



Neutral Citation Number: [2023] EWHC 2746 (Comm)

Case No: CL-2022-000073

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 2 November 2023

Before :

Mr Stephen Houseman KC
Sitting as a Deputy Judge of the High Court

Between :

African Mining Services Mali SARL	<u>Claimant</u>
- and -	
(1) Société des Mines de Komana (SMK) SA	
(2) Hummingbird Resources Plc	<u>Defendants</u>
- and -	
Perenti Global Limited	<u>Third Party</u>

Richard Power and Christopher Monaghan (instructed by **Grosvenor Law**) for the Claimant and the Third Party

Lance Ashworth KC and Wilson Leung (instructed by **Charles Fussell & Co LLP**) for the First and Second Defendants

Hearing date: 1 November 2023

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR STEPHEN HOUSEMAN KC

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 Thursday 2 November 2023 at 12:30.

STEPHEN HOUSEMAN KC:

1. Yesterday I heard the first case management conference in this action as well as a restored application for security for costs in respect of the counterclaim. This judgment covers the latter application. It reflects a brief ruling made at the conclusion of the hearing. I have issued an approved judgment because of the unusual outcome and circumstances.
2. The hearing was conducted in public with brief sections in private when discussing material subject to an agreed confidentiality regime sanctioned at the outset of the hearing. Sitting in private was kept to a minimum in furtherance of the principle of open justice.
3. The order for directions makes provision for a split trial to be listed in the usual way in the near future. This contemplates a trial lasting 18 days (including 3 days of pre-reading) during Trinity or Michaelmas Term 2025. The parties have agreed to a stay for ADR to take effect once the trial has been listed, ending on 1 February 2024 unless the matter is settled or the stay extended. Disclosure and inspection will take place during 31 May to 28 June 2024. Witness statements are to be exchanged on 5 November 2024. Expert evidence directions cover January-March 2025.
4. The application for security was made by the claimant and third party (“applicants”) against the two defendants (“respondents”) on 22 November 2022. The application is based upon CPR 25.13(2)(c), the so-called impecuniosity or illiquidity gateway. Although it is an application made against defendants in respect of their counterclaim, nothing turns on this feature. It was common ground that the counterclaim has independent vitality. The applicants estimate their relevant costs to be in the region of £2.5m for the first trial.
5. No issue is taken by either side as to substantive merits. The dispute concerns provision of services in relation to mining operations in Mali and the validity of a settlement agreement between the claimant (“AMS”) and the first defendant (“SMK”). The details don’t matter for present purposes, save to note that the second defendant (“Hummingbird”) provided a parent guarantee in respect of SMK’s relevant liabilities. The third party provided similar suretyship in respect of AMS.
6. Hummingbird is an AIM-listed public company incorporated in England. Its business is gold mining in Africa at three mines owned or operated by subsidiaries in Mali (Yanfolila Mine),

Guinea (Kouroussa Mine) and Liberia (Dugbe Mine), respectively. Hummingbird has undertaken to pay any costs order made against SMK in this litigation.

7. The gateway issue on the security application is, therefore, whether there is reason to believe that Hummingbird will not be able to pay an adverse costs order at the conclusion of the first trial during the second half of 2025. Satisfaction of that gateway or threshold would lead to a discretionary power under CPR 25.13(1)(a) as to which there would be little independent debate in the present case.
8. For the purposes of analysis this costs order has been assumed to be roughly £1m payable in October 2025 - although nothing turns on whether the sum is (up to 50%) higher or the payment date is earlier or later by a few months. For convenience, this is referred to simply - and generically - as the or a “trial costs order”.
9. The security application was originally listed before me on 8 June 2023. I was concerned on that occasion by the risk of deciding the matter one way or the other on the basis of “*data which is incomplete or immature*”. The available financial information for Hummingbird at that time suggested a reasonable level of liquidity (e.g. cash, overdraft facilities and processed gold) but also evidenced “*a turbulent period of operations*” which had yet to establish “*a stable trading position or profile*”. I noted the expressions of material uncertainty as to the going concern status of the company in its previous two sets of audited accounts for the 2021 and 2022 financial years.
10. I stood the application over to this CMC so as to allow further financial data to be produced for the market and provided to the court. In my ruling I referred to “*the benefit of additional material ... in the form of management accounts and relevant quarterly reports to the market*”. (Hummingbird had disclosed its Q1-2023 management accounts shortly before that hearing, having sought to use some of the data in them in one of the three witness statements it had served at the time.) The rationale for standing the matter over was to obtain “*a fuller picture*” for the court. It was desirable that the court at the CMC should have “*a better view so as to calibrate and assess the various estimates and projections as to future trading performance, both through evidence and in further reports to the market*”.

11. Hummingbird has provided two further witness statements in the meantime. Both are made by its Finance Director, Mr Hill, bringing his tally of witness statements to five in opposition to the security application. Mr Hill's fourth and fifth witness statements provide various sets of facts and figures, but without identifying the source of each proposition. They exhibit the three most recent public statements about the company's financial position and operations, namely: Q2-2023 & Q3-2023 Operational and Trading Updates and H1-2023 Interim Results & Group Refinancing Package Update.
12. Despite a clear expectation, expressed in my original ruling, Hummingbird did not exhibit either its Q2-2023 or Q3-2023 management accounts to this further witness evidence. It did, however, disclose a copy of the latter on the evening before this further hearing following rounds of correspondence on the issue. I have separately directed that Mr Hill's two recent witness statements should be re-served with the source of his information identified for every reference to facts or figures, and that this approach must be followed in any further witness evidence served on behalf of Hummingbird. I also ruled inadmissible various materials which the applicants' solicitors sought to include in a further bundle for this hearing.
13. After hearing counsel and dealing with the case management order, I indicated that I would once again stand the security application over until a date to be fixed in September or October 2024. This is, in effect, a second successive adjournment at the insistence of the court and for essentially the same reasons. It implies no criticism of the parties, none of whom sought either of the adjournments.
14. I recognise that this course is somewhat unusual. Appendix 10 to the Commercial Court Guide contains a clear statement as to the need to seek and, if not agreed, apply for security ahead of the first CMC. It warns about the risk of late applications being dismissed (paragraph 1). The rationale for this insistence on early determination of security is no doubt found in the inherent desirability of legal certainty and avoiding injustice to unsecured parties or oppressed counterparties. The availability of successive, so-called 'topping up' applications is contemplated (paragraph 2) but this presupposes that a gateway has been established ("*can be granted*"). The guidance is understandably silent as to successive applications where the first has been dismissed at the threshold stage.

15. My decision to further adjourn the security application might be said to undermine legal certainty and cause prejudice to one or other of the parties. However, I am persuaded that it is the just and appropriate course to take in the unusual circumstances of the present case.
16. Although not *presently* persuaded that there is reason to believe that Hummingbird will not be able to pay the trial costs order, this particular evaluation exercise involves an unusual degree of speculation. It requires the court to evaluate the position in two years' time for a business which has undertaken substantial investment in setting up gold mines in Africa which have only just entered operation and potential profitability.
17. The court must approach this forward-looking inquiry in all cases by reference to the “*totality of the evidence*” so as to ascertain the “*overall picture*”. This involves an appraisal of what is both present and conspicuously absent in order to predict the liquidity of a respondent at the relevant future time in respect of a trial costs order: see *SARPD Oil International Ltd. v. Addax Energy S.A.* [2016] EWCA Civ 120; [2016] BLR 301 at [19].
18. In the present case there are ostensible indicators in both directions. This was so at the June hearing and remains so by reference to the more recent published updates and reports. Both sides can point to specific metrics that support their position, whilst striving to give benevolent context to specific figures that appear adverse to their position. For example:
 - i. Hummingbird has recently restructured substantial financing at a materially higher rate of interest so as to defer capital repayments falling due this year. Those capital repayments will commence next year and involve the repayment of US\$77m during 2024 and US\$61m during 2015, plus further sums through to 2028. Current liquidity may not be a safe indicator of the company's position once those heavy financing obligations bite over the next two years. The need for such restructuring might be said to indicate poor current liquidity, although Hummingbird contends that the availability of such re-structuring indicates its resilient commercial proposition.
 - ii. Whilst the H1-2023 interim results show a profit before tax of US\$4,081,000 to 30 June 2023 (as against, for example, a loss of US\$44.3m in the year to 31 December 2022), Hummingbird's current liabilities stand at US\$185.6m against current assets of US\$87.6m. The current liabilities figure includes trade and other payables of

US\$88.2m which has itself increased from US\$49.4m a year earlier. The group financial position shows a negative net position for cash and gold inventories of US\$119.5m for Q3 (July-September) 2023.

- iii. Hummingbird's EBITDA has risen each quarter this year compared to the position a year before. EBITDA for three complete quarters stands at US\$34.3m. Q1-2023 was US\$15.5m (against minus US\$2.3m for Q1-2022); H1-2023 was US\$33.1m (against minus US\$9.3m for H1-2022); and Q3-2023 was US\$1.2m (against minus US\$8.9m for Q3-2022). These figures may suggest that the business is out of the woods or fledged into operational flight. But it remains early days.
 - iv. Commencement of first gold production was delayed at the Kouroussa Mine until June 2023. Production costs (known as AISC) have ranged between US\$1,109/oz (Q1-2023) and US\$2,161/oz (Q3-2022) at Yanfolila where production volumes dipped significantly in Q3-2023. These production metrics may be explained as seasonal, i.e. caused by the annual wet season. But the point emerging from such significant variations is that there is not yet sufficient operational and financial data to establish a stable or meaningful pattern for the court's predictive task.
 - v. Although not easy to break down, the available evidence shows a correlation between Hummingbird's cash position and use of its overdraft facilities. This picture is likely to remain the case into (at least) next year by the looks of things. As noted in i. above, substantial financing repayments will commence next year.
19. In short, this gold mining business hasn't had enough time in production yet to gauge operational performance in a way that enables the court to make safe predictions as to Hummingbird's liquidity position in two years' time. More operational and financial data is needed in order to plot a graph with confidence that it serves the ends of justice. This is a fundamentally different exercise from Hummingbird's own future projections for commercial and investment purposes.
20. For the court to make a binary determination of the gateway at this juncture in these circumstances would risk injustice:

- i. If security were ordered, only for Hummingbird’s business to flourish and its performance predictions to be vindicated or even exceeded, that would prove unfair unless the applicants were to provide counter-security for an undertaking to compensate the cost and any proximate consequential loss of providing such unnecessary security.
 - ii. On the other hand, if security were denied at this stage, that would make it difficult for the applicants to seek security afresh in light of further financial data suggesting that it ought to be - or, indeed, have already been - provided. Whilst such a further application may be possible, it would no doubt be resisted by Hummingbird as an abusive second (or third) bite at the cherry.
21. Beyond the risk of distinct injustice to each side from an all-or-nothing resolution, for the court to proceed to such binary determination at this stage risks analytical corruption. Psychologists and statisticians are attuned to the dangers of human intuitive trust in the predictive or representative value of small samples of data. This cognitive bias is discussed in *Thinking, Fast and Slow* by Daniel Kahneman at pp.112-114. The average of 1 and 9 is 5, but that is a pretty meaningless measure for predicting what number may follow. The Yanfolila Mine may have an “average” production cost (AISC) of “US\$1,298 per oz to the end of September 2023” according to the Q3-2023 update; but that average is based on the same number of integers as there are digits on a human hand, as to which the quarterly average AICS varies by a considerable amount as noted in paragraph 18.iv. above.
22. It is much safer to determine the liquidity prognosis by reference to more financial data than less. This is not about chasing perfection. It is about ensuring that justice is done in a way that makes optimum pragmatic sense. Put another way, some more hindsight will facilitate better quality foresight in a case such as this.
23. I gave serious thought to whether the just solution here was to dismiss the security application with liberty to re-apply after a certain period of time or in a certain window within the pre-trial timetable. The problem I envisage with that solution is the creation of uncertainty and potential inefficiencies that may consume court time. Any attempt to define the circumstances in which such further application(s) could be made would risk over-prescription and further contests about whether such conditions were satisfied. Leaving it to

the general approach requiring a material change in circumstances would likewise risk uncertainty and satellite disputes, because the court is concerned with the “*totality of the evidence*” and “*overall picture*” under CPR 25.13(2)(c): see paragraph 17 above. What would a material change in circumstances involve in the context of testing prior predictions where the court had already concluded there was no reason to believe that Hummingbird will be unable to pay the trial costs order?

24. The risk of uncertainty and potentially expensive satellite skirmishing over such issues persuaded me to avoid the solution of dismissal with liberty to re-apply. The appropriate solution to this particular problem is, in my judgment, to stand the security application over again to a hearing next year. This will ensure that further trading and financial information has become available to test the credibility of Hummingbird’s current or subsequent predictions as to its own future liquidity.
25. Taking this course means that four more quarterly updates/forecasts will be available (Q4-2023; Q1-2024; Q2-2024; Q3-2024) together with H1-2024 interim results and the 2023 audited accounts for Hummingbird. It may be relevant to see whether the same going concern reservation is contained in those audited accounts as has appeared in the two prior years of audited accounts, for example. A comparison between the 2024 outlook issued with the Q4-2023 update, on the one hand, and the first three quarters’ updates for 2024 may also be informative in terms of calibrating Hummingbird’s own predictions.
26. I appreciate that this prolongs uncertainty as to the provision of security and may increase the costs referable to this single application if not otherwise resolved in the meantime. The parties are, of course, free to compromise this application as well as the entire dispute at any time. This is something they may factor into their attempts at ADR during the stay which will shortly take effect in this litigation, as described above. They could, for example, agree to share the cost of a third party accountant with specialist gold or equivalent mining sector experience who could provide an evaluation of the liquidity prognosis based on available data early next year. This might form part of their chosen ADR process.
27. I see no material prejudice to the respondents by taking this course, save as outlined above.

28. The position of the applicants is different. They will have to incur substantial legal costs in the disclosure phase of these proceedings (February-June 2024) and preparation for witness statements due in November 2024 without any security for their costs, assuming that the dispute is not settled through ADR. However, I regard that as a fair price for them to pay given that they have not *presently* persuaded me that I have jurisdiction to order such security. At any rate, this position is much better for them than having the application dismissed with liberty to re-apply and an adverse costs order payable within weeks.
29. I have reserved the costs of the security application, including the June hearing, to any further hearing at which this application is restored pursuant to my direction. I make no order requiring Hummingbird to provide its management accounts. However, as stated above, I have directed that Mr Hill's fourth and fifth witness statements be re-served and any future witness evidence must be prepared on the basis that the source of every financial or operational proposition is identified. I discourage further interrogation by correspondence or future attempts to augment hearing materials at the last minute.
30. I am grateful to Mr Ashworth KC and Mr Power for their oral submissions at both hearings. They each did an effective job of persuading me that both may be right and both may be wrong based on the current state of information. The outcome on both occasions is testament to their skill, even if neither side sought such outcome.
31. I commend the parties for the high degree of cooperation on case management matters, including full agreement as to the list of issues, pre-trial directions and extended disclosure.