical difficulties in recording of the handing down of this judgment on 17 May 2022, of which I was informed today (7 June 2022) I have proceeded to edit and issue it as an approved judgment.

3. The substantive claim against D2 concerns payment under or on two dishonoured cheques drawn on State Bank of India via its branch in Singapore where D2 is domiciled and based. The claim is, in effect, for US$4,628,084.84 plus interest accrued since the cheques were dishonoured on dates in June and July 2019.

4. There are three defendants to this action commenced on 29 January 2020: D1 ("KI") is Indian-registered entity sued as purchaser under two contracts of sale of coal cargoes which are expressly governed by E law and provide for the EJC. D3 ("Kamachi") is another Indian company related to KI. D3 is sued for payment under separate post-dated cheques said to have been provided as security for the same payment obligations. Since mid-February 2020, so from a fortnight or so after commencement of this action as it happens, D3 has been subject to a statutory Corporate Insolvency Resolution Process in India. I should add here that C is a Maltese company.

5. For present purposes it is to be assumed or is at any rate common ground that the cheques issued by D2 (and, so far as relevant, D3) in favour of C were intended to secure KI's liability as purchaser under the two sale contracts. Whilst the separable and distinct contractual relationship created by issuance of each cheque issued by D2 may be governed by Singaporean law, no material differences from English law have been pleaded or evidenced.

6. On 6 May 2020 Henshaw J made an order without notice and on paper granting permission to serve each of the three defendants out of the jurisdiction. The basis for such permission in respect of KI was that the claim relates to two contracts governed by English law and containing EJC; whereas the basis for such permission in respect of D2 and D3 was that they were each a necessary or proper party to such claim pursuant to 6BPD gateway (3) (referred to as "**gateway 3**"). In the context of gateway 3, KI is the anchor defendant and the claim against it may be referred to for convenience as the 'anchor claim'.

7. Service was effected upon KI on 24 June 2021 (email) and 27 June 2021 (courier) pursuant to a further and intervening order of Cockerill J on 28 May 2021 granting permission to serve by alternative methods and confirming the basis of permission granted by Henshaw J over a year earlier.

8. KI appointed solicitors in England (CND Parker) on 11 August 2021. KI filed acknowledgement of service out of time on 20 August 2021 indicating an intention to defend the claim in full. It thereby submitted to the jurisdiction of this court in a curial or procedural sense in accordance with the *lex fori* and consistent with its contractual promise to do so. KI then applied on 3 September 2021 for an order seeking a 28 day extension to file and service its Defence together with relief from sanctions. Counsel was instructed to prepare a Defence and it was again said that KI intended to defend the claim. However, by letter dated 28 August 2021 CND Parker informed the solicitors for D2 (Greenwoods) and C (Clyde&Co) that KI did not wish to defend the claim and would not participate in these proceedings.

9. D2 had in the meantime made this CPR 11 application on 15 September 2021 by which it contests the satisfaction of gateway 3 as well as proper forum. In short D2 says that the anchor claim is unanswerable and lacks utility and KI had no intention of defending it; and that England is neither clearly nor distinctly the most appropriate forum for determination of this dispute as a whole. In the alternative, and as is customary on such applications - perhaps as much by dint of drafting precedent than anything - D2 seeks a stay on *forum non conveniens* grounds; but it is fair to say that this alternative relief was not pressed with any vigour and no independent basis for such contingent relief was identified or advanced before me.

Legal Framework

10. It is common ground that the time for testing the jurisdictional gateway and proper forum is the date of the relevant permission order - here, Henshaw J's Order on 6 May 2020 - *but* evidence of subsequent matters may be relevant in so far as it casts light on the position at that time. Binding authority for this approach is found in the judgment of the Court of Appeal delivered by Gloster LJ in *Erste Group Bank AG v. JSC "VMZ Red October*" [2015] EWCA Civ 379; [2015] 1 CLC 706 at [44]-[45].

11. A good illustration of the principle in practice can be found in the judgment of Morgan J in *Satfinance Investment Ltd v. Athena Art Finance Corp* [2020] EWHC 3527 (Ch) in which consideration is given to the possibility that an anchor defendant may change their mind and decide later not to defend an action. This case also shows that it may be reasonable for the court to try the anchor claim, even where the anchor defendant lacks an intention to defend it by or as at the date of the relevant permission order.

12. The position is different where a court is dealing with an application to stay jurisdictionally-founded proceedings on the basis of *forum non conveniens* – in that case, the time for evaluation is when the stay application is heard/determined. The court needs to be satisfied in a such a case as to the interests of justice and that is measured at the time of determination.

13. As an aside, but not relevant for my judgment today, the timing rule applicable to challenges in 'service out' cases may produce anomalies in certain circumstances, requiring the court to ignore material changes of circumstance post-dating the relevant permission order. The underlying legal policy is one of certainty in jurisdictional matters so that litigating parties know where they stand on the preliminary (and often strategic or decisive) question of jurisdiction. It is not clear that the language of CPR Part 11 itself mandates this strict temporal approach given that it is not directed primarily at setting aside the relevant permission order.

14. There is no dispute before me as to the existence of threshold merits, i.e. a serious issue to be tried on the claim against D2 arising on or from the dishonoured cheques. There is little real dispute about the second limb of gateway 3, assuming the first limb is satisfied. The real focus of this challenge is on the first limb of the gateway and, if satisfied, proper forum. C has the burden on both. The relevant standard is good arguable case, as to which nothing turns for my purposes on the different stages of that test posited in *Brownlie v. Four Seasons Holding Inc.* [2018] 1 WLR 192 SC(E).

15. The first limb of gateway 3 requires demonstration that the anchor claim involves "*a real issue which it is reasonable for the court to try*". This involves two distinct elements. The concept of a "*real issue*" denotes a claim which is jurisdictionally-founded and substantively viable, i.e. not bound to fail, according to authority. This is not itself enough to satisfy the first limb because it must be "*reasonable for the court to try*" such viable anchor claim. This requires something more than a viable claim.

16. The CA in *Red October* stated that this formulation is a "*finely nuanced, soft-edged, question*". It is objective, not subjective; such that C's own considerations or motivations cannot supply the answer. It may be reasonable for the court to try a claim against an anchor defendant even where it is found (to the relevant standard of proof) that they had no intention to defend such claim at the time of the relevant permission order, so long as some useful purpose or legitimate interest might be served by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant. That was the position in *Satfinance* (referred to above) concerning the availability of a declaration of title in respect of the disputed painting.

17. Thus the word "*try*" in this first limb of gateway 3 need not involve a trial in the traditional or formal sense or even a contested hearing for final relief or summary judgment. It does, however, denote some form of judicial determination of the claim and grant of relief as distinct from the administrative process of entering default judgment.

18. The concept of "*reasonable*" is not susceptible to gloss. It is avowedly evaluative and looks to all the circumstances of the case measured, as required, at the time of the relevant permission order. It is nevertheless bound up with the concept of - and may to some extent become the converse or corollary of - the absence of utility, as features in the authorities identified above and others concerning gateway 3. The test in this context is not exacting for a claimant. It is only where the court concludes that pursuit of an intrinsically viable anchor claim lacks discernible utility that is likely to lead to a conclusion that it is not "*reasonable to try*" such claim. Any utility therefore matters. It doesn't necessary establish reasonableness, but it all counts towards discharge of the interlocutory burden by the claimant.

19. The concept of "utility" requires no further gloss. It is an intuitive and familiar concept in civil procedure, private international law and especially concerning the grant of non-monetary remedies such as declarations or anti-suit injunctions. Whether a claim lacks utility is a matter of common sense. In the context of a monetary claim, it is important to see whether such claim has value in terms of potential ultimate recovery against the assets of the defendant (here or abroad, via recognition/enforcement) including any insolvency process.

20. Beyond providing authoritative guidance as to what gateway 3 means and requires, the fate of the specific jurisdiction challenge in each of the decided (including reported) cases is of limited value when evaluating the circumstances of the present case. Both sides sought to compare or contrast (as the case may be) certain features of certain cases to further their analysis as to gateway 3. I turn now to that analysis.

21. The scope of dispute which really matters on this application is narrow. This Court is not required to make any findings, nor (on analysis) decide any issues of law. The test is common ground. The task is evaluative and contextual. This hearing was listed for three hours. Skeleton arguments exceeded 20 pages on both sides, plus rival chronologies. I held counsel to the three hour hearing estimate and invited them to refer me to any piece of genuine evidence in the witness statements that was important to their analysis. Very few references were made in the course of oral submissions. (I have checked them all and those in the skeletons, including since the hearing.) All of that said, I am grateful to counsel for the quality and clarity of their written and oral submissions.

Gateway 3

22. C has the burden of showing a good arguable case to the effect that its claim against KI under the sale contracts involves a real issue that it is reasonable for the court to try, measured at 6 May 2020 per Henshaw J's Order.

23. If shown, I have no hesitation in concluding that there is at least a good arguable case to the effect that D2 and (if relevant) D3 is each a "proper party" to such claim. On the assumed case thesis / threshold merits for present purposes, the cheques issued by D2 and D3 were intended to be security for KI's liability as purchaser of the coal cargoes under the two sale contracts which are the subject of the anchor claim. The extent of D2's liability (or that of D3, so far as matters for present purposes) as security-providers or (in effect) sureties for KI as principal debtor/obligor under the substantive commercial contracts would, in the usual course of things, depend on the degree of default on the part of KI itself. The nature and basis of such security would ordinarily depend on the objective common intentions of the stakeholders in such mercantile arrangements, necessarily involving the relationship between C and D1. Issues as to contribution or subrogation may arise between principal debtor (D1) and co-sureties (D2 & D3) in such multipartite arrangements. D2 is clearly a proper party to the anchor claim against the principal debtor.

24. In December 2021 a settlement agreement was reached between C and KI covering the latter's liability under the sale contracts which are subject of the present claim. Its terms are confidential. As explained to me, it appears to be in the nature of a restructuring or commutation whereby KI undertook a payment plan of some kind, but there is no Tomlin Order or other step impeding the prosecution of the claim against KI through to judgment as matters stand. KI appears to be in default of its obligations under the Settlement Agreement.

25. As to the first limb of gateway 3: D2 says first that there is no real issue because KI has no defence and therefore the anchor claim is bound to succeed. D2 refers to the fact that KI admitted $3,619,688 of the claim in a letter from its Indian lawyers dated 22 August 2019 and submits that the arguments of purported set off or exclusion of liability

for the balance (just over $1m, plus interest) by reference to the operation of tripartite agreements between C, KI and a sub-buyer known as GCV do not withstand scrutiny. Clyde&Co described such arguments as "*manifest nonsense*" in their response letter dated 5 September 2019. Mr Collett QC, appearing on behalf of C at this hearing, was not quite so emphatic, but nevertheless contended that such defences as articulated on behalf of KI were weak and fraught, such that his client would have defeated them even if KI resisted any summary judgment application on the anchor claim.

26. The short answer to this threshold point is that the anchor claim involves a "real issue" *even if* it is overwhelmingly strong and indeed bound to succeed. The only recognised limitation on the concept of a "real issue" is at the other end of the merits spectrum where such claim is bound to fail and hence cannot be called viable. The same *might* be said where the entire claim has been admitted in clear and unequivocal terms, but that is not the case here as already described: a non-admitted claim for over $1m plus interest accruing for almost three years is far from *de minimis* in absolute terms or in the context of the present dispute. No authority was cited to the converse effect. I conclude, therefore, that the anchor claim involves a real issue and this was the case at the date of the relevant permission order.

27. The real question on this application is whether it was reasonable for the court to try the anchor claim as at 6 May 2020?

28. I am satisfied to the relevant interlocutory standard that this is so. The analysis breaks down into three sub-issues with some cross-fertilisation.

29. As regards the contention that KI lacked intention to defend the claim against it at the relevant time, I reject such contention on the available evidence and within the applicable burden/standard of proof rubric. The last thing said by or on behalf of KI prior to commencement of these proceedings in January 2020 was the letter from its Indian lawyers dated 22 August 2019 described above. The final paragraph of that letter stated that "*all actions taken by you will be suitably defended at your costs and consequences*". The next thing that was said or done by or on behalf of KI in relation to such claim (once served in late June 2021) was filing acknowledgement of service through English solicitors on 20 August 2021 indicating an intention to defend the claim in full. The ensuing application for an extension of time to file/serve a Defence with relief from sanctions, instruction of counsel to settle such Defence, and absence of any indication that the previously intimated defences to liability had been abandoned all suggest a continuing intention in the meantime to defend the claim. KI's subsequent withdrawal from the proceedings by its solicitor's letter on 28 August 2021 does not begin to demonstrate that it lacked intention to defend over 16 months earlier on 6 May 2020 in the context of the consistent contemporary outward indicators of intention summarised above.

30. I need not decide or express any view on KI's motivation for this *volte face* in September 2021 - although its timing, coming a fortnight after D2's present application to challenge jurisdiction, was relied upon by C to suggest that such withdrawal was tactical and optical to assist D2.

31. The key point here is that nothing was said or done by or on behalf of KI prior to 6 May 2020 to countermand or gainsay its latest stated position in August 2019, i.e. that the claim against it would be "*suitably defended*". It isn't strictly necessary to look post-6

May 2020 to KI's acknowledgement of service and extension application during 2021 for additional or corroborative support, but that later position is consistent and supports the conclusion that such intention or posture continued after August 2019 and up to (at least) the date of the Henshaw Order. The outward position was that KI would defend the claim. Full stop.

32. As noted above, whether or not KI intended to defend the claim as at 6 May 2020 is not determinative one way or the other. It might be reasonable for the court to try an anchor claim notwithstanding the anchor defendant's non-participation for whatever reason, so long as there is some utility in such uncontested summary or final judgment. Conversely, the fact that an anchor defendant intends to defend the claim at the relevant time does not mean that it is reasonable for the court to try it.

33. The main inquiry on this application therefore concerns utility.

34. D2 says that KI is and was at the date of the relevant permission order an impecunious entity based in India against whom a judgment of this court would have no practical value to C. I disagree with this analysis. The available evidence is sufficient to show that there is some utility in the anchor claim such that it is reasonable for the court to try it, and this was the position as at 6 May 2020 and to the requisite interlocutory standard of proof incumbent upon C.

35. KI's latest audited accounts at the relevant time were those to 31 March 2019. Those accounts were signed off 6 June 2019 on the basis that KI was a going concern, but with a materiality statement in the auditor's report under the heading "*Emphasis of matter*" and in bold font. The materiality statement referred to measures being undertaken by KI to restructure its business in order to remain a going concern. The accounts themselves show current assets of KI in the region of US$43m (converted from local currency) which was far in excess of secured liabilities as at 31 March 2019.

36. KI's bank declared it a so-called 'Non Performing Asset' in late April 2019 due to its default record. KI's financial predicament had manifested in non-payment under the sale contracts with C and the entering into in March and April 2019 of sub-sale and tripartite arrangements with another entity (GCV) whereby payments were to be made direct to C in discharge of the intermediate obligations in the chain. KI's last payment to C had been on 21 February 2019. There is evidence to the effect that KI had been referred to a debt recovery tribunal in India and become "unoperational" or "unoperative" at some point preceding Henshaw J's Order. As already noted, KI's sister company (D3) was placed into formal insolvency process in India in February 2020, less than three months before Henshaw J's Order.

37. KI is not, however, subject to any formal insolvency process itself despite these evident financial difficulties. There is some doubt as to whether "unoperational" in this context precludes any form of trading or activity on the part of an Indian-registered company. There is evidence that KI has made payments during 2021, although the source of funds for such payments is unknown.

38. It is common ground that a monetary judgment of this court would *prima facie* be capable of recognition and enforcement in India pursuant to the applicable legislation covering reciprocal arrangements in such matters between the UK and India.

39. In these circumstances, there is some utility. So far as relevant, the position is materially different from that concerning the anchor claims in issue in *Red October* where the anchor defendants were subject to a foreign insolvency process and any English judgment that might be obtained against them would have to be proved in such insolvency process.

40. Finally, as regards the fact that KI has openly admitted liability for a substantial portion of the amount claimed, and raised weak and fraught defences to the balance in pre-action correspondence during August 2019, this does not preclude there being a "real issue" in respect of the claim even for the balance of $1M or so plus interest. Nor does it make it not reasonable to try such a claim if otherwise reasonable due to the existence of some utility.

41. In summary, therefore, I am satisfied to the requisite standard that the anchor claim involves a real issue which it is reasonable for the court to try, even if (which appears inevitable) that process might at most involve an uncontested summary judgment application against KI.

Proper Forum

42. In accordance with well-established principles summarised by the HL in *The Spiliada* [1987] AC 460, C has burden of showing that England is – i.e. was at the date of the Henshaw Order - clearly the appropriate forum for the trial of the action, i.e. the forum where the case may most suitably be tried for the interests of all the parties and the ends of justice. I was referred to the decision of Mrs Justice Carr (as she then was) in *Tugashev v. Orlov & others* [2019] EWHC 645 (Comm) for various points of emphasis within this overriding test.

43. It does not follow from satisfaction of both limbs of gateway 3 that England is the proper forum for determination of the claims as a whole or those as against D2 specifically. It has often been observed that gateway 3 is anomalous as it requires no connection between the parties or their dispute to this jurisdiction save in a reflective way through the concept of a "necessary or proper party" to an anchor claim that will be and ought to be determined here. Since gateway 3 permits joinder of further foreign defendants to existing litigation, the proper forum analysis that flows from such gateway invariably involves analysis as to fragmentation of the overall dispute.

44. Nor does such conclusion follow from the fact that there is an EJC governing the anchor claim and the anchor defendant (KI) has (albeit since the relevant permission order) submitted to this jurisdiction. That jurisdictional anchor is, in a sense, a given or spent feature at this stage in the analysis.

45. D2 points out with some force that the claim on the dishonoured cheques has no connections of any kind to this jurisdiction. If it is connected anywhere, that would be Singapore where the cheques were drawn, presented and dishonoured and where D2 itself is domiciled. It is not yet clear, however, what defences may be raised by D2 to this claim and (therefore) what issues they would arise or evidential inquiries they would necessitate. As observed already, there is no identified or evidenced difference between Singaporean law and English law as to the ingredients of a claim on a dishonoured cheque, although that position may evolve down the line.

46. Viewed in isolation it is tempting to conclude that the natural forum for the discrete claim against D2 on the dishonoured cheques is Singapore.

47. However, given the intrinsic connection between the cheques and the sale contract in respect of which those cheques were provided as security, the position shifts to this forum. There is good sense in having the claim against principal debtor (KI) and surety or security provider (D2) (and, if relevant, D3 albeit subject to Indian insolvency proceedings) heard and determined together by one court. As noted above, issues may arise as to quantum which depend on the primary debtor position; if there is any dispute as to the basis of security that will turn on the objective common intention of the parties to the commercial arrangements; and issues may arise by way of contribution or subrogation as between (for example) KI and D2.

48. Further, there is a risk of inconsistent decisions and possibly findings (e.g. as to quantum) if the principal debt claim is pursued against KI here, but the security or surety claim on the dishonoured cheques has to be pursued against D2 in Singapore. The non-admitted amount of just over $1m plus interest accrued since mid-2019 is significant enough for it to be reasonable for the court to try the principal/anchor claim, but it is not so large as to justify fragmentation of such dispute between two forums if otherwise avoidable through joinder in this way. The dispute already suffers a degree of fragmentation by reason of D3 being subject to formal insolvency process in India. But on the figures that may not matter. What matters for present purposes is that fragmentation of this modest monetary claim between England and Singapore would be undesirable unless there were good reason for it – albeit this is to be rationalised through the concept of proper forum on which C has the relevant burden.

49. I conclude on balance that England is clearly and distinctly the appropriate forum for determining this dispute as a whole and (therefore) the claim on the dishonoured cheques. I don't rest this conclusion on whether KI is a minor or major, primary or secondary player in this dispute, as discussed in ***Tugashev*** at [261]. I am satisfied, however, that the joinder of D2 (and D3, if relevant) to these proceedings does not constitute the 'tail wagging the dog' given the commercial structure which is the subject-matter of this action.

50. I dismiss the jurisdiction challenge.

Stay Application

51. Finally, and for completeness, I mention D2's alternative application for a stay of the claim against it on the premise that jurisdiction is established. In so far as this was pursued with any conviction or independent basis (neither of which I discerned in the evidence or submissions) such application is likewise dismissed.

52. D2 would need to show that it was contrary to the interests of justice to permit such claim to proceed notwithstanding the court's decision on gateway 3 and proper forum as aforesaid. Whilst this might be theoretically possible given the difference in time points for evaluating the respective positions (as already noted) there is no evidence of matters post-dating the Henshaw Order which could lead me in such circumstances to conclude that it is contrary to the interests of justice for the claim against D2 to be pursued in this jurisdiction. I therefore also dismiss the alternative stay application.