



Neutral Citation Number: [2023] EWHC 809 (Comm)

Case No: CL-2021-000691

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 5 April 2023

Before :

MR JUSTICE BRIGHT

Between :

Credit Suisse AG

Claimants

- and -

(1) Burgundy Sea Ltd
(2) Premium Big Continental Inc
(3) HRH Prince Fahad bin Sultan bin Abdulaziz al
Saud

Defendants

Guy Blackwood KC and Koye Akoni (instructed by Clyde & Co.) for the Claimants
The Defendants did not appear

Hearing dates: 31 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRIGHT

Mr Justice Bright:

Introduction

1. On Friday 31 March 2023 I dealt with the application of the Claimant (“CSAG”) for summary judgment against the First and Third Defendants and the strike-out of the First and Third Defendants’ Defences. CSAG was represented by Mr Guy Blackwood KC and Mr Koye Akoni (instructed by Clyde & Co.). The solicitors on the record for the First and Third Defendants are TLT LLP. However, they wrote in advance of the hearing stating that they were instructed not to attend.
2. I indicated my decision at the end of the hearing and made an order granting judgment in favour of CSAG. I also indicated that I would produce a written judgment setting out my reasons, within a few days. This is that judgment.
3. The claims I have had to consider are for outstanding sums under:
 - i) A loan agreement between CSAG and the First Defendant (“Burgundy”) dated 3 February 2020 (the “Yacht Loan”) in connection with the financing of the m.y. “SARAFSA” (the “Yacht”). In this respect, Burgundy is a special purpose vehicle concerned with the ownership and use of the Yacht and is ultimately beneficially owned by the Third Defendant (“Prince Al Saud”).
 - ii) A personal guarantee given by Prince Al Saud to guarantee Burgundy’s obligations under the Yacht Loan (“the Guarantee”).
4. CSAG set out its case in Particulars of Claim, supported by a statement of truth. Burgundy and Prince Al Saud have both filed Defences, responding to the Particulars of Claim. However, most of the key elements of CSAG’s case were not put in issue by those Defences.
5. CSAG’s application was also supported by two witness statements made by Patrick Murphy. Burgundy did not serve any evidence in response. Prince Al Saud filed evidence by way of a witness statement made by Claire Kershaw, however, I did not find that Ms Kershaw’s witness statement assisted Prince Al Saud’s position.
6. CPR 24.2 provides as follows:

“Grounds for summary judgment

24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

7. The principles applicable to applications for summary judgment under CPR 24.2 are well established. They were explained by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

“15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

Background and the parties’ respective positions

8. The background to the application and the parties’ respective positions in respect of that background can be largely taken from the pleadings. Very few of the factual allegations in the Particulars of Claim were disputed by Burgundy or by Prince Al Saud.

(i) The Yacht Loan and the Guarantee

9. There is no dispute on the pleadings as to the following:

- i) By an agreement dated 3 February 2020, CSAG agreed to provide the Yacht Loan to Burgundy for various purposes, including refinancing existing debts. This was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
- ii) By a Deed of Guarantee also dated 3 February 2020, Prince Al Saud guaranteed Burgundy’s obligations under the Yacht Loan pursuant to the terms of the Guarantee. This was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
- iii) The total Loan Amount was €48 million, and it was drawn down in its entirety by Burgundy on 3 February 2020 by a Drawdown Notice served by Burgundy on CSAG. This was admitted by Burgundy and by Prince Al Saud, in their respective Defences.

(ii) Payment of Interest under the Yacht Loan

10. There is also no dispute on the pleadings that, in respect of the payment of interest under the Yacht Loan, the agreement provided as follows (this all being admitted by Burgundy and by Prince Al Saud, in their respective Defences).
 - i) Clause 4.2.2 required Burgundy to “pay interest on the amount of the Loan outstanding during each Fixing Period at the rate of interest calculated in accordance with Clause 4.2.4. Such interest shall be payable in arrears on the last day of each Fixing Period, except in the case of a Fixing Period longer than 3 months where Interest shall be paid in arrears every 3 months during that fixing Period and on the last day of that Fixing Period”.
 - ii) Pursuant to Clause 4.2.3, the Fixing Period was a period of 3, 6, 9 or 12 months, as specified by Burgundy.
 - iii) By virtue of Clause 4.2.4, the interest rate for each Fixing Period was the aggregate of (i) CSAG’s Costs of Funds, and (ii) the applicable ‘Margin’, which was defined as 2% per annum.
11. Save for a payment of €13,505.00 paid on 3 February 2021, Burgundy did not pay any further sums to CSAG in respect of interest between February 2021 and 10 September 2021. In particular, Burgundy did not pay (i) the remainder of the €490,666.67 that CSAG claims was due on 3 February 2021, or (ii) any of the €480,000.00 that CSAG claims was due on 4 May 2021, or (iii) any of the €485,333.33 claimed by CSAG to be due on 3 August 2021. This was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
12. CSAG contended that this failure to pay interest constituted a breach of Clause 4.2.2 of the Yacht Loan.
13. In their Defences, both Burgundy and Prince Al Saud however deny that the non-payment of the sums constituted a breach of the Yacht Loan because they deny that any sums were due to CSAG in interest. However, no basis was given for the respective denials nor was a positive case advanced by either of them.

(iii) Evidencing Prince Al Saud’s portfolio

14. It is also common ground on the pleadings (having been admitted by Burgundy and Prince Al Saud) that in circumstances where the Drawdown Date on the Loan Amount was 3 February 2020, pursuant to Clause 9.10.2 of the Yacht Loan, Burgundy was obliged to:
 - i) procure that, from 3 February 2021 and for the remainder of the term of the Yacht Loan, Prince Al Saud held directly or indirectly, a bankable, liquid and diversified portfolio of assets free from encumbrances, with a value of not less than US\$25 million; and
 - ii) provide evidence on 3 February 2021 and quarterly thereafter, that Prince Al Saud held directly or indirectly, a bankable, liquid and diversified portfolio of assets free from encumbrances, with a value of not less than US\$25 million.

15. CSAG's position on the pleadings was that Burgundy failed to provide any evidence of Prince Al Saud's financial portfolio either by 3 February 2021 or at any time, and that this constituted a breach of the Yacht Loan.
16. In their respective Defences, Burgundy and Prince Al Saud each pleaded a bare denial of that allegation. No explanation was provided for the denial; merely that "*Paragraph 23 is denied*".

(iv) Payment of legal fees and expenses

17. There was no dispute on the pleadings that pursuant to Clause 14.1.4, Burgundy was obliged to "pay and indemnify the Lender on demand for all costs and expenses (including legal and notarial fees, filing, registration and recordation expenses, the costs of searches, appraisals, inspections and audits and other out-of-pocket expenses) incurred by the Lender in connection with ... any appraisals or inspections necessary to determine the current market value of the Yacht at any time for the purposes of the Transaction Documents". The existence of this obligation was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
18. CSAG sought payment of two invoices relating to legal fees from Burgundy. It did so through invoices dated 3 May 2021 and 23 July 2021. There was no dispute on the pleadings that Burgundy did not pay or indemnify CSAG in respect of those invoices. The issue of the invoices and the fact that CSAG was not paid or indemnified was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
19. CSAG's position is that this non-payment constituted a breach of the Yacht Loan.
20. The response of Burgundy and Prince Al Saud was (a) not to admit that CSAG in fact incurred the legal fees invoiced, and (b) to deny that Burgundy was in breach of the Yacht Loan by failing to pay such sums even if CSAG establishes that it incurred the costs. No explanation was given for this bare denial.

The Clause 10.2 Notice

21. It was common ground on the pleadings, and in any event was self-evident from the document themselves, that:
 - i) Clause 10.1 of the Yacht Loan stipulates what constitutes an "Event of Default", which includes where:
 - "10.1.1 any Obligor defaults in the making of any payment which has become due and payable under this Agreement or any other Transaction Document on the due date for such payment in the currency and in the manner therein specified or, if payable on demand, within three (3) Business Days of a demand by the Lender for such payment;
 - 10.1.2 The Borrower does not comply with the provisions of any of Clause 5.3, Clause 6.1, Clause 9.10.1(B) or Clause 9.13; ..."
 - ii) Clause 10.2 of the Yacht Loan sets out CSAG's rights in the event of an Event of Default, providing as follows:

“Upon the occurrence of an Event of Default which is continuing, in addition and without prejudice to any other rights of the Lender under the Transaction Documents or under applicable law, the Lender may by written notice to the Borrower:

- 10.2.1 cancel its obligation to make the Loan or any further advance available in accordance with the Agreement if the Loan has not yet been advanced in full and declare the Loan and all other Outstanding Indebtedness to be immediately due and payable, whereupon the Loan shall become due and payable together with unpaid interest accrued thereon, any Funding Break Costs arising out of such repayment, all other Outstanding Indebtedness and together with:
- (A) (following an Event of Default of any kind whatsoever which results in the Lender arresting or repossessing the Yacht) the present value of the amount which is the sum of all scheduled payments of interest to the extent representing the Margin which would have fallen to be paid by the Borrower under this Agreement but for the acceleration of the Loan pursuant to this Clause from the date on which the Loan becomes due and payable by reason of such acceleration to the Final Repayment Date., discounted from the dates upon which such the scheduled payments of interest would have fallen due to the date on which the Loan becomes due and payable by reason of such acceleration at the Discount Rate: and/or
 - (B) (following any other Event of Default) the applicable Early Repayment Fee (unless waived in writing by the Lender, in its absolute discretion); and/or
- 10.2.2 declare the Loan and all other Outstanding Indebtedness to be due and payable on demand of the Lender, in which event the Loan and all other Outstanding Indebtedness shall, upon any subsequent demand of the Lender, become immediately due and payable together with all of the other amounts specified in Clause 10.2.1.

Regardless of whether the Lender shall have served notice pursuant to this Clause 10.2 declaring the Loan and all Outstanding Indebtedness to be immediately due and payable or due and payable on demand, and notwithstanding any other provision of this Agreement, following the occurrence of an Event of Default which is continuing interest shall, upon the Lender notifying the Borrower of such accrual, accrue on the entire Outstanding Indebtedness at the Default Rate.”

22. By a letter dated 10 September 2021, CSAG served a notice on Burgundy to the effect that it was exercising its rights pursuant to Clause 10.2.1 of the Yacht Loan, and it declared the Loan and all other Outstanding Indebtedness to be immediately due and payable by Burgundy, the Notice of Acceleration. This was admitted by Burgundy and by Prince Al Saud, in their respective Defences.
23. The Notice of Acceleration referred to each of the Events of Default that CSAG also relied on in its application for summary judgment, all of which the Notice of Acceleration stated were continuing as of 10 September 2021:
- i) Burgundy’s failure to pay interest, which constituted an Event of Default within the scope of Clause 10.1.1.
 - ii) Burgundy’s failure to evidence Prince Al Saud’s portfolio with a value of at least US\$25,000,000, which constituted an Event of Default within the scope of Clause 10.1.4.
 - iii) Burgundy’s failure to pay and indemnify CSAG for the legal fees, which constituted an Event of Default within the scope of Clause 10.1.1.

24. The Notice of Acceleration also referred to two additional alleged Events of Default, which CSAG did not rely on in its application and which I assume for present purposes – i.e., without deciding the point – may not have been established as Events of Default.
- i) Burgundy’s failure to pay the Margin Call as required by the Early Amortization Invoice, which was alleged to constitute an Event of Default within the scope of Clause 10.1.1 and/or 10.1.2.
 - ii) Burgundy’s appointment of a crew manager which was not a Manager, which was alleged to constitute an Event of Default within the scope of Clause 10.1.15.
25. It is important to note that, under the Loan Agreement, any single Event of Default can give rise to the right of CSAG to give Notice of Acceleration. The Notice of Acceleration of 10 September 2021 made it clear that each of the matters referred to constitute a separate Event of Default, and that CSAG was relying on each of them separately rather than on their cumulative effect. It therefore does not matter that two of them are not pursued by CSAG for the purposes of this application.
26. CSAG’s position was that, as a consequence of the Notice of Acceleration, Burgundy’s overall indebtedness to CSAG became immediately due and payable pursuant to Clause 10.2.1 of the Yacht Loan. That overall indebtedness was €37,298,762.37, US\$7,367.57, and £128,860.18 (as quantified on 10 November 2021).
27. The pleaded responses of both Burgundy and Prince Al Saud in their respective Defences were as follows:
- i) They denied, without explanation, that the matters set out in the Notice of Acceleration constituted breaches of the Yacht Loan or Events of Default.
 - ii) On the basis of the bare denial of the existence of any Events of Default, they contended that CSAG was not entitled to serve the Notice of Acceleration and as a result, that the Notice of Acceleration had no valid effect.

The Call under the Guarantee

28. It is common ground, and in any event is self-evident from the document itself, that Clause 2.1 of the Guarantee stipulates the scope and nature of Prince Al Saud’s guarantee obligation as follows:

“In consideration of the Lender agreeing to make the loan available to the Borrower pursuant to the Loan Agreement (which consideration the Guarantor acknowledges is a good and valuable consideration for the Guarantor accepting the Guarantor’s obligations under this Deed) the Guarantor, as principal obligor and not merely as surety and as a continuing obligation, hereby unconditionally and irrevocably:

- 2.1.1 guarantees to the Lender the full and punctual payment and performance of the Guaranteed Obligations in accordance with the terms of the Transaction Documents;
- 2.1.2 undertake (by way of separate obligation and not merely as surety) to pay to the Lender forthwith on demand by the Lender any Guaranteed Obligations which are not fully and

punctually paid in accordance with the terms of the Transaction Documents;

- 2.1.3 undertakes to procure the performance forthwith on demand by the Lender of any Guaranteed Obligations which are not fully and punctually performed in accordance with the terms of the Transaction Documents; and
- 2.1.4 agrees to indemnify and to keep indemnified the Lender forthwith on demand by the Lender against any Loss incurred by the Lender as a result of any of the Guaranteed Obligations not being fully and punctually paid and/or performed in accordance with the terms of the Transaction Documents or being or becoming, in whole or in part, void voidable or unenforceable for any reason whatsoever whether or not known to the Lender.”
29. The essence of Prince Al Saud’s primary obligation is that pursuant to Clause 2.1.1 of the Guarantee, he guaranteed to CSAG, the full and punctual payment of Burgundy’s obligation to pay sums due and payable pursuant to acceleration provision at Clause 10.2 of the Yacht Loan.
30. It was common ground, and in any event was apparent from the document itself, that, by a letter of 10 November 2021, CSAG wrote to Prince Al Saud making a Call under the Guarantee, as follows:
- i) The letter informed Prince Al Saud of Burgundy’s non-compliance with the Yacht Loan, that CSAG had exercised its right to accelerate the loan, and that, accordingly, he was in breach of the Clause 2.1.1 of the guarantee.
 - ii) It demanded that:
 - a) Pursuant to Clauses 2.1.2 and 2.1.3 of the Guarantee, he should pay CSAG forthwith Burgundy’s outstanding indebtedness of €37,298,762.37, US\$7,367.57, and £128,860.18.
 - b) Pursuant to Clause 2.1.4 of the Guarantee, he should indemnify CSAG against any Loss incurred by CSAG as a result of any Guaranteed Obligations not being fully and punctually performed, and
 - c) Pursuant to Clause 5.1 of the Guarantee, he should pay interest on the sums demanded at the Default Rate.
31. It was not in dispute on the pleadings that Prince Al Saud did not pay any sums demanded in the Call under the Guarantee.
32. Prince Al Saud’s pleaded position in his Defence was that, in view of his denial that (a) Burgundy had failed to comply with the Yacht Loan, and (b) CSAG was entitled to accelerate the Loan pursuant to Clause 10.2, he denied that he had any responsibility to CSAG under the Guarantee in general or that he was in breach of Clause 2.1.1, or that CSAG was entitled to the sums or indemnity claimed in the Call under the Guarantee.

CSAG’s Claims

33. CSAG’s pleaded claims were for relief as follows:

- i) €37,298,762.37, US\$7,367.57, and £128,860.18, being Burgundy's accelerated overall indebtedness as of 10 November 2021.
 - ii) Compound interest on the outstanding sums at the contractual rate of 4% with daily rests pursuant to Clause 12.9 of the Yacht Loan and/or Clause 5.1 of the Guarantee; alternatively, interest on the outstanding sums pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the Court thinks appropriate.
 - iii) Such further sums that continue to accrue, to be assessed.
34. The claim for sums that continue to accrue of course could not be disposed of at the hearing before me. CSAG's application in this respect therefore was for the Court to retain jurisdiction to adjudicate later in relation to those sums.

Analysis

35. As set out above, CSAG's position before me was that it was entitled to accelerate the Loan to Burgundy as a result of the existence of any of the three Events of Default that were relied on for the purposes of the application, on the basis that they were continuing as of 10 September 2021. All that was necessary to trigger CSAG's rights to accelerate the Loan pursuant to Clause 10.2.1 of the Yacht Loan is "*the occurrence of an Event of Default which is continuing*" (emphasis supplied), viz. the occurrence of one Event of Default that was continuing as of the date of the relevant notice.
36. Neither Burgundy nor Prince Al Saud suggested otherwise in their respective Defences. In any event, that is the obvious meaning of the relevant provisions of the Yacht Loan.
37. Rather than taking issue with that point as to the meaning of the provisions, Burgundy and Prince Al Saud instead pleaded in their respective Defences that the Notice of Acceleration served by CSAG was invalid to accelerate the Loan because Burgundy had not committed any Events of Default under the Yacht Loan that would give CSAG the right to exercise the right to accelerate the Loan under Clause 10.2.1.
38. In respect of Burgundy's failure to pay legal fees, Burgundy and Prince Al Saud did not admit that the fees were actually incurred by CSAG, but the evidence in Mr Murphy's witness statements satisfies me that they were. Burgundy and Prince Al Saud then denied – without explaining or giving reasons – that the failure to pay the fees constituted an Event of Default even if it is established that the fees were incurred by CSAG. Once again, therefore, the Defences did not advance any basis on which any court could decline to accept CSAG's case that there was an Event of Default.
39. Since all CSAG needs to establish is one continuing Event of Default, it follows that CSAG was entitled to serve the Notice of Acceleration of 10 September 2021.
40. However, in respect of two of the Events of Default alleged and relied upon by CSAG, i.e., (a) Burgundy's failure to pay interest and (b) Burgundy's failure to evidence Prince Fahad's financial portfolio, Burgundy and Prince Al Saud admitted the existence of the underlying facts alleged by CSAG. Their Defences therefore did

not advance any basis on which any court could decline to accept CSAG's case that those relevant facts constituted Events of Default.

41. It further follows that (a) Burgundy became obliged to pay the overall indebtedness of €37,298,762.37, US\$7,367.57, and £128,860.18 on an accelerated basis, (b) CSAG was entitled to make its Call on the Guarantee, (c) Prince Al Saud then became obliged to pay the overall indebtedness of €37,298,762.37, US\$7,367.57, and £128,860.18 forthwith upon the service of the Call on the Guarantee, and to indemnify CSAG as set out in the Call, and (d) CSAG became entitled to compound interest on the outstanding sums.
42. In these circumstances I have concluded that Burgundy and Prince Al Saud have no real prospect of successfully defending CSAG's claims (within CPR 24.2(a)(ii)). In the light of the fact that the Defences contained at most bare denials, and in circumstances where neither Burgundy nor Prince Al Saud made submissions or appeared at the hearing of CSAG's application, I have also concluded that there is no other compelling reason why the case or issue should be disposed of at a trial (within CPR 24.2(b)).
43. CSAG therefore was entitled to judgment in its favour, in the terms of my Order.