Neutral Citation Number: [2024] EWHC 156 (Comm)

Case No: CL-2023-000411

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, EC4A 1NL

Date: 30/01/2024

Before :

CHRISTOPHER HANCOCK KC

- -

Between :

RIPPLE MARKETS APAC PTE. LTD[1]

Claimant

- and -

(1) P DOT MONEY LIMITED
(formerly k.a. TAASAI FS LTD)

(2) MR MICHAEL NYANANYO **Defendants**

- -

Nehali Shah (instructed by **Paul Hastings (Europe) LLP**) for the **Claimant**
Nik Yeo (instructed by **Russell-Cooke LLP**) for the **Defendants**

Hearing dates: 8 December 2023

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Judgment Approved by the court for handing down (subject to editorial corrections)

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 12:00 on Tuesday 30th January 2024

[1] *The underlying proceedings were commenced by Ripple Labs Singapore Pte. Ltd. which amalgamated into Ripple Markets APAC Pte. Ltd. to become Ripple Markets APAC Pte. Ltd. with effect from 1 October 2023.*

Introduction and background.

1. This hearing was listed to deal with the Defendants' application for a stay of execution (the **Stay Application**) of default judgments dated 14 August 2023 (the **Default Judgments**), pending the determination of the Defendants' application dated 20 October 2023 to set aside the Default Judgments (the **Set Aside Application**). That latter application has been listed for 13 March 2024, a date fixed for the convenience of the Court and the Claimant's counsel. I refer herein to the Claimant as C and the Defendants as Taasai (or D1) and D2 respectively.

2. C's claim in these proceedings was for US$12,780,530.35 plus fees and interest due pursuant to an agreement between it and Taasai entitled "Master XRP Commitment to Sell Agreement" with an effective date of 15 August 2022 (the **CTSA)**. Under the CTSA, C made available for purchase by Taasai the digital asset XRP for the sole purpose of completing a payment transaction over C's hosted service called "On-Demand Liquidity". C claims that Taasai took the XRP made available to it under the contract, but failed to pay the sums due pursuant to invoices dated 13, 20 and 27 March 2023 (the **Unpaid Invoices**).

3. Payment was chased for the Unpaid Invoices, including in emails dated 16, 22 and 29 March 2023. Although Taasai made partial payment of the amount owing under the first invoice, it has failed to pay the balance of that invoice or the other invoices (although Taasai continues to make weekly payments of approximately $50,000).

4. C commenced proceedings on 24 July 2023. It is accepted that the pre-action protocol was not complied with, but C contended that there could be no doubt but that Taasai knew that proceedings were in the offing against it since they were sent several emails before issuance threatening such. I accept that this was the case.

5. The proceedings were sent the following day by way of service to the Defendants at the registered addresses listed for them at Companies House as at 24 July 2023. There is no dispute but that this constituted valid service, pursuant to s.87(2) and s.1140(5) of the Companies Act 2006, the deemed date of service being 27 July 2023.

6. The 14-day period required for filing an acknowledgment of service, defence or admission elapsed on 11 August 2023, and accordingly C filed a request for judgment on 14 August 2023. Given the absence of any acknowledgment of service or Defence from the Defendants, C obtained the Default Judgments on 14 August 2023.

7. C discovered the original default judgments when checking the CE File on 30 August 2023, but upon checking them discovered clerical errors. The change in the Defendants' registered addresses on 25 July 2023 (which I refer to below) (after the Claim Form and Points of Claim were filed) had also by then come to its attention.

8. Accordingly, on 2 September 2023, Paul Hastings (Europe) LLP, for C, sent a letter to the Court requesting the correction of the clerical errors in the original default judgments pursuant to CPR 40.12 (the slip rule) and updating the Defendants' addresses to the new address (4638 Spaces, Hanover Avenue, Feltham, TW13 4JP). C located the corrected Default Judgments on 20 September 2023 on CE File.

9. In the meantime, on 18 September 2023 (following a previous email on 9 August 2023), Ms Walsh emailed C asking for a summary of payments by Taasai and a current statement of the outstanding balance. On 3 October 2023, following that email from Ms Rachael Walsh (who had been introduced to Ripple by Taasai as Taasai's in-house counsel), Mr Raeburn of Paul Hastings sent Ms Walsh a copy of a letter of the same date serving the Default Judgments on the Defendants at the new address, specifying the amounts still owed, and recording the payments made by Taasai to C. The same documents were also sent on the same date to the two Defendants at their new address.

10. However, as I have noted above, the Defendants had changed their registered business addresses on 25 July 2023. The Default Judgments were sent to the Defendants at the new address (and by email) on 3 October 2023, as I have also noted. The Defendants say they did not know about the proceedings until this time.

11. Following service of the Default Judgments, on 6 October 2023, Russell-Cooke LLP sent a letter to Paul Hastings stating that they had been instructed by the Defendants who "*intend to robustly defend the Proceedings"*, and alleging that the Defendants only became aware of them on 3 October 2023. Russell-Cooke stated that the Defendants intended to apply to set aside the Default Judgments and sought C's confirmation that they would not pursue an enforcement application until after the prospective set aside application had been determined.

12. The Defendants then, on 11 October 2023, made the Stay Application, followed by the Set Aside Application on 20 October 2023.

13. Further correspondence followed in which, in particular:

    (1) C asked the Defendants various questions as to the reasons for the change of registered address noted above, and as to a change of name on the part of Taasai, requests which were made in Paul Hastings' letters dated 9, 18, 25 and 26 October and 2 November 2023. The Defendants stated that the change of name was due to a branding decision, which had been made months before; and that the change of registered address was due to disputes with the landlord.

    (2) C offered not to take steps to enforce the Default Judgments if the Defendants agreed not to seek to set them aside and to have a meeting (including in Paul Hastings' 9 October letter). That offer was not accepted and there was in the event no such meeting.

    (3) Paul Hastings stated in a letter dated 25 October 2023 to Russell-Cooke that C would agree to a stay if the Defendants paid 50% of the judgment sum into Court, which the Defendants have not agreed to do.

14. As noted above, the Stay Application was made on 11 October 2023, and the Set Aside Application on 20 October 2023. C's evidence in response to the Set Aside Application is due to be filed on 2 February 2024 and the Set Aside Application has been listed to be heard on 13 March 2024. In that application, the following bases are put forward:

    (1) Taasai's case is that the ODL Facility provides a revolving working capital facility to Taasai, in a sum of US$10m, revolving every 7 days. More particularly, it was submitted that prior to the contractual relationship between the parties, C offered the ODL Facility to Taasai to "[i]*mprove your working capital position and invest in growing your business"*.

(2) It was submitted that in an email on 11 April 2023, a number of months after the ODL Facility started operating, C acknowledged that the ODL Facility "*has … been sold … as a working capital solution (revolving 7-8 days credit line)".* It was submitted that in that same email, C acknowledged the practical consequences of this: "*Fall out over the last couple of weeks has identified that if we* [C] *pause ODL, customers like Tier Money* [Taasai], *do not have the cash to pay us back as per the payment terms* [ie the terms of the individual invoices issues under the agreement] *because it is being used* [and has been "*sold"*, as previously acknowledged] *as a working capital solution*"

(3) It was submitted that 11 April 2023 email made clear that the ODL Facility had also been sold to, and used by, other customers of C as a revolving working capital facility, just as Taasai had always understood the ODL Facility was to function. It was submitted that hile any drawdown had to be repaid at the end of 7 days, a further drawdown was to be available to repay that, to the extent that cash from other sources within the business were not available. As such, it is Taasai's case that C could not simply "turn off the taps" and sue for the three invoices on the basis that they were due on 13, 20 and 27 March 2023, respectively. That would effectively make the revolving working capital facility repayable immediately at will. Taasai's case is that, since the ODL Facility was intended to be a revolving facility used for working capital, it cannot have been intended to be repayable on such cliff-edge terms, and their case is that the 11 April 2023 email from C acknowledges this. This therefore gives rise to an implied term, or a claim for rectification of the underlying written agreement, to the effect that C could not simply decide to cease providing drawdowns under the ODL Facility as it did in March 2023. If so, then Taasai has a counterclaim against C for C failing to make further funds available under the ODL Facility to enable payment of the three invoices in question. Alternatively, an estoppel by convention arises to the same effect as that implied term.

(4) The issue for the Set Aside/SO Application will not be whether Taasai owes C anything at all, or will owe C anything in the future. That is because the Default Judgments were simply based on the allegations in the Particulars of Claim that three particular debts fell due on 13, 20 and 27 March 2023, respectively. It is said that Taasai has at least real prospects of showing that those debts did not fall due on those dates (alternatively, that it has a counterclaim for the same amounts and therefore a defence of circuity of action). It is Taasai's case that since there is no other pleaded case against Taasai, the Default Judgment against it should be set aside.

(5) So far as D2 is concerned, and in addition to the points in relation to Taasai above, it was submitted that the Default Judgment against D2 is based on an inadequately pleaded case. C claims that D2 is liable for procuring Taasai's alleged breach of contract. However, says D2, C appears to overlook the principle in *Said v Butt* [1920] 3 KB 498 that a director will not be liable for inducing a breach of contract by his or her company unless the director was acting in bad faith or outside the scope of the director's authority: see *Bowstead & Reynolds on Agency* (22nd ed) para 9-121. Notably, it was submitted that the Particulars of Claim include no allegation that D2 was, at any material time or at all, acting in bad faith or acting outside the scope of his authority or in breach of his fiduciary duties to Taasai. It is D2's case that the Particulars of Claim merely allege that D2 knew of the alleged breaches of contract of Taasai and

allegedly failed to ensure that Taasai complied with its alleged contractual obligations. Therefore, it was submitted that the Default Judgment against D2 is unsustainable. Moreover, it was submitted that there is no tenable basis on which such allegations of bad faith, breach of authority or other breach of fiduciary duty could be introduced into the Particulars of Claim by amendment, and therefore the claim against D2 should be struck out.

Legal principles

15. The Stay Application is for "*A stay of execution of any application/warrant of control made by the Claimant"* pending the determination of the Set Aside Application.

16. I understood it to be common ground that the Defendants' application was made under CPR 83.7, which provides (insofar as relevant):

> *"(1) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.*
>
> *(2) Where the application for a stay of execution is made on the grounds of the applicant's inability to pay, the witness statement required by paragraph (6)(b) must disclose the debtor's means.*
>
> *(3) If the court is satisfied that—*
>
> *(a) there are special circumstances which render it inexpedient to enforce the judgment or order; or*
>
> *(b) the applicant is unable from any reason to pay the money, then, notwithstanding anything in paragraph (5) or (6), the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit.*
>
> *(i) ….*
>
> *(ii) (6) The grounds on which an application under this rule is made must—*
>
> *be set out in the application notice; and*
>
> *be supported by a witness statement made by or on behalf of the applicant substantiating the grounds."*

The Claimant's submissions.

17. To start off with, C submitted, in Michael Wilson & Partners Ltd v Sinclair (No. 2) [2017] 1 WLR 3069; [2017] EWCA Civ 55 at [15] (McCombe LJ) it was held that CPR

83.7 precludes the operation of the more general power to order a stay under CPR 3.1(2)(f) in the case of money judgments, such that a stay can only be granted in those circumstances if the criteria in CPR 83.7(4) are satisfied (see [16] and [18] of that case).

18. As to the general principles relating to the grant of a stay in such circumstances, C then relied on a number of authorities.

19. Mark Arthur Andrew v Flywheel it Services Ltd [2021] EWHC 3746 (Comm) was an application for a stay in reliance upon CPR 83.7(4)(b). HHJ Pelling QC noted at [11] that it was not in dispute that where the ground in CPR 83.7(4)(b) was relied upon, the onus was firmly on the applying party to make good that case. HHJ Pelling QC went on to state, at [12] that there were two stages to the process, being: (a) first, to ask whether the Defendant had established to the level identified by Lord Wilson JSC in Goldtrail[2] an inability to pay; and (b) if it had, whether the Court ought in the exercise of its discretion to grant the stay sought. HHJ Pelling QC also considered the authorities on the relevance of applications for stays where the contract contains a no set-off provision, at [13]-[14], including: (i) the judgment of Hamblen J in Credit Suisse International v Ramot Plana OOD [2010] EWHC 2759 (Comm) (which concluded at [45] that "*It is clear that the Court will usually give effect to the bargain made by the parties and enforce a no set off clause. Although it retains a discretion to grant a stay, strong reasons for doing so needs to be shown, and thus it is likely to require proof of exceptional circumstances"*); and (ii) the judgment of Robin Knowles J in ABN Amro Bank v Totisa Holdings [2017] EWHC 3260 (Comm), to similar effect. Finally, HHJ Pelling QC noted at [34], again citing Hamblen J in Credit Suisse, that whether enforcement would be of practical benefit for a judgment creditor is a matter for the judgment creditor and not a reason for granting a stay of execution.

20. Given the nature of the arguments made by the Defendants on the Set Aside Application, C argued that the principles applicable under CPR 83.7 where a cross-claim is brought are also relevant. In this regard, ordinarily, the existence of a cross-claim does not justify a conclusion that there are special circumstances rendering it inexpedient for the judgment to be enforced under CPR 83.7: see Dar al Alkan Real Estate Co v Al Refai [2015] EWHC 1793 (Comm) at [7], citing the judgment of Bingham LJ in Burnet v Francis [1987] 1 WLR 802 (which described an order for a stay as "*unusual"* and said that the requirement of special circumstances is strictly insisted upon). In Dar al Alkan at [9], Andrew Smith J cited as a convenient framework the eight considerations referred to by Bingham LJ in the Burnet case when a stay is sought on the basis of a cross-claim (whilst making clear that these were not the only

[2] This was a reference to Lord Wilson JSC's dictum in Goldtrail Travel Ltd (in liquidation) v Onur Air [2017] UKSC 57; [2017] 1 WLR 3014 at [23]-[24]. He stated:

"In this context the criterion is: 'Has the appellant company established on the balance of probabilities that no such funds condition?"
… In cases … 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 its owner with, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested …"

relevant considerations and the importance of each depends on the circumstances of the particular case):

> *"i) The nature of the claim (so that, for example, there will seldom be a stay on enforcement of a judgment on a dishonoured bill of exchange).*
>
> *ii) In cases where the judgment debtor does not himself have a cross-claim against the judgment creditor, but a person associated with the judgment debtor does, how close that association is….*
>
> *iii) The relationship (if any) between the claim giving rise to the judgment and the cross-claim.*
>
> *iv) The strength of the cross-claim.*
>
> *v) The size of the cross-claim, a consideration that Bingham LJ thought to be rarely, if ever, decisive.*
>
> *vi) The likely delay before the cross-claim will be determined.*
>
> *(vii) The prejudice to the judgment creditor if a stay is granted.*
>
> *(viii) The risk of prejudice to the party making the cross-claim if a stay is refused."*

21. In considering whether there are special circumstances rendering it inexpedient to enforce the judgment or order for the purposes of CPR 83.7(4)(a), and although the Defendants' application is to set aside (rather than appeal) the Default Judgments, C submitted that some of the principles applicable to applications for stays pending appeals pursuant to CPR 52.16, summarised in the White Book at [52.16] and in Otkritie International Investment Management Ltd v Urumov [2014] EWHC 755 (Comm) at [22], were of assistance. In particular:

    (1) The starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending. The applicant must *"put forward solid grounds"* for seeking a stay, which are normally "*some form of irremediable harm if no stay is granted"*: Mahtani v Sippy [2013] EWCA Civ 1820 at [13]-[14]. The fact there has been permission to appeal does not of itself constitute "*solid grounds"*: *Ibid.* at [15].

    (2) Any application for a stay must be supported by evidence which needs to be full, frank and clear, and "*Before it could properly grant a stay, the court needs to have a full understanding of the true state of the company's affairs"*: Hammond

Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065; [2002] CP Rep 21 at [13] and [20]. The evidence "*must go to the risk of injustice which withholding the stay would engage":* Goldsmith v O'Brien [2015] EWHC 510 (Ch) at [9].

(3) In considering whether, absent a stay, an appeal would be stifled, the court does not only look at the means of the appellant; it also considers whether the money can be raised from the appellant's directors, shareholders, other backers or interested persons: Contract Facilities Ltd v Rees [2003] EWCA Civ 465 (at [10]).

22. Here, C submitted, the application was not compliant with CPR 83.7(6) which requires that the grounds on which such an application is made must be set out in the application notice and be supported by a witness statement made by or on behalf of the applicant substantiating the grounds. The Stay Application was not filed with a supporting witness statement, but only in reliance upon the evidence in the box in the application notice itself signed by Mr Mitchell of Russell-Cooke. That evidence does not, however, identify any reason why a stay should be granted, beyond asserting that the Defendants were preparing the Set Aside Application, that "*the Defendants should have the opportunity to review the claims made against them and obtain advice in relation to the same before enforcement action is taken"*, and "*The Defendants are understandably concerned that they face imminent enforcement".* C submitted that the Stay Application does not state that the Defendants are unable to pay the money (under CPR 83.7(4)(b)), nor provide any witness statement disclosing means pursuant to CPR 83.7(3) or meeting the requirements for such evidence as established in the authorities referred to above. Indeed, it is not suggested in the Defendants' evidence that they could not comply with the Default Judgments.

23. In the absence of evidence of financial inability, C submitted that the Defendants would have to establish that there are under CPR 83.7(4)(a) special circumstances rendering it inexpedient to enforce the Default Judgments. There are no such circumstances. None have been articulated by the Defendants despite it being a requirement which is strictly insisted upon in an application of this nature.

24. Turning to the case made by the Defendants, C submitted that the starting point was that Ripple is entitled to the full benefit of the Default Judgments. It was argued that the Defendants had not identified any irremediable harm or prejudice to them such as to necessitate a stay, the evidence in this regard being wholly deficient:

25. There is a general assertion that "*Any enforcement action would inevitably further damage the First Defendant's business."*. However, no further explanation or supporting documentation is provided, and this vague and generalised assertion (which in any event is not said to constitute irremediable harm) is far from the solid grounds which are required. Nor is the evidence full, frank and clear, nor does it provide a "*full understanding of the true state of the company's affairs"*. This unsubstantiated assertion is wholly inadequate to justify a stay in the circumstances.

26. The Defendants further state that Ripple could take enforcement action on an *ex parte* basis and the Defendants would not have an opportunity to respond prior to interim steps being taken, such as an interim third party debt order over sums in the Defendants' accounts. But any such steps would be merely *interim* enforcement steps which would be subject to further consideration prior to any final order being made. The prejudice

the Defendants seek to make out does not therefore arise. In any event, if the Stay Application is refused – as it should be – there would be no basis for the Defendants to complain if interim enforcement steps were taken. Moreover, as confirmed in Ms Coulton's evidence, Ripple is willing to undertake to pay any sums recovered on enforcement into Court pending the determination of the Set Aside Application. Thus even if any potential prejudice to the Defendants were established (which it is not), they would be adequately protected by this undertaking.

27. Looking at the other side of the equation, C submitted that a stay until the determination of the Set Aside Application (listed for 13 March 2023) would significantly prejudice Ripple, which is concerned that further delay could hinder its enforcement efforts, including because of possible attempts by the Defendants to hinder enforcement. In particular:

    (1) Ripple has legitimate concerns arising out of the Defendants' conduct and correspondence to date. Ripple has, on numerous occasions, sought to engage the Defendants in order to obtain clarity as to their financial status and has made offers to settle these proceedings by agreeing a flexible plan for repayment. The Defendants have refused all such invitations.

    (2) Ripple has sought details of the Defendants' current financial position. Ripple has also sought an explanation of the fact that it would appear that the First Defendant conducted a "share buy-back" on or around 3 October 2023 (the date upon which the Default Judgments were served), the result of which is understood to be a reduction in the share capital of Taasai from £1,000,000 to £10,000.

    (3) The Defendants refused to pay 50% into Court as an alternative to the stay, despite the fact they do not suggest they could not do so, only stating that doing so "*would inevitably further damage the First Defendant's business".* They are, moreover, now claiming that they intend to raise a spurious defence to the claim despite previously having acknowledged the debts due. In the premises, Ripple is concerned about their willingness to comply with the judgments. Further, the Defendants' conduct to date appears to indicate a clear reluctance to provide the Claimant (and the Court) with the open and transparent financial information necessary for the proper consideration of this application.

    (4) On the same day that the Defendants claim first to have become aware of the proceedings (3 October 2023), Taasai changed its name to P Dot Money Ltd. Whilst it has been suggested that this was part of a rebranding exercise and not connected to the debt in issue, no supporting documentation has been provided. Nor has any explanation been provided as to why the name change was made specifically at this time, particularly in circumstances where it is said that the name of a Canadian related entity was changed in May 2023 and that the *"original decision"* to change name *"had been considered since around May 2023".* The timing of the name change therefore remains curious.

    (5) Next, in relation to the address change on 25 July 2023, the day after proceedings were commenced, although Mr Nyananyo suggests this was an "*unfortunate coincidence"* it remains of concern to Ripple. The Defendants have blamed this on issues with its then landlord, and the nature of its then tenancy as compared with its new tenancy, but once again no supporting

documentation has been provided at all, or further information as to when this alleged requirement was notified by Regus, whether a notice of termination was communicated by either party, or why (if the tenancy for the new address commenced on 23 June 2023) the address change was not registered until 25 July 2023.

(6) The Defendants were aware of the likelihood of proceedings from correspondence and could have set up a forwarding address or ensured that the documents (which were not returned after service) were obtained. Furthermore, the Defendants could have found out about the proceedings from publically available docket monitoring services which provide instant notifications on cases filed against company names once they are issued in CE-File, even if they did not receive the documents serving proceedings upon them.

(7) C also rely on the suggestion that the defence which is mooted by the Defendants is fanciful. In this regard, C drew my attention to the following:

(a) Taasai has admitted in writing on multiple occasions now that it owes Ripple this money (e.g., "*At Taasai, we are absolutely committed to fulfilling our financial obligations towards Ripple and are actively working on a comprehensive strategy for this repayment*").

(b) In recognition of the fact that Taasai owes Ripple this money, Taasai continues to pay Ripple approximately $50,000 USD nearly every week.

(c) C's case is entirely supported by the clear terms of the CTSA which governed the parties' relationship, and provided, among other things, that Taasai was obliged to pay invoices for the purchased XRP immediately upon receipt (clause 2(b)). The Defendants' arguments are wholly contrary to the CTSA, which contains an express entire agreement clause in clause 9(c)**.** C also relied on clauses 1(a), 1(c), 1(k)(iv), 1(k)(b), 2(a), (b) and (f), 3(d), 8(a), and 8(b). These clauses set out the manner in which transactions would be dealt with, and the fact that payment would be due upon receipt of an invoice sent on the Monday following the week during which the XRP was purchased (clauses 1 and 2); that payment would be made without set off (clause 3(d)); and what constituted an event of default (clause 8).

(d) Even if (which is denied) Taasai has a claim against C based upon a (misconceived) obligation to make available XRP, there is no basis for a set-off against the sums owed by Taasai to C, particularly in light of the express no set-off clause in 3(d) of the CTSA, providing: "*The Purchaser must pay all sums due to the Company under this Agreement, any Line of Credit Addendum or any other Transaction Document in full, without setoff, abatement, discount, counterclaim or reduction. The obligations of the Purchaser hereunder shall survive the termination of this Agreement*".

28. Following the hearing, and pursuant to my request to be provided with any authority dealing with a stay of execution pending a set aside application, Ms Shah very kindly provided me with a copy of the decision HH Judge Cawson QC sitting as a Judge of the High Court in Chiswick International Holdings Ltd v Hotblack Holdings Ltd and ors [2023] EWHC 2098 (Comm). In that case, a claim was made by Chiswick against,

amongst others, Mr Holyoake. The claim against Mr Holyoake was in deceit and conspiracy. Mr Holyoake served a defence in which he alleged that the money that was claimed against him was not lent by Chiswick but was provided by a Mr Lovering, the sole director of Chiswick. Mr Holyoake's defence was in due course struck out for non-compliance with an unless order and judgment was entered for the sum claimed in the Particulars of Claim, and a consent order was thereafter made for payment of the judgment sum in instalments. After several payments were made, Mr Holyoake applied to set aside the judgment against him, on the basis that it had been procured by fraud. He also sought a stay of execution of the judgment, on terms that he commenced proceedings within 21 days. His contention was that the allegations in the Particulars of Claim were knowingly fraudulent, because the actuality of the position was that the monies allegedly loaned by Chiswick had in fact been provided by Mr Lovering. It is thus apparent that the allegation put forward by Mr Holyoake was the same as that put forward in his original defence, which had been struck out.

The Defendants' submissions.

General.

29. It was submitted by the Defendants that the Court's discretion under s. 49(3) of the Senior Courts Act 1981 and CPR 83.7(4) should be exercised on similar grounds to a stay pending an appeal, summarised in the *White Book* at para 52.16.2 in familiar terms: although there is no presumption of a stay, and the applicant must show solid grounds, the Court's discretion is unfettered and the question turns on where the interests of justice lie, as to which the following questions are helpful to address. If a stay is refused, will the appeal (or application) be stifled (or rendered redundant)? If the stay is refused and the application succeeds, and the judgment is enforced in the meantime, what are the risks of the applicant being unable to recover any money paid to the respondent? If the stay is granted and the appeal (or application) fails, what are the risks that the creditor will be unable to enforce the judgment?

The allegation that C deliberately misled the Defendants.

30. It is unclear *when* C realised that the address was incorrect, and in particular whether C realised this between 25 July 2023 (when the proceedings were served) and 14 August 2023 (when the Default Judgments were obtained). C's evidence is ambiguous on this point. C's evidence does not preclude the possibility that C in fact knew of the change of registered office at the time of service and simply chose to rely on s. 87(2) of the Companies Act in the hope that the proceedings would not come to the actual attention of Ds and Default Judgment could then be obtained (as in fact occurred).

31. Even if that is not the case, subsequent conduct of C clearly indicates that it avoided every opportunity to bring the proceedings to the actual knowledge of Ds. C had been in email discussions with D2 and Ms Walsh (both on behalf of D1) about the alleged debt owed by D1 to C not only before, but even after, these proceedings were issued and yet C made no mention of the issue or service of proceedings until 6 weeks after the Default Judgments were obtained. More particularly:

    (1) C had been in discussions with D2 (on behalf of D1) about the alleged debt on which these proceedings are based from 11 April 2023. However there was nothing even approximating any pre-action protocol letter ever served by C (or C's solicitors on behalf of C) to either D. As importantly, there was not even

any intimation of any claim of any sort against D2 before D2 received the Default Judgments on 3 October 2023.

(2) On 17 May 2023, D2 introduced C to Ms Walsh as "*our inhouse legal council* [sic] *and she will help facilitate the negotiations and any responses that you might need"*. "Our" here clearly refers to D1.

(3) Ms Walsh then contacted C directly on 24 May 2023, and over the following few days C and Ms Walsh had an email exchange about the matters underlying the dispute, with C asking Ms Walsh "*So how do <u>you</u> plan to settle this issue in a cooperative manner"* (emphasis added). That clearly indicates that C accepted that Ms Walsh represented D1.

(4) Ms Walsh even emailed C *between* commencement of the proceedings (24 July 2023) and C obtaining the Default Judgments (14 August 2023) in terms which made clear that Ds were unaware of the proceedings: on 9 August 2023, Ms Walsh emailed C asking for the total number of payments made by D1 to C and "*a current statement showcasing the outstanding balance on our account"* [A/11/116-7]. Tellingly, C did not respond. As noted, Default Judgments were obtained a few days later, on 14 August 2023.

(5) C was, at some time prior to 2 September 2023, aware that it had served the Claim Form and PoC at an old registered office address of D1. Nevertheless, despite having the email addresses of both D2 and Ms Walsh, C did not attempt to check that Ds were aware of the issue of the proceedings, which is especially notable in light of the absence of any pre-action protocol and the absence of *any* indication whatsoever of a claim by C against D2 personally. Ms Walsh then chased up her query on 18 September 2023.

(6) C's solicitors responded then, asking her to "*direct all correspondence regarding Taasai's* [D1's] *payment obligations to me"*. However no mention was made of the proceedings or the Default Judgments, which by then had not only been obtained but had been amended pursuant to the slip rule. Also, again, no mention was made of any allegation that D2 owed any "*obligations"* to C at all. C's solicitors merely responded to Ms Walsh's query of 9 August 2023 to say that C is gathering information asked for by Ms Walsh and that "*Ripple reserves all of its rights"*. (C's solicitors clearly accepted that Ms Walsh represented D1.)

(7) It was only on 3 October 2023, 6 weeks after the Default Judgments had been obtained, that C's solicitors served the Default Judgments on Ds at D1's up-to-date registered office. Moreover, C's solicitors also emailed the same documents to Ms Walsh. Again, C clearly accepted that Ms Walsh represented D1.

C's continual threats to enforce and refusal to stay except on unreasonable terms

32. C has continually threatened imminent enforcement of the Default Judgments: e.g. it said that if an offer was not accepted by a certain deadline "*our client will proceed to take steps to enforce the Judgments against your clients"*; and (at the end of almost every letter from C's solicitors) C reserved its "*right to take further action against your clients to enforce the Default Judgments by any means"*.

33. The only basis on which C has offered to defer enforcement of the Default Judgments was on unreasonable conditions. The first set of conditions were that Ds agree not even to issue a set aside application for a period, and to attend a meeting with C, while C retained the ability immediately after expiry of that period, and with no notice, to take enforcement steps. Those conditions were unacceptable to Ds since:

(1) requiring Ds to refrain from even issuing a set aside application could undermine the requirement in CPR 13.3(2) that such application be made promptly; and

(2) it allowed C to take immediate, without notice, enforcement action upon expiry of that period, thereby exposing C to the need to make an urgent application to seek immediate relief by way of stay (which imposes unnecessary costs and inconvenience on Ds, their legal team and the courts), when a more planned process for seeking a stay, as was eventually adopted for this Stay Application, is far more proportional and in keeping with the overriding objective.

(3) The second set of conditions was that Ds pay 50% of the judgment sum (therefore over US$6 million) into Court. It was submitted that this was unacceptable because at base this is a claim for recovery by C of what it says it lent D1. It was submitted that C chose to do business with D1 as a counterparty and chose to lend on an unsecured (albeit short term and rolling) basis, and thereby voluntarily took the credit risk of D1. C should not be able to improve its credit position as a condition of staying enforcement of the Default Judgments. On the other hand, D2 did not have any personal prior exposure to C but, as noted above, there is very arguably no cause of action against D2 in the first place.

(4) C's continual threats of imminent enforcement is in tension with C's attitude to listing of both applications:

(a) Once the Stay Application was issued, C insisted that its listing be delayed to allow it to brief replacement counsel (its originally briefed counsel having gone on maternity leave), and so clearly C did not itself want to be put in the position of having to rush to court on short notice or at a time inconvenient its legal team, unlike the situation which C's conditional offers would potentially put Ds in. D was, as would be expected, willing to accede to this request. The parties have also agreed directions for the filing of evidence in this Stay Application; and

(b) Similarly, C has insisted on the Set Aside/SO Application being listed at a time convenient to itself and its legal team, and the parties have agreed to sensible directions for the filing of evidence in respect of that Application. See the Consent Order.

34. That is why there has been some time between when Ds were first notified of the Default Judgments (3 October 2023) and this hearing (8 December 2023) and the hearing of the Set Aside/SO Application (13 March 2024). Nevertheless, Ds have filed a Certificate of Urgency in respect of this hearing at the direction of Dias J, who on 19 October 2023, gave the following direction by email via Commercial Court Listings:

"In light of the Claimant's insistence that it has enforceable judgments which it is entitled to execute and the fact that it is only prepared to agree to a stay on conditions, it does seem to me that the stay application should

be determined as a matter of urgency. Your suggestion that the Defendant file a certificate of urgency and then contact listing to get a hearing date sounds sensible. As the matter is in the Commercial Court it will come before a judge in any event. - JD 19 10 23"

Justification for a stay in the present case

35. C has already admitted that if the Default Judgment were enforced against D1 then D1 will be unable to pay, as is apparent from C's 11 April 2023 email, quoted above, which acknowledged that D1 would not have the cash to pay C back. Therefore it is no surprise that if enforcement proceeds, D1 will be forced into insolvency, as Mr Nyananyo states in his witness statement. CPR 83.7(4)(b) is therefore satisfied, and so there is no need to consider "special circumstances".

36. In any event, there are "special circumstances" under CPR 83.7(4)(a) given that the judgments sought to be enforced were entered purely as a result of an administrative action, without any consideration of the merits of C's claim or Ds' defences, in circumstances where there is (at the very least) some evidence that C has done what it can to avoid Ds becoming actually aware of the proceedings before the Default Judgments were entered, and where (it is submitted) Ds have good grounds for their Set Aside/SO Application and D2 has good grounds to strike out the entirety of the claims against him. Moreover, requisite "special circumstances" are also apparent from the answers to the specific questions set out above, which are as follows:

    (1) *If the stay is refused, will the application be stifled?* The detriment to D1 of the Default Judgments is clear. As noted, D1 will be unable to meet immediate enforcement of the Default Judgments, and so will lead D1 into insolvency. That does not just stifle the Set Aside/SO Application but it renders the application effectively redundant for Ds.

    (2) If C was to offer to pay any recoveries into Court (or to C's solicitors to be held as stakeholder) then that would simply show that it is not prejudiced by not presently being able to recover from Ds, while unfairly elevating C's unsecured claim creditor (as it was always designed to be under the ODL Facility) to a secured claim, which is unjust for the same reasons that C's offer to stay proceedings if Ds paid 50% of the claim into court was an unreasonable condition.

    (3) *If a stay is granted and the application fails, what are the risks to C?* Despite C's continual threats to enforce the Default Judgments, C appears to accept that it is in C's own interests to give D1 time to pay. C has also insisted on a relatively generous timetable for the hearing of this Stay Application, and has readily agreed to an even more generous timetable for the hearing of the Set Aside/SO Application. Unless C was sure that a stay could be resisted (which cannot reasonably be the case), its agreement to the timetable for the Set Aside/SO Application indicates that C is in fact content with not having any immediate rights of enforcement.

37. C has sought to claim that it has concerns that D1 (it is unclear how that extends to D2) might seek to dissipate its assets or attempt to evade enforcement. The only matters raised are that D1 has changed its name and registered office, and has not provided answers to questions to the satisfaction of C. Those concerns are irrational. D1's change of name cannot be an attempt to hide anything, since the change is on the public register,

as is D1's change of registered office. Explanations of those changes have been given. D1's change of name was a branding decision. D1's change of address was required by D1's former landlord and because of problems receiving mail. C notes that D1's current registered office appears to be a residential address not owned by D2 and speculates whether that is in breach of a charge on those premises. However D1 leases the premises and has permission to use the property for business purposes. C queries the source of D1's weekly repayments of US$50,000. But the availability of this level of cashflow can hardly be regarded as evidence of D1 dissipating its assets. D1's business regularly generated a certain amount of US$ which it often used to repay previously weekly drawdowns in part.

38. In any event, if C has fears of asset dissipation then there are express remedies which the CPR provides to a claimant, such as freezing orders and information disclosure orders (albeit remedies which have a certain testing threshold). C should not be able to avoid having to fulfil those requirements (including, where appropriate giving undertakings in damages) by being permitted to continue to threaten imminent enforcement in order to achieve, by the back door, at least some of what it has chosen not to pursue directly.

39. Finally, the reasonableness of Ds' Set Aside/SO Application, and the extent to which C seems to have sought to obtain the Default Judgments while positively avoiding bringing proceedings to the actual attention of Ds, also point to the justice in the Stay Application being granted.

40. In relation to the decision in the Chiswick Holdings case, Mr Yeo made the following points by email:

    (1) The order in Chiswick, execution of which the applicant (Mr Holyoake, who was D3) sought to have stayed, was a consent order to pay an earlier judgment debt by instalments. As such, the case is like Dar Al Arkan and Andrew v Flywheel, which were also applications to stay consent orders. Although purely administrative default judgments had been entered against D1 and D2, no application for a stay was sought by those Defendants.

    (2) It is fair to note that the judgment debt, which was the subject of the consent order for payment by instalments, had been entered after Mr Holyoake had been debarred from defending the case on the merits, due to his failure to comply with an earlier unless order. However, an unless order is not the result of a purely administrative act. It will only be made after the exercise of judicial discretion. Indeed, in Chiswick the Court said that "*Unless orders of the kind that was made in the present case provide an important function in the management of litigation*".

    (3) The extraordinary procedural history in Chiswick was as follows:

        (a) In response to service of the Claim Form, Mr Holyoake duly filed a Defence and Counterclaim.

        (b) He agreed to a consent order for the provision by him of security for costs.

        (c) He failed to provide that security.

(d) An unless order was made against him in relation to non-compliance with the consent order.

(e) He failed to comply with the unless order and so his Defence and Counterclaim were struck out.

(f) Mr Holyoake unsuccessfully applied to vary the consent order or for relief from sanctions; he then appealed that application to the Court of Appeal unsuccessfully.

(g) On an application by Chiswick to assess damages on its Particulars of Claim (the Defence having been struck out), Mr Holyoake resisted on the basis that he was entitled to challenge the claim notwithstanding the strike out. The Court unsurprisingly rejected that, assessed damages and made an order that Mr Holyoake pay a judgment debt of a stated amount, refusing him leave to appeal.

(h) Mr Holyoake then agreed a consent order for the payment of the quantified judgment debt by instalments, but then sought a stay of *that* consent order, claiming that he had grounds to set aside the judgment debt as a result of it having been obtained by fraud.

(i) When considering the stay application, the Court concentrated on the merits of the putative set aside application. The Court had no hesitation in finding that the claim that the underlying judgment debt had been procured by fraud was devoid of merit, noting that the process which Mr Holyoake was proposing "*would drive a coach and horses through the ability of the court to manage litigation …*" The Court only devoted a short passage to other discretionary considerations, though it is right to point out that the Court regarded the lack of draft pleadings as a reason why the court ought not to exercise its discretion to grant a stay. However, as the respondent pointed out and the Court recorded, a pleading performs an important function in fraud cases given Counsel's duty in respect of fraud pleadings. Here fraud is no part of the Defendants' defence. The alleged fact underlying the proposed defence is, it is submitted, sufficiently clear: the facility was a revolving credit facility. Moreover the pleading point underlying the strike out claim for D2 is sufficiently clear: there is no pleading of bad faith, want of authority or breach of fiduciary duty. Therefore, unlike in Chiswick, it is submitted that the absence of a draft pleading is not material.

41. There is passing reference in Chiswick to an argument that the law on setting aside a judgment for fraud recognises a distinction between "*judgments obtained automatically, such as the default judgment in this case as opposed to a judgment obtained on the merits after a trial"*. That is not taken further in the judgment (although as noted above the order in question was not entered purely as a matter of an administrative act). In Takhar v Gracefield [2020] AC 450, [83] (referred to in Chiswick), Lord Briggs in passing drew the distinction between relitigating a matter which had already been the subject of a merits-based decision, where the finality principle applies, and where the only judgment was a Default Judgment, "*where there has as yet been little real litigation"*. This does, in another context, recognise the same distinction that the Defendants here say is material to the present application.

Exchanges after the hearing.

42. Following the hearing, I asked for further submissions in relation to my jurisdiction to impose conditions on any grant of a stay of execution. This had been raised in very general terms at the hearing.

43. Both Counsel were agreed that I had jurisdiction to impose conditions, pursuant to the express terms of CPR 83.7(4)(b), quoted above. Each Counsel however contended for the imposition of very different conditions.

44. Ms Shah, for C, contended that Ripple would not be adequately protected by any order other than an order for payment in of either the whole, or a substantial proportion of the judgment.

45. Mr Yeo, on the other hand, contended that I should not impose any condition. Essentially, he argued that Ripple needed to satisfy the same tests as would be applied on an application for a freezing order, since their concern was as to dissipation of assets, and that they had not done so. In this connection, he referred me to the decisions in Gosvenor London Ltd v Aygun Aluminium UK Ltd [2019] 1 CLC 26 (CA) and Holyoake v Candy [2017] EWCA Civ 92, [34] as authority for the proposition that the same test as to dissipation of assets applied where it was argued that a stay of execution following judgment should be granted on the basis of such risk as was applied in the case of a normal freezing injunction.

Discussion and conclusions.

46. I have reached the conclusion that a stay of execution should be granted as regards the claim against D2, since in my judgment there is likely to be a defence with a real prospect of success. Certainly, I think that no execution should issue before the judge hearing the application to set aside considers the point.

47. The position in relation to Taasai is, in my judgment, more finely balanced. I am satisfied, on the evidence, that Taasai did not in fact receive notice of the proceedings until after the entry of the default judgment, and I am also satisfied that their application to set aside the judgment was made without delay.

48. In those circumstances, the principal question is whether Taasai has a defence with a real prospect of success. In my judgment, on the materials before me, I cannot say that Taasai has no prospect of successfully defending this claim. In essence, its defence is that it was led to believe that the contract was not what it appeared to be.

49. Whether this is sufficient to justify setting aside the default judgment is not a matter for me, but for the judge who hears that application in due course.

50. The question, therefore, for me, is what the appropriate order is in circumstances in which C has the benefit of a judgment which was been obtained without consideration of the merits, Taasai is applying to set aside that judgment, but there is an interregnum between now and the date of the set aside application. I have been shown no equivalent application to the one in front of me.

51. In my view, it is appropriate to preserve the status quo pending this application. However, I am also satisfied that some at least of the points made by Ms Shah have

force. The question is how best to balance the interests of the parties in the period between now and the hearing of the set aside application.

52. In these circumstances, I have concluded that there should be a stay of execution of the judgment against Taasai, pending the hearing of the application to set aside the default judgment. However, I have also concluded that this stay should only be granted on terms, it being agreed that I have jurisdiction to impose such terms.

    (1) First, Taasai should either pay the judgment amount into Court or provide security in a form acceptable to C within 14 days. If the form of such security cannot be agreed, the Court will determine this dispute on the basis of written submissions, limited to 3 pages. Taasai should however have liberty to apply in relation to this condition, if it is said that they cannot in fact comply with it. Any such application should be supported by full documentary evidence of the company's assets and available sources of funding.

    (2) In addition, and in any event, Taasai should provide an affidavit of assets within 14 days of the date of this judgment. In particular, this affidavit should deal with the question of what had been done with the monies that are alleged to be owed.

53. I would be grateful if Counsel could draw up an order to give effect to this judgment.