Neutral Citation Number: **[2024] EWHC 1182 (Comm)**

Case Nos: **CL-2024-000084; CL-2024-000086**

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

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

Date: **14 May 2024**

Before :

Dame Clare Moulder DBE

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Between :

CL-2024-000084

J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Claimant**
- and -	
WEREALIZE.COM LIMITED	**Defendant**

And Between:

CL-2024-000086

WEREALIZE.COM LIMITED	**Claimant**
- and -	
J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Defendant**

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Richard Handyside KC and Rosalind Phelps KC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Richard Lissack KC and Robert Weekes KC (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

Hearing dates: **14th May 2024**

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RULING

Dame Clare Moulder DBE **Tuesday, 14 May 2024**
(**10:32** am)

Ruling by **DAME CLARE MOULDER DBE**

1. There are three issues for the court to determine. Firstly, the application by J.P. Morgan International Finance Limited ("JPM") to amend the particulars of claim (the "JPM Amendment Application"). Secondly, JPM's application to add the issue of the transfer agreement to the issues for this trial. Thirdly, the application by Werealize.com limited ("WRL") to amend its pleadings and add an issue to the issues for this trial.

2. The background to this dispute is familiar to the parties, and in the interests of handing down judgment this morning, the second day of what was anticipated to be a four-day trial, I do not propose to set out the background facts and issues in these proceedings. Suffice to say that WRL is the majority shareholder (as to 51.49%) in Viva Wallet Holdings Software Development SA ("Viva"); JPM owns the remaining shares in Viva (as to approximately 48%). The terms governing the relationship between WRL and JPM as shareholders in Viva are set out in a shareholders' agreement dated 24 January 2022 as amended and restated (the "SHA").

3. The call option process in Schedule 1 of the SHA gives JPM the right to buy WRL's shareholding in Viva at a price to be determined following an expert valuation process.

4. At a hearing on 22 March 2024, the Court ordered this expedited trial of the issues in the approved list of issues. Expedition was ordered in circumstances where the second call option exercise period starts on 1 July 2024 with valuations to be carried out by the valuers as at 16 June 2024.

5. Yesterday was the first day of the expedited trial at which I heard oral submissions from leading counsel to both parties on the issues which now fall to be determined.

6. In relation to JPM's Amendment Application, I also had written submissions from WRL opposing the JPM Amendment Application and correspondence from JPM's lawyers, Freshfields Bruckhaus Deringer LLP ("Freshfields"), to WRL's lawyers, Quinn Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel"), in response to the issues raised by WRL. In relation to WRL's amendment, I had the benefit of the correspondence between the parties' lawyers leading up to the application.

7. I note that JPM has agreed to WRL's amendment and to it being determined as part of this expedited trial, subject to the agreement of the court and three conditions which are referred to below and accepted by WRL.

8. Dealing first with the JPM Amendment Application, this was made by application notice dated 7 May 2024 for permission to amend the particulars of claim in respect of the Part 7 claim issued by JPM on 14 February 2024 in the form attached to the application.

9. In essence, by the JPM Amendment Application, JPM seeks to make the following amendments to the declarations in paragraph 64.3 of the Particulars of Claim.

10. Firstly, a declaration (with associated amendments elsewhere) that in the construction of the Call Option Fair Market Value (as defined in the SHA), the Call Option Fair Market Value is to be determined on the basis of Viva's current approved Business Plan, including, for the purposes of paragraph 3.7(b)(vi) of Schedule 1 of the SHA, financial projections based on the current approved Business Plan insofar as they are not already contained in that Business Plan (the "64.3(b) amendment").

11. Secondly, a declaration that if the financial projections have not been prepared by Viva on the basis of the current approved Business Plan and/or approved by JPM and/or WRL, the Valuation Experts are entitled and required to prepared the valuations on the basis of the most recent projections as have previously been prepared by Viva and approved by JPM and WRL, making such adjustments as the Valuation Experts consider appropriate to take into account the actual performance of Viva's business in the period between those projections being prepared and the relevant Measurement Date (the "64.3(c) amendment").

12. I was referred to the principles on late amendments which are set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) in particular at [36]:

> "An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation."

13. Further, at [38] of the judgment, Carr J (as she then was) set out the relevant principles from which I summarise the key principles relevant in this case as follows:

    a. whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general if the amendment is permitted.

    b. Where a very late application to amend is made, the correct approach is not that the amendments ought in general to be allowed so that the real dispute between the parties can be adjudicated upon, rather a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it.

    c. It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.

14. JPM stressed that the explanation for the delay was that the issue of the financial projections only became apparent in the minutes of the extraordinary general assembly of Viva held on 11 April 2024 when Viva claimed that it was:

> "... currently not in a position to provide appropriate forward-looking projections due to the ongoing litigation between its shareholders." (the "April Statement")

15. This was followed up by a letter from Freshfields on 15 April 2024 stating that Viva should abide by its obligations and prepare financial projections ahead of 16 June 2024 based on the current business plan and regardless of the litigation.

16. JPM submitted that although their lawyers had written to WRL's lawyers in these terms, no response was forthcoming until May 2024. It was submitted for JPM that justice lay in granting the amendment because otherwise if Viva did not produce the financial projections, then the valuation process would crater, absent a decision that the valuers can proceed on the basis of the most recent projections with such adjustments as they think fit.

17. In its submissions, WRL raised a number of objections to the amendments.

(a) ADR

18. WRL objected that no dispute notice has been served under the SHA. A dispute notice under the SHA was served which cross-referred to Quinn Emanuel's letter of 23 December 2023.

19. Insofar as the issue is whether fresh financial projections are required, I accept that this now is not a fresh dispute, but it seems to me that the proposed amendments go further than this. However, it seems to me that the court has a discretion whether to stay proceedings, and I do not think that there would be any purpose in requiring the dispute procedure to be followed under the SHA when the trial window is not only upon us but the trial has commenced. Bearing in mind the way in which this litigation is being contested, what counsel described as "hotly contested", there seems no purpose in directing ADR on these issues. In the circumstances, it would only serve to increase the costs incurred on the dispute between these parties with no real prospect of resolving the issues.

(b) "Exceptionally Late"

20. WRL submitted that the amendments are exceptionally late.

21. It cannot be disputed that the amendments coming immediately before the start of the expedited trial are very late, even if JPM maintain that the application was foreshadowed over the past week or so in correspondence.

22. The issue is whether JPM has discharged the "*heavy burden on [it] … to show the strength of the new case and why justice to [it], [its] opponent and other court users, require [it] to be able to pursue it*."

23. As referred to above, JPM submit that the amendments stem from recent pronouncements by Viva in April 2024 concerning the delay to the preparation of the financial projections. However, I do not accept that the 64.3(b) amendment could not have been sought earlier or that it arose as a result of the April Statement.

24. Nevertheless, it seems to me that the issue of the business plan was already in issue on the pleadings and the 64.3(b) amendment can therefore be described as a logical extension, even though it was not an extension that had apparently occurred to JPM until April 2024.

25. I accept that the 64.3(c) amendment only arose after the April Statement and in light of that April Statement, and the ensuing correspondence show it was raised only at this late stage.

(c) Factual and Expert Evidence

26. As to the justice of allowing the amendment, WRL submitted that the application broadens the scope and reach of the issues and both amendments would require factual and expert evidence.

27. In its letter of 7 May 2024, Quinn Emanuel wrote to Freshfields identifying a number of issues which they said would require factual and expert evidence in relation to 64.3(b): (i) factual evidence addressing which documents were intended to form part of the business plan, e.g. whether it included the strategy framework which, they wrote, they understood was a matter in dispute between the parties; (ii) expert evidence addressing what is contained in the business plan and the financial projections and how they differ in order to determine whether a declaration that the financial projections be "based on the business plan" is sufficiently precise and whether it could be implemented in practice. Further it was said that the question was not straightforward because the business plan was not a single document but involved at least two different documents and that there might need to be factual evidence surrounding the compliance or non-compliance with the provisions of the SHA.

28. These issues raised by Quinn Emanuel were repeated in oral submissions for WRL. Mr Lissack KC stressed that there was a dispute over the strategy framework and the issue of compliance.

29. In JPM's current particulars of claim, JPM pleaded at paragraph 64.3:

> "The Call Option Fair Market Value is to be determined on the basis of Viva's current approved Business Plan and not by reference to any revised Business Plan that might be prepared and adopted by Viva if approved by both WRL and JPM in accordance with clause 9 of the SHA."

30. In its Defence, WRL pleaded:

> "The Business Plan is not required to be taken into account for the valuation under paragraph 3 of [the] Schedule..."

31. It seems to me that if evidence had been thought to be required in relation to what documents comprised the business plan, this evidence would already have been required on the original pleadings and yet such evidence has not been adduced. The business plan is defined in the SHA and the court is concerned with the question of construction and not with any question as to whether the business plan or any projections do in fact comply with the terms of the SHA.

32. WRL submitted that expert evidence addressing what is contained in the business plan and the financial projections and how they differ was required in order to determine whether a declaration that the financial projections be based on the business plan was sufficiently precise and could be implemented in practice. However, the parties had already agreed the trial list of issues in the following terms:

    Issue 2:

    > "On the proper construction of paragraph 3 of Schedule 1 of the SHA, what is the basis on which the Call Option Fair Market Value is to be determined? In particular:
    >
    > "(a) Is to be determined on the basis of:
    >
    > "... (ii) Viva's actual financial performance and its projected financial performance based on the current Business Plan (as approved by JPM and WRL in accordance with clause 9.1 of the SHA)?"

33. There was no suggestion at the March hearing that this language was imprecise or that expert evidence would be required to resolve this issue. In my view, WRL has not shown that it would be prejudiced by any lack of evidence if the paragraph 64.3(b) amendment is allowed.

34. As to the question of evidence and the 64.3(c) amendment, WRL said in a letter from Quinn Emanuel that WRL would seek to show, based on expert evidence, that the proposed declaration "would fundamentally undermine the consistency and reliability of the valuation exercise and would not be consistent with the exercise that the valuation experts are required to undertake because it would require them to perform the valuations based at least in part on their own … projections of the expected performance of the business in future…" [emphasis added]

35. However, it seems to me that the issue is not whether such a valuation exercise is "reliable" but whether this is the objective meaning of the language which is used.

36. To the extent that business common sense is relevant to the issue of construction, this could be dealt with in submissions and does not, in my view, require expert evidence.

(d) Real Prospect of Success

37. As referred to above, on the authorities the court also has to consider the merits of the late amendment.

38. As to the 64.3(b) amendment, I note the arguments advanced by WRL on the merits but do not propose to engage in an analysis of the merits at this stage other than to say that it seems to me that the 64.3(b) amendment cannot be said to have no real prospect of success given the low bar which that test entails and that this amendment appears to be consistent with JPM's core case which I understand to be that the valuation should be based on the business plan.

39. However, as to the 64.3(c) amendment, the merits were not addressed substantively in JPM's skeleton or in the correspondence. I note paragraph 25 of the JPM skeleton and footnote 55 in the JPM skeleton.

40. In its oral submissions to the court, JPM submitted that it would be submitting that it was not a precondition that the financial projections had been prepared by Viva. JPM stressed that it was a point of construction which could be dealt with by both sides at the trial and it cannot have been the intention of the parties that the process should fail in this way. It must be the case, it was submitted, that the experts can make the projections themselves or proceed on the basis of the most recent figures with adjustments as necessary.

41. Whilst I do not bar out this argument for the future, on the material which is currently before the court I have insufficient to conclude that at this point JPM have shown a real prospect of success on this issue. The arguments which were advanced by JPM as to why in substance commercial common sense would suggest that the process must continue in some form would form but a part of any interpretation of the meaning of the language in the schedule based on the principles of construction which the court would apply. The express language of 3.7(b)(vi) refers to:

> "... financial projections <u>to be prepared by the Company</u>, approved by the Board and Shareholders, and provided to the Valuation Expert." [emphasis added]

42. In the absence of fuller argument I am not therefore satisfied that for the purposes of determining this application to amend, the 64.3(c) amendment passes the threshold merits test.

<u>(e) Overriding Objective</u>

43. However, even if I were wrong on the merits test, I am not satisfied that the amendment in 64.3(c) should be allowed.

44. It was submitted for JPM that WRL had not submitted that they could not deal with the issue at the expedited trial and their other submissions as to the need for evidence and ADR were not well founded.

45. I am not satisfied that WRL would not be prejudiced by this amendment being allowed at this stage. WRL have not agreed to the amendment and even though WRL have advanced arguments in opposition, including by reference to the language of the schedule, the lateness of the application means that in my view, WRL has been denied a proper opportunity to prepare a response and it is now too late to do so.

JPM Amendment Application Conclusion

46. In conclusion on the JPM Amendment Application, on the 64.3(b) amendment, in my view there is not a good explanation for the delay, but it is in the interests of justice for the core issue of valuation by reference to the business plan to be fully resolved so far as justice allows. In circumstances where, in my view, no additional evidence is required, the issue of the business plan in general terms at least has been on the table throughout, and as a

result WRL are fully able in my view to respond on the issue of construction. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted. In case of the amendment to 64.3(b), in my view there is no injustice to WRL and it is in the interests of justice for this amendment to be allowed. I therefore grant the application to that extent.

47. On the 64.3(c) amendment, I remind myself that:

> "A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it."

48. Even if the proposed amendment may address a set of circumstances which JPM now envisage may arise if new financial projections are not produced by Viva and approved in time for the next valuation, it is, at this stage at least, unclear whether this is in fact going to be the case.

49. Further, the parties identified the issues for this expedited trial at the hearing in March. The issue is a new one which, for the purposes of this application, JPM has not demonstrated a real prospect of success and for which WRL has not been given adequate time to prepare its case in response. For these reasons, the application to amend 64.3(c) is refused.

JPM Application to add to the Issue for Trial

50. JPM make a further application to add to the issues to be dealt with at this expedited trial, namely the issues set out at 64.8 of the particulars of claim:

> "If JPM exercises the JPM Call Option … JPM is entitled to require WRL to transfer its shares in Viva on the terms of paragraph 2 of Schedule 7 without it being necessary for the parties to have agreed a form of transfer agreement to implement such terms."

51. Paragraph 3 of Schedule 7 provides for a form of agreement to be agreed to implement the transfer, but that agreement has not yet been agreed although correspondence is being exchanged between the legal representatives.

52. WRL opposes the addition of this issue and submitted that:

    a. Firstly, even if JPM's complaint about the negotiations to the draft transfer agreement were well founded, it would still be inappropriate to introduce the issue for determination at the expedited trial. The parties have been preparing for the expedited trial on the basis of the Court's order that the transfer agreement issue does not arise for determination;

    b. Secondly, a fair resolution of the transfer agreement issue will involve factual evidence on the circumstances surrounding the negotiation of the transfer agreement, and;

c. Thirdly, it is premature to direct that the court determines the transfer agreement issue in circumstances where the parties are continuing to discuss and negotiate the form of draft transfer agreement.

53. It was submitted for JPM that what JPM seeks is clarification of the fallback position in the event that it has not been possible to reach agreement on the form of the transfer agreement by the time of any successful option exercise and no evidence is required.

54. I accept that it appears from the correspondence that the parties are still in negotiation of the form of transfer agreement, although the correspondence that I have seen would suggest that the two sides have substantial disagreements. However, irrespective of whether the parties are able to resolve their differences over the transfer agreement by negotiation, the issue for this court is whether to vary its direction in relation to the issues to be determined at this expedited trial.

55. The overall time allowed for this expedited trial was fixed having regard to the issues which the court directed should be determined at the expedited trial, and the addition of this issue would place an additional burden on the court time. Further, when considering whether expedition is appropriate, the court has to consider any prejudice to WRL.

56. I do not accept that factual evidence would be required concerning the transfer agreement negotiations as these would seem to be irrelevant to JPM's case on this issue which is that they can bypass the provisions of paragraph 3. However, it seems to me that the issue has not been fully formulated by JPM in a way which would enable WRL to have properly responded. Although JPM say that they have addressed this issue in their skeleton (paragraphs 97 and 98) these paragraphs do not set out on what basis the court would be able to make such a finding on the language of Schedule 7, and whilst acknowledging the oral submissions made for JPM that it would be able to seek an injunction, absent any reasoning advanced by JPM in support of the declaration or injunction, it is difficult to see how the court can conclude that WRL has had an adequate opportunity to prepare its case such that it would not be prejudiced if JPM were permitted to advance this issue at this expedited trial.

57. Acknowledging that negotiations are ongoing on the transfer agreement, in all the circumstances, in my view, it is not in furtherance of the overriding objective to add this issue at this juncture to the list of issues to this expedited trial.

<u>WRL Application</u>

58. Turning then to WRL's application, WRL have now made an application to advance a case that the call option can only be exercised by JPM on one occasion and not in each of the call option periods (the “one shot issue”).

59. In correspondence, WRL stated that the issue can and should be determined at the expedited trial, since it involves a short point of construction, although WRL also stated that on its case it was not necessary for the matter to be resolved at this trial. WRL has produced a draft amendment to its Part 8 claim.

60. Although this is a new issue in my view, and contrary to the way the case was presented to me when I dealt with the expedited issues for trial at the hearing in March, JPM do not oppose WRL advancing this case at this trial provided that WRL also amends its Part 7 defence, sets out its argument in opening and JPM is able to reserve its rights concerning rectification and estoppel.

61. I expressed concern at the hearing yesterday whether the matter was suitable to be heard if JPM were to reserve its rights concerning rectification and estoppel, accepting that there is no time to advance a case on these issues at this trial. JPM submitted that they are keen to have the issue resolved and would want, therefore, for the court to determine this at this trial.

62. Although I am reluctant to add another issue to this short trial in circumstances where it may not resolve the issue, it does seem to me to be a fundamental point on the construction of the call option.

63. Further, I accept that both parties have taken the view that they can deal with the issue at this trial and it seems to me that determination of the way in which the call option is to be valued, the main issue at this trial, will be negated if this significant point is not determined at the earliest opportunity.

64. I therefore accept that it is in furtherance of the overriding objective that this issue should be dealt with at this trial. WRL did make oral submissions yesterday and have said that they will amend their Part 7 defence. However, in order to ensure that the issue is properly dealt with, I will require written supplemental skeletons and will allocate additional time for oral submissions. The parties have estimated that they will finish on the current issues within the four days this week. The court had set aside next Tuesday in case that was not possible. Irrespective of whether the current issues are concluded within the four days or whether part of next Tuesday is required on the current issues, I direct that oral submissions on the "one shot issue" will be heard from both sides with a right of reply next Tuesday afternoon at 2.00 pm allowing a maximum of half a day. Supplemental skeletons on this issue alone are to be produced and filed: WRL is to file its supplemental skeleton on this issue alone by 4.00 pm this Friday; JPM is to file its supplemental skeleton on this issue alone by 9.00 am on Monday. The position concerning rectification and estoppel is reserved.