Neutral Citation Number: [2023] EWHC 1943 (Ch)

Case Nos: CR-2019-004187, CR-2019-008077
CR-2020-002329, CR-2020-002340

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY & COMPANIES LIST (ChD)

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1 NL

Date: 27/07/2023

Before :

MR JUSTICE ADAM JOHNSON

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Between :

CR-2019-004187 **CR-2019-008077**	**KRISHNA HOLDCO LIMITED**	**Petitioner/ Claimant**
	- and -	
	(1) GOWRIE HOLDINGS LIMITED **(2) SAMIT GOVINDJI HATHI** **(3) GOVINDJI THAKERSHI HATHI** **(4) ALPA HATHI** **(5) PORTSIDE NORTH LIMITED** **(6) LAXMICO GROUP FINANCE LIMITED** **(7) SYRI LIMITED** **(8) LAXMI BNS HOLDINGS LIMITED**	**Respondents/ Defendants**
CR-2020-002329	**GOWRIE LAXMICO LIMITED**	**Claimant**
	- and -	
	KEYCIRCLE LIMITED	**Defendant**
CR-2020-002340	**KEYCIRCLE LIMITED**	**Claimant**
	- and -	
	(1) LONDON PILSNER LIMITED	**Defendants**

(2) LAXMI BNS HOLDINGS LIMITED

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Iain Quirk KC, Freddie Onslow and Robert Winspear (instructed by **McCarthy Denning**) for (i) the Petitioner/Claimant in Actions CR-2019-004187 CR-2019-008077, (ii) for the Defendant in Action CR-2020-002329, and (iii) for the Claimant in Action CR-2020-002340

Mark Anderson KC and Samir Amin (instructed by **ORJ Law**) for (i) the Respondents/Defendants (1) to (7) in Actions CR-2019-004187 and CR-2019-008077 and (ii) for Defendant (1) in Action CR-2020-002340

Christopher Harrison (instructed by **JKW Law**) for (i) Respondent/Defendant (8) in Actions CR-2019-004187& CR-2019-008077, (ii) for the Claimant in Action CR-2020-002329, and (iii) for Defendant (2) in Action CR-2020-002340

Hearing dates: 24 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

1. This Judgment will deal with certain points arising from the hearing to deal with consequential matters in this case on 24 July 2023. I will adopt the same abbreviations used in my Judgment ("*the Trial Judgment*") dated 26 June 2023.

Return of Security for Costs

2. In early 2021, in light of a decision of Deputy ICC Judge Agnello, Krishna made payments into Court by way of security for costs of the Respondents/Defendants totalling just over £6.3m. In light of the Trial Judgment, Krishna applied for release of that security. At the hearing on 24 July, I refused that application and said I would give reasons separately. These are those reasons.

3. For Krishna, the argument of Mr Quirk KC was that there had been a material change of circumstances since the decision of Deputy ICC Judge Agnello.

4. Her reasoning had proceeded on the basis that Krishna had no assets; that therefore the condition for the grant of security in CPR 25.13(2) was satisfied (i.e., there was reason to believe that Krishna would be unable to pay the Respondents/Defendants' costs if ordered to do so); and that the available discretionary factors were in favour of the grant of security (because the main argument for not doing so, namely the idea that Krishna's impecunious state was the result of GHL's wrongdoing, merely begged the question whether there had been any wrongdoing, and that was the very matter in issue in the proceedings).

5. In light of the Judgment, Mr Quirk KC said that matters had moved on. He said it was no longer correct to say that the threshold for the grant of security was overcome. That conclusion had earlier been justified because of the existence of the 2016 Agreement, which operated as a major encumbrance on the value of Krishna's B Shareholding. But the 2016 Agreement was now rescinded, as was the 2013 Agreement, and moreover the Court had endorsed the view that there had been very substantial asset stripping by Samit. In light of all that, it was no longer correct to say there was reason to believe that Krishna would be unable to pay any costs award. It has an asset of considerable value, namely the B Shareholding.

6. Even if that was wrong, said Mr Quirk, the discretionary balance had also shifted, because now there were serious findings in the Trial Judgment against GHL and against Samit, including a finding of fraudulent misrepresentation. It would be unjust, in light of such findings, to allow GHL and Samit to continue to benefit from the protections afforded by the security amounts remaining in place.

7. Taking these points in turn, to begin with I *am* persuaded that there has been a material change of circumstances since the decision of Deputy ICC Judge Agnello, such as to justify the Court revisiting her decision. But to be clear, on the basis of the evidence presently available, in my opinion the change is a change in the discretionary factors the Court should weigh in the balance, rather than any change as regards the threshold question whether (in the language of CPR 25.13(2)) " *… there is reason to believe that [Krishna] will be unable to pay the defendant's costs if ordered to do so …*". I do not think there has been any change as regards that question, although admittedly I reach

that conclusion on different grounds to those which obtained at the time of Deputy ICC Judge Agnello's decision.

8. The meaning of the language of CPR 25.13(2) was considered in Jirehouse Capital v. Beller [2008] EWCA Civ. 908, [2009] 1 WLR 751. At [26] Arden LJ (as she then was) said:

> "*In my judgment, there is a critical difference between a conclusion that there is reason to believe that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen*."

9. As expressed in the Notes to the current version of the White Book at 25.13.12, the words "*there is reason to believe*" thus have the effect of watering down what follows. The defendant does not need to prove on a balance of probabilities that the claimant (here, Krishna) *will* be unable to pay; only that "*there is reason to believe*" it will not be able to do so.

10. In my opinion, the position in this case remains that "*there is reason to believe*" Krishna will not be able to pay any costs award or awards made against it. That is because, on the basis of the evidence presently available, the value of the B Shareholding remains too uncertain, notwithstanding the rescission of the 2016 and 2013 Agreements, and notwithstanding the now proven extractions. In his evidence for Krishna, Mr Adam made the assertion that " *... there is little doubt that a substantial sum of many millions of pounds will be awarded to Krishna at the conclusion of the quantum trial*." I think there is some doubt about that, however, because another effect of the Trial Judgment was to uphold GHL's assertion that sums paid to CPL's creditors in light of CPL's insolvency were to be added to the so-called Equalisation Amount. Mr Adam's evidence does not take account of the Equalisation Amount, and sets out no detailed workings which would give the confidence needed to conclude that there will be sufficient value in the B Shareholding to cover the amount of any costs award or awards if ultimately made in favour of the Respondents/Defendants. Given the presently uncertain state of the evidence, I think it still fair to say there is "*reason to believe*" Krishna will be unable to pay any costs award or awards made against it. That being so, I agree with the submission made by Mr Anderson KC, namely that the threshold issue must still be resolved against Krishna, albeit for different reasons than were relevant previously.

11. I do though think there has been a material change of circumstances such as to justify a reconsideration of the exercise of discretion conducted by Deputy ICC Judge Agnello. Here, matters *have* moved on and the relevant factors are different. I therefore think it appropriate to consider whether the security should remain in place. I have reached the view that it should, at least for now:

    i) What has changed is that there has now been a trial and there are substantial findings of wrongdoing on the part of Samit and GHL. So the Court is no longer inhibited by the constraint which Deputy ICC Judge Agnello found persuasive, namely that one could not weigh in the balance any consideration of GHL's alleged wrongdoing, because whether or not there had been wrongdoing was

still to be decided. We now know that there was wrongdoing. It seems to me it is relevant to take it into account.

ii) Mr Anderson KC submitted that one could or should not do so, because this was a case where Part 36 Offers have been made on both sides, and what really matters is whether one or other offer will be beaten or not. That will determine the overall reasonableness of each side's position, however badly they may have behaved towards each other. Such questions still remain to be answered, and the Court should not be swayed in the meantime by the findings on liability already made.

iii) I think this is too simplistic a view. The language of CPR 25.13(1) requires the Court, when considering whether to order security for costs, to ask itself whether it is just to make such an order, "*having regard to all the circumstances of the case*." It seems to me clear, in a case where there has already been a trial and there are findings of wrongdoing including dishonesty, that such matters must be relevant when one considers "*all the circumstances of the case*." All other things being equal, I agree with Mr Quirk that there is something objectionable about a wrongdoer, who has vehemently denied his wrongdoing and thereby driven up the costs of the proceedings, then continuing to benefit from the protection afforded by orders for security for costs even after liability findings are made against him.

iv) Had that been the only issue in play I would have been more sympathetic to Mr Quirk's submissions. But it is not the only matter in play. The fact is that, quite aside from the liability findings, other matters emerge from the Trial Judgment which it seems to me must feature in the exercise of my discretion.

v) Most importantly, I have in mind the concerns I have expressed about the implications of the so-called Rewind Suite, described at various points in the Trial Judgment including at [375], where I give directions for copies of the Trial Judgment to be provided to persons who may have been affected by the Rewind Suite, in particular former creditors of CPL. As noted in the Trial Judgment at [114], ultimately there was a deficit of some £11.4m on CPL's liquidation. It is yet unknown whether any of CPL's creditors, or indeed others, may wish to take action in light of the Rewind Suite and related matters, especially the "*Baggy.Andy*" payments referenced in the Trial Judgment at [69]-[82]. The present uncertainty gives rise to potential complications. If there is value in Krishna's B Shareholding, that might lead to a contest between the Respondents/Defendants and CPL's creditors in relation to that shareholding. If there is no value in it, or if there is but it is insufficient to cover the amount of any costs award(s) in favour of the Respondents/Defendants, that might lead to a similar contest over any funds remaining in Court.

vi) Such uncertainties lead me to think that, at least for now, the funds should remain where they are. In saying that, I also think it important that there is no evidence from Krishna (whether via Arun or Mahesh) that they would be materially prejudiced by that outcome. They do not say, for example, that the funds are required for the ongoing conduct of the proceedings, or that such ongoing conduct might be stifled if the funds are not released.

vii) That being so, it seems to me there is little prejudice in maintaining the *status quo*, and some risk in changing it. Despite the change in circumstances, therefore, my view of it is that the renewed exercise of discretion leads to the same overall outcome. I therefore refuse Krishna's application to release its security.

Clarification of Reasoning: "*Gowrie Accruals*"

12. In Volpi v. Volpi [2022] EWCA Civ. 464, [2022] 4 WLR 48, Lewison LJ at [2] reminded us that reasons for judgment will always be capable of having been better expressed. I accept that is true in this case of my reasoning in the Trial Judgment at [303], where I agreed with the evidence of Krishna's expert, Ms Hart, that an over-accruals figure of only about £100,000 could be justified. That left it to the reader to join the dots between para. [303] and para. [162], where I pointed out that Mr Quirk's cross-examination had revealed a number of shortcomings in the evidence of GHL's expert, Mr Davidson, although little turned on this given that the issues in the case were largely factual. In light of this, GHL asks for clarification of my reasons for preferring the evidence of Ms Hart over that of Mr Davidson.

13. Let me be clear. There *was* an issue between the experts as regards the over-accruals figure and on that point, I preferred the evidence of Ms Hart. That was because there were no shortcomings in the manner in which she gave her evidence. She was (as I said at [162]), a "*considered and careful witness*." I had complete confidence in her evidence, but not in that of Mr Davidson, who among other matters made a number of obvious errors. Some examples were given in Krishna's Written Closing Submission at para. 23.2. These included, in paragraph 6.9 of his Report, Mr Davidson setting out a Table which inaccurately recorded R&D costs incurred by LBNS in connection with SYRI. Although this was pointed out by Ms Hart in the Experts' Joint Statement, it was not corrected. In cross-examination Mr Davidson was presented with other, similar errors, including in connection with the SYRI arrangement, in respect of the calculation of deferred consideration, in relation to the payment of creditors prior to CPL's administration, and in relation to the interest applied to the Equalisation Amount. Such matters I am afraid did little to inspire confidence that Mr Davidson had approached the preparation of his evidence with the degree of rigour and care the Court was entitled to expect.

14. The question of over-accruals was a point of detail, but an important one (Trial Judgment at [300]). The evidence of Ms Hart was more persuasive because her evidence as a whole suggested she had applied greater care in dealing with matters of detail. Her approach to the accruals figure took account of the letter from HMRC dated 3 December 2013, also relied on by Mr Davidson, but on analysis considered that it justified only the additional £100,000 figure already referred to (Joint Report at 7.15(2)). Beyond that, Ms Hart was not persuaded there was any evidence to support a higher over-accruals figure, in particular in light of the points addressed in her own Report at paras 10.26-10.31, including the point that if there had in fact been a material overstatement of GLL's value in the year to March 2010, one would have expected to see a correction in its financial statements for the following year; but there was none. This was careful and considered evidence and the Court was entitled to rely on it and endorse it, in preference to that of Mr Davidson.

Permission to Appeal

Grounds 1(a) and (b): SYRI

15. The conclusion reached in the Judgment (at [300]-[311]) was that the operation of a *clinicals* business by GHL's subsidiary SYRI involved breaches of fiduciary duty by Samit and Govindji as directors of LBNS. The point raised by Ground 1 is this: because Arun's evidence was that he had agreed to the SYRI arrangements on the basis of an alleged misrepresentation about LBNS's financial state, it was not open to the Court, having rejected that allegation, to conclude that Arun's consent was still not fully informed in light of another matter, namely Samit's fraudulent misrepresentation as to the source of £4.5m funding provided to LBNS. It is said specifically that it was never alleged that the latter misrepresentation had induced, whether on a "*but for*" basis or otherwise, any agreement relating to SYRI, and GHL had not had the opportunity of testing the point in cross-examination.

16. I do not consider that these points have any real prospect of success. Dealing first with Ground 1(b), which raises a point of substantive law, I think the argument proceeds on a false assumption. The point is that Samit was a *fiduciary* – i.e., a company director. Via SYRI, he conducted a business which represented a valuable business opportunity for LBNS. If he wanted to act in a manner involving an obvious and most serious breach of fiduciary duty, it was his responsibility to make full disclosure of *all relevant facts*: see, e.g., Gwembe Valley Development Company Limited v. Koshy [2003] EWCA Civ. 1048, per Mummery LJ at [65], who referred to the need for the assenting shareholders to be "*fully informed of the real state of things*" (reflecting the language of Lord Radcliffe in Gray v. New Augarita Porcupine Mines [1952] DLR 1 at p.14).

17. As I read it, this is an obligation of positive disclosure. What vitiates the consent or acquiescence is the failure to make disclosure. It is not a question of what the reaction might or might not have been had proper disclosure been made.

18. Here, the failure to disclose could not have been more serious or more directly connected Arun's ongoing acquiescence in the SYRI venture. It was Samit's failure to disclose that he lied in order to secure the contract – the 2013 Agreement – in which Krishna's consent to that venture was expressed. Arun was obviously not "*fully informed of the real state of things*." That was enough to vitiate any ongoing consent.

19. Turning then to Ground 1(a) (procedural point), GHL/Samit were fully aware of the Arun's allegation concerning the source of the £4.5m funding. That allegation was tested at length and in detail and was found to be made out. That being so, Samit must accept all the consequences flowing from his dishonesty. There is nothing procedurally unfair in saying that they include the fact that in 2013, Arun was not fully informed about what he was doing when he consented to the SYRI arrangement by means of the 2013 Agreement. He was not fully informed. To say otherwise would be quite artificial.

Ground 2: £4.5m Funding

20. Ground 2 is an attempt to re-open factual findings made at the trial. It rehearses the same arguments.

21. The essential finding in the Trial Judgment (see at [231]) was that Samit misled Arun when he told him that the Hathi family had injected £4.5m into LBNS which needed to be repaid. They had not done so. The assertion now made is that that finding is inconsistent with the evidential record, in the sense that (i) there are no contemporaneous documents supporting it, and (ii) it attaches credibility to Arun's account when it lacked credibility.

22. As to (i), that is simply incorrect. The terms of the 2013 Agreement itself are consistent with the finding made, most particularly the provision that an amount of £4.5m would be payable to GHL as part of a "*Super Priority Dividend*", without leading to any reduction in the Equalisation Amount (Trial Judgment at [86(i)] and [237]). That directly supports the idea that Samit represented that his family were pressing for payment of an amount of £4.5m to be made available to them. Even more significant are the forged bank statements produced by Samit (Judgment at [119]-[121]), which were designed precisely to show that his family, and not others, were the source of the £4.5m funding figure. I analysed Samit's purported explanation for the forgeries at [249]-[258], and rejected it in light of its inherent implausibility and the findings made elsewhere about Samit's basic unreliability (see Judgment at [143]-[161]). The conclusion expressed in the Judgment is therefore consistent with the documentary record and with the obvious inferences to be drawn from it.

23. The further point is about Arun's own credibility. The gist of his evidence on the funding question was essentially that Samit had presented him with only sketchy and incomplete information at the time which was designed to be confusing (Judgment at [247]). My assessment, having heard evidence from both of them, was that that was an entirely credible account (Judgment at [247]-[248]). It was completely consistent with my overall assessment of Samit's character, as someone who "*was not at all afraid to try and use his intelligence and natural oral fluency in order to confuse and mislead*" (Judgment at [143]). In giving a description of the funding position at [212], I referred specifically to the picture needing some "*untangling*", and typically so, "*given the complexity of Samit's machinations*" (Judgment at [232]). In light of all that, it was plainly open to the Court to accept Arun's account on the question of funding, notwithstanding the reservations expressed elsewhere in the Judgment as to his own lack of credibility on other issues (see at [131]-[139]).

24. In summary, I see no real prospect of any of these factual findings being overturned on appeal and so I refuse permission on Ground 2 as well.

Ground 3: Gowrie Accruals

25. Ground 3(a) is a challenge to the adequacy of the reasons given on this issue. I have dealt with this above and have spelled out in more detail my reasons for preferring the evidence of Ms Hart over that of Mr Davidson.

26. Ground 3(b) if a further attempted line of attack on the limited figure for over-accruals settled on in the Trial Judgment. It is said that the idea of a larger figure is supported by "*the evidence and the contemporaneous correspondence between the parties*." But the evidence relied on is essentially a set of exchanges between the parties said to have resulted in their *agreement* in 2013 on an over-accruals figure of £1.2m. The problem with this, as stated in the Trial Judgment at [302], is that there is no clear evidence of any agreement on a £1.2m figure, beyond that reflected in the 2013 Agreement, which

has now been rescinded for Samit's fraud. That is a factual finding and there is no proper basis for seeking to overturn it. The evidential trail is too sketchy, aside from the 2013 Agreement, to justify the conclusion that there was consensus on a particular accruals figure. It does not matter that Arun interrogated the accruals figure during the parties' negotiations, and neither does it matter that Samit had an honest belief in the figures he put forward (both matters being reflected in the Judgment at [203]). Neither matter is evidence of consensus.

27. In short I again see no real prospect of success on Ground 3 and I refuse permission in relation to this Ground as well.