

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2020/0047

BETWEEN:

RENISTON LTD

Claimant

and

NEDLAND OVERSEAS INC

Defendant

Appearances:

Ms. Daisy Bovington of Collas Crill LP
The defendant did not appear

2020: June 18,
July 2

JUDGMENT

[1] **JACK, J [Ag.]:** By, what on its face is, a fixed date claim for issued on 8th April 2020 the claimant seeks:

“Payment in the sum of USD\$5,847,979, being amounts outstanding pursuant to:

(a) A loan agreement dated 22 March 2013 between Daferson Developments Limited (Lender) and Severo-Zapadnaya Agropomishlennya Gruppa LLC (also known as SZAG LTD) (Loan Agreement);

(b) A guarantee agreement dated 22 March 2013 (Guarantee Agreement), pursuant to which the Defendant guaranteed the amounts payable to the Lender pursuant to the Loan Agreement; and,

(c) Assignments of the rights of the Lender under the each of the Loan Agreement and the Guarantee Agreement to the Claimant on 16 August 2018.”

- [2] In fact, the claim form should not have been as a fixed date action. CPR 8.1(5) has a list of claims which can be the subject of a fixed date action. An ordinary debt claim (other than those under hire-purchase or credit sale agreements) should be brought by an ordinary action on a Form 1 claim form.
- [3] Be that as it may the notice of hearing was issued on 18th May 2020 with a return date of 18th June. As I pointed out in **Brings (suing as Administrator of the Estate of Fresco Douglas Charles Stewart, deceased) v Golden Century Industrial Ltd and another**¹, the return date on the fixed date form should have been given when the fixed date claim form was issued. It is after all what the fixing of the date on a claim form means. If the Registry continues the practice of issuing fixed date claim form without a fixed date, at some point an issue may arise as to whether Her Majesty’s Attorney-General should be liable for the costs thrown away by any adjournment caused by the Registry’s failure to comply with the Rules.
- [4] At any rate the claimant sensibly waited until it had a return date from Registry before serving the defendant at the registered agents on 19th May 2020. This is within time for the hearing before me on 18th June 2020. Whereas ordinary actions are the subject of the procedure for default judgments: CPR Part 12, fixed date actions are not: CPR 12.2(b). Instead on the return date, the Court can treat the hearing as a case management hearing: CPR 27.2(a). Alternatively, if the claim is not defended, it can consider the matter as the trial of the action: CPR 27.2(b). The claimant on 17th June 2020 issued an application for judgment by default, but this is not a possible procedure on fixed date action.
- [5] The statement of claim in the current matter provides, so far as material:

¹ BVIHC (COM) 2019/0171 (determined 31st March 2020).

“3. On 22 March 2013, Daferson Developments Limited, a company/body corporate incorporated under the laws of Cyprus (Lender) entered into a loan agreement with Severo-Zapadnaya Agropomishlennaya Gruppa LLC (also known as SZAG LTD), a legal entity organized under the laws of the Russian Federation (Primary Debtor) the terms of which were recorded in writing (Loan Agreement). The salient terms of the Loan Agreement, which will be relied on in full for its full force and effect were:

3.1 Principal Sum: USD\$6,530,000

3.2 Term: 3 years

3.3 Interest: 5% per annum

4. The funds were advanced by the Lender to the Primary Debtor pursuant to the Loan Agreement on 27 March 2013.

5. Also on 22 March 2013, the Lender entered into a guarantee agreement with the Defendant (Guarantee Agreement). The Guarantee Agreement, the terms of which will be relied on in full for their full force and effect, provided that:

5.1 The Defendant both:

(a) guaranteed the obligations of the Primary Debtor to the Lender under the Loan Agreement; and

(b) indemnified the Lender for amongst other things losses and expenses suffered or incurred arising out of or in connection with the obligations of the Primary Debtor to the Lender pursuant to the Loan Agreement:

clause 2 of the Guarantee Agreement

5.2 If the Primary Debtor defaulted under the Loan Agreement, the Defendant was liable to pay default interest in the amount of 0.1% per day: clause 4.1 Guarantee Agreement.

6. The Primary Debtor failed to pay any sums due to the Lender under the Loan Agreement. As at 27 March 2016, the total amount outstanding any payable by the Primary Debtor to the Primary Lender pursuant to the Loan Agreement was \$7,509,500.

7. On 16 August 2018, the Lender and the Claimant entered into two agreements, being:

7.1 an assignment agreement pursuant to which the Lender assigned its rights under the Loan Agreement up to the value of \$5,847,979.00 to the Claimant (Loan Assignment)

7.2 an assignment agreement pursuant to which the Lender assigned its rights under the Guarantee Agreement to the Claimant (Guarantee Assignment).

8. On 21 November 2018 the Claimant issued written demands to the Primary Debtor to pay to it all of the amounts outstanding pursuant to the

Loan Agreement. The Claimant received no payment from the Primary Debtor in satisfaction of the debt.

9. The Claimant thereafter sought payment from the Defendant pursuant to the Guarantee Agreement. Negotiations progressed between the Claimant and Defendant by telephone and face to face meetings, during which time the Claimant gave the Defendant a written demand for payment, which demand was dated 5 February 2019.

10. As a result of the negotiations the Defendant agreed to make payments pursuant to the Guarantee Agreement. Therefore, between 4 March 2019 and 1 November 2019, the Defendant paid the amount of USD\$5,270,000 in reduction of the Primary Debtor's and its own liability to the Claimant under the Loan Agreement and Guarantee Agreements, respectively, on the dates and in the amounts as follows:

- 10.1 4 March 2019 – USD\$350,000
- 10.2 12 March 2019 – USD\$770,000
- 10.3 6 September 2019 – USD\$1,100,000
- 10.4 19 September 2019 – USD\$1,100,000
- 10.5 1 October 2019 – USD\$1,100,000
- 10.6 1.11.2019 - 850 000 USD
- 10.7 13.02.20 – 250 000 USD
- 10.8 13.02.20 – 200 000 USD

11. On 14 November 2019, the Claimant issued a letter of demand to the Defendant, claiming the outstanding balance under the Loan Agreement and Guarantee Agreement of USD\$7,789,027.37, being comprised of principal outstanding debt of USD\$5,847,979 and interest pursuant to the Guarantee Agreement of USD\$1,941,048.37.

12. As at the date of this Statement of Claim, the following amounts are outstanding pursuant to the Guarantee Agreement:

- 12.1 Principal \$5,847,979.00;
- 12.2 Interest at \$2,056,405.76 which is accruing at a daily rate of USD\$801.09;
- 12.3 Default Interest at \$2,818,049.35 which is accruing at a daily rate of \$5847.98 per day,

13. The Claimant claims:

- 13.1 The sum of USD\$10,724,334.10;
- 13.2 Contractual interest accruing at the amount of \$6649.07 per day;
- 13.3 Costs; and
- 13.4 Such further or other relief as this honourable Court deems fit."

- [6] When I first saw the statement of claim, I had a problem with these figures. In August 2018, the defendant is said to owe \$5.8 million odd. By February 2020 it has paid \$5.2 million. Yet the entire amount of the principal is said still to be outstanding, with interest of over \$2 million plus default interest of \$2.8 million. It was unclear how credit had been given in the statement of claim for the payments made. *Prima facie* the debtor would choose that these should go against capital rather than interest. There is no justification given in the statement of claim for the default interest, which seemed potentially to be a penalty and thus potentially irrecoverable.
- [7] Even more seriously, there appeared to be no cause of action. As is well known, the law of this Territory does not permit the assignment in law of choses in action, such as the alleged assignor's claim against the defendant debtor. Assignment can only take effect in equity. Equity recognises an assignment in two cases:
- (a) Where the assignor gives notice of the assignment to the debtor; or
 - (b) Where the assignee has given consideration for the assignment.
- See **Chitty on Contracts**² at Chapter 19(b).
- [8] In the current case, the statement of claim asserted neither head. Accordingly, the claimant had no cause of action against the defendant. Further and in any event, when claiming on an equitable assignment it is essential that the assignor be added as a defendant. This had not been done either.
- [9] The interest rate on the guarantee also appeared to be penal.
- [10] When the case came before me on 18th June, I discussed these points with Ms. Bevington, who appears for the claimant. She showed me in broad terms how the figures for amount outstanding on the loan were calculated. The figures seemed broadly right, providing the claimant was entitled to allocate payments by the defendant to outstanding interest rather than principal, but Ms. Bevington could

² 33rd Ed, 2019.

not at that time explain the basis for that allocation. I adjourned the hearing for her to consider her pleadings, the penal interest point and any further evidence which she might wish to adduce.

[11] On 30th June 2020 the claimant issued an application seeking relief pursuant to CPR 26.9 so that the claim was to be treated as having been brought by ordinary claim form. As consequential relief, judgment by default was sought.

[12] This application came before me today on the hearing adjourned from 18th June. The claimant sought to rely on a witness statement of Ms. Anneka Williams, a paralegal employed by Collis Crill LP, the claimant's legal representative. She says that the loan agreement was governed by Russian law and the guarantee by English law, although she exhibits neither document. She says nothing about either the Russian law of assignment or the English law of assignment. No amendment was made to the statement of claim to plead anything about the Russian or English laws of assignment.

[13] In the absence of any pleading of foreign law, that law is presumed to be the same as BVI law. Since legal assignment does not exist here, it behooves a party to plead either the elements of an equitable assignment or of the governing provisions of foreign law. Despite my discussing this with Ms. Bovington on 18th June, no proposed amendment has been forthcoming. I am of course aware that English law recognises legal assignments of debts: **Law of Property Act 1925** (UK)³ section 136(1). I am prepared to assume (although there is no evidence to this effect) that Russian law also recognises legal assignments of debts. However, foreign law is treated as a question of fact. It must therefore be pleaded in the statement of claim: CPR 8.7(1). This the claimant has failed to do. It follows that there is still no cause of action disclosed by the statement of claim.

[14] As regards the allocation of the payments made by the defendant, Ms. Williams says that Article 319 of the Russian Civil Code provides for payments to be

³ 15 & 16 Geo 5 c 5.

allocated to interest before principal, so that under the Loan Agreement the repayments are properly allocated to interest rather than capital. Clause 9.4 of the Guarantee Agreement prohibits the guarantor from allocating repayments, so that the creditor could allocate the payment between interest and capital, which it has done by allocating the payments to interest. These points in my judgment adequately justify the treatment of payments in my judgment.

- [15] The new evidence, however, says nothing about the point that the default interest rate on the guarantee is a penalty. The rate of 36.5 per cent per annum is so high that it may be *in terrorem* and therefore unenforceable: see **Chitty on Contracts** at para 39-294.
- [16] Instead of addressing these issues, Ms. Bovington asks the Court to convert the current fixed date claim into an ordinary claim, so that the claimant can apply for judgment by default. I agree that the issuing of a fixed date claim was a procedural error. CPR 26.9(3) provides that “the court may make an order to put matters right.” Were there no other problems with the claim, I would have no hesitation in doing so.
- [17] The current state of the pleadings is, however, for the reasons I have given, anything but problem-free. If I acceded to Ms. Bovington’s request, I would be inviting the claimant to enter judgment on a claim which discloses no cause of action for a figure which (even if there were a cause of action) may be much too high. The Court’s weightiest duty is “to deal with cases justly”: CPR 1.1(1). I do not consider that allowing the claimant to enter judgment in these circumstances is dealing with this case remotely justly. Under CPR 26.9(3) I have a discretion whether to allow this action to proceed as an ordinary action instead of a fixed date claim. For the reasons stated, it is not in my judgment appropriate to exercise my discretion in that way.
- [18] I am mindful that, albeit in dribs and drabs, the claimant appears to be getting its case together. The amount claimed is very large. Despite my reluctance to waste

further resources of the Court on this matter (see CPR 1(2)(e)), I think I should give the claimant one last opportunity to get its tackle in order. I shall therefore adjourn the matter for one further hearing, so that the claimant can amend its statement of claim to show a viable cause of action for a legally and factually justifiable sum.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar