Neutral Citation Number: [2017] EWHC 3288 (Comm)

Case No: CL-2016-000352

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2017

Before:

Lionel Persey QC
(sitting as a Judge of the High Court)

- -

Between:

	ZCCM INVESTMENTS HOLDINGS PLC	**Claimant**
	- and –	
	-	
	KONKOLA COPPER MINES PLC	**Defendant**

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Jamie Riley (instructed by **Clifford Chance LLP**) for the **Claimant**
Sophie Mallinckrodt (instructed by **Latham & Watkins LLP**) for the **Defendant**

Hearing dates: 22 November 2017

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Judgment Approved**Lionel Persey QC:**

1. In this CMC the Claimant seeks:

   (1) summary judgment pursuant to CPR Part 24 in the sum of US$35,875,873, alternatively in the sum of US$9,060,000 together with contractual interest; and/ or, if necessary

   (2) various directions for the future conduct of these proceedings.

Introduction and background

2. The Claimant ("**ZCCM**") is a Zambian company in which the Zambian Government holds a 77.53% interest. The Defendant ("**KCM**") is also a Zambian company, whose principal activities are the mining, production and marketing of copper and cobalt alloys.

The ultimate majority shareholder of KCM is Vedanta Resources Plc ("**Vedanta**").

3. In March 2000 ZCCM and KCM entered into copper and cobalt price participation agreements. In November 2004 they concluded a shareholders' agreement. Various claims for non-payment of sums due from KCM to ZCCM arose under those agreements. These claims were subsequently settled pursuant to the terms of a detailed Settlement Agreement dated 11 February 2013 ("**Settlement Agreement**"). The terms of the Settlement Agreement, to which I will return in more detail below, required KCM to make payments (together with accrued interest) to ZCCM in the following sums:-

   (1) US$46,324,655 to be paid on or before 31 August 2013 in accordance with the payment schedule set out in Schedule 1 ("**the Part A Instalments**"); and

   (2) US$73,420,000 to be paid on or before 30 September 2013 in accordance with the payment schedule set out in Schedule 2 ("**the Part B Instalments**").

   I was told that the Settlement Agreement was negotiated and drafted by the parties' solicitors, Clifford Chance LLP and Latham & Watkins LLP.

4. By the time the Claim Form came to be issued on 6 June 2016 KCM had paid just under US$19.5 million in respect of the Part A Instalments and had failed to make any payment in respect of the Part B Instalments. The total sum then owing under the Settlement Agreement was a little over US$103 million, inclusive of contractual interest. The final Part B Instalment of US$9,060,000 ("**the Final Instalment**") had not at that time yet fallen due.

5. ZCCM at that time suspected that the full amount of all sums payable under the Settlement Agreement, including the final instalment, had become due pursuant to the acceleration provisions in Clause 6.3 of the Settlement Agreement ("**the Acceleration Provisions**") by virtue of possible breaches by KCM of clauses 7.3 and 7.4 of that agreement. Those clauses, as will be seen, effectively conferred a priority in favour of ZCCM over Vedanta and other Vedanta group companies ("**the Vedanta Group**") in respect of payments made by KCM, and prohibited KCM from making payments of certain kinds to the Vedanta Group. ZCCM did not have access to information that would have enabled it to determine clearly whether KCM was in breach of the Settlement Agreement terms. In the Particulars of Claim served with the Claim Form ZCCM claimed an account or inquiry into the sums that KCM might owe by virtue of the operation of the Acceleration Provisions.

6. Two extensions of time for service of KCM's Defence were agreed between the parties, the second of which was on the terms of a signed Consent Order dated 15 August 2016 pursuant to which KCM agreed to give inspection of documents that had previously been requested by ZCCM. Those documents were not supplied and KCM did not serve a Defence by the agreed date. ZCCM therefore issued an application for default judgment.

7. KCM purported to comply with the documentary requirements of the Consent Order by

providing some documentation on 22 August 2016 and further information on 29 August 2016. That information showed that certain payments had been made to Vedanta on 11 April 2013 (2 months after the date of the Settlement Agreement) but fell well short of that which KCM had agreed to provide. On 9 September KCM provided some further information showing that sums totalling US$3,716,914 had been paid to the Vedanta Group on 11 April 2013. The supporting documentation was not, however, clear. KCM did not serve a Defence.

8. ZCCM's application for a default judgment was heard on 16 December 2016 by Mr Ali Malek QC, sitting as a Judge of the High Court. He ordered default judgment in ZCCM's favour of US$103,327,244 (inclusive of contractual interest) in respect of the Part A and Part B Instalments outstanding as at the date of the Claim Form (ie not including the Final Instalment). He also ordered an inquiry ("**the Inquiry**") or alternate account as to whether and, if so, in what sum, KCM was liable for the Accelerated Sum pursuant to the Acceleration Provisions in the Settlement Agreement. KCM was required by 20 January 2017 to give inspection of all documents evidencing payments by it to Vedanta in the financial years 2013 to 2015 in certain identified categories and to serve a witness statement providing a full narrative explanation of all payments made by KCM to any Vedanta Group company in those financial years. The Judge also gave directions for the service of pleadings in the Inquiry.

9. The parties subsequently agreed to a Consent Order dated 20 January 2017 which varied the payment terms in the Default Judgment and permitted KCM to pay the Judgment sum in a series of instalments. Also on that day KCM served a third witness statement of Daniel Smith of Latham & Watkins in purported compliance with the terms of the Default Judgment. Although some further information was given this statement did not provide the full narrative explanation called for by the Default Judgment.

10. ZCCM served its Points of Claim in the Inquiry on 24 February 2017 and on the same day demanded payment of the Final Instalment together with interest. KCM's Points of Defence were served on 17 March 2017 and ZCCM served its Points of Reply on 31 March 2017. KCM did not pay the Final Instalment and draft Amended Particulars of Claim were sent to Latham & Watkins on 3 April 2017. These were later revised to satisfy concerns that had been raised by KCM. KCM consented to the revised draft on 27 April 2017 and the draft was filed with the Court on the following day. The Amended Particulars plead out ZCCM's claim for payment of the Final Instalment, together with contractual interest. KCM has not served a Defence to that claim. Nor did it respond to ZCCM's requests for further information and clarification of the payments made by KCM to the Vedanta Group.

The present Application

11. This Application was issued on 6 July 2017. Two witness statements were made by Ms Carla Lewis of Clifford Chance in support of the Application. KCM did not serve any evidence in opposition until 17 November 2017 (two working days before the hearing) when it filed the witness statement of its Chief Financial Officer, Mr Gargiya. A further statement of Mr Jimuliya, KCM's Finance Controller, was served on the morning of the hearing. No objection was made to the late service of this evidence.

12. At the outset of her oral submissions Ms Sophie Mallinckrodt for KCM stated that the final Part B instalment of US$9,060,000 was admitted to be due and owing and that KCM therefore had no defence to this claim. KCM disputed the balance of ZCCM's claims on two grounds:-

(1) There was no breach by KCM of clauses 7.3 or 7.4 of the Settlement Agreement and ZCCM was not entitled to accelerate payment ("**the No Breach Defence**");

(2) The interest rate in Clause 6.3 is an unenforceable penalty clause ("**the Penalty Clause Defence**").

13. There was no issue between the parties as to the approach to be taken on the Part 24 application. The Court will give summary judgment on a claim if it considers that the Defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial. The applicable principles are helpfully summarised in the judgment of Lewison J. in *EasyAir Ltd. v Opal Telecom Ltd* [2009] EWHC 339 at para.15.

The Settlement Agreement Terms

14. The Settlement Agreement provided in relevant part, as follows:-

> "... **4. Interest on Part A Instalments**
>
> 4.1 Each Part A Instalment shall carry interest at the rate of LIBOR plus 2.5 per cent per annum calculated on a day to day basis from the date of this Agreement until the due date of payment.
>
> 4.2 If a Part A Instalment is not made in full on the date such payment is due (as set out in Schedule 1), interest on that part of the unpaid Part A Instalment shall increase to LIBOR plus 5 per cent. per annum calculated on a day to day basis from the relevant due date, until the date the instalment in question is paid in full, (together with any interest that has accrued). For the avoidance of doubt, interest on Part A Instalments not overdue will remain at LIBOR plus 2.5 per cent. per annum ...
>
> ...
>
> **5. Forbearance, interest and enforcement of Part B Instalments**
>
> 5.3 Default interest shall apply at LIBOR plus 5 per cent. per annum and be calculated on a day to day basis from the Initial Instalment Due Date until the Next Instalment Due Date on the unpaid Part B Instalment.
>
> 5.4 If a Deferred Amount is not paid at the Next Instalment Due Date, default interest on the unpaid Part B Instalment shall increase to LIBOR plus 7.5 per cent. per annum on the unpaid

Part B Instalment calculated on a day to day basis from the Next Instalment Due Date to the date falling 3 months following the Next Instalment Due Date.

5.5 If a Deferred Amount has not been paid at the conclusion of the period falling 3 months from the Next Instalment Due Date, interest on the unpaid Part B Instalment shall increase to LIBOR plus 10 per cent. per annum calculated on a day to day basis from the date falling 3 months from the Next Instalment Due Date until the Deferred Amount (including any accrued interest) is paid in full ...

6. Prepayment

...

If KCM breaches Clause 7.3 or Clause 7.4 of this Agreement, all amounts unpaid to ZCCM-IH under this Agreement (including accrued interest on Part A and Part B Instalments) shall be accelerated and required to be paid within 5 Business Days of the breach occurring. If KCM does not pay all amounts due to ZCCM-IH within 5 Business Days, interest shall accrue at the rate of LIBOR plus 10 per cent. per annum calculated on a day to day basis from the date Clause 7.3 or Clause 7.4 was breached to the date all amounts under this Agreement are paid in full ...

...

7. Ranking of Amounts due under this Agreement and Dividends

7.1 KCM agrees that all amounts due under this Agreement, as set out in Clause 3.1 shall:

7.1.1 be subordinated only to the secured bona fide third party debt of the KCM Group as set out in but not limited to Schedule 4; and

7.1.2 rank senior to any Debt (secured or otherwise) owed to a company in the Vedanta Group or a Vedanta Group affiliate ...

...

Pursuant to Clause 7.1.2, KCM undertakes to not repay any part of any Debt (secured or otherwise) owed to a company in the Vedanta Group or a Vedanta Group Affiliate while any amount, including any portion of a Part A or Part B Instalment or any accrued interest on Part A and Part B instalment, remains due for payment under this Agreement ...

KCM is not permitted to (i) declare or pay any dividend to the shareholders of KCM or otherwise make a distribution to shareholders of KCM subject to an exception for any outstanding payment as at the date hereof, or (ii) make any other payments to the Vedanta Group (including, repayments of shareholder loan interest and principal, and any management fees), while any

payment, including any portion of a Part A or Part B Instalment or any accrued interest on a Part A and Part B Instalment, remains due for payment under this Agreement. If any payment is deferred (in accordance with Clause 5 above) such payment shall be deemed to be due ..."

Payments to Vedanta

15. It is now common ground that on 11 April 2013 KCM paid Vedanta the sum of US$3,716,914.54. This payment was allocated as follows:-

(1) US$916,666 in respect of management fees;

(2) US$723,975 in respect of corporate guarantee commission;

(3) US$2,021,749 in respect of the reimbursement of employee stock option plans in Vedanta; and

(4) US$54,405 as reimbursement for various expenses paid for by Vedanta.

The No Breach Defence

Introductory

16. ZCCM contends that the April payments were made in breach of Clauses 7.3 and/or 7.4 of the Settlement Agreement. KCM argues that the payment to Vedanta did not breach the Settlement Agreement because:-

(1) The sums that were paid had fallen due before the Settlement Agreement was executed; and

(2) A significant part of the payment related to reimbursements for sums paid by Vedanta to third parties.

17. Both parties referred me to a number of well-known authorities on the principles of contractual construction including, most recently, the decision of the Supreme Court in *Wood v Capita Insurance Services Ltd.* [2017] 2 WLR 1095. The Settlement Agreement is a detailed contract concluded between two sophisticated parties that was negotiated and drafted by leading law firms.

Clause 7.4

18. It is convenient to start with Clause 7.4 of the Settlement Agreement. This forbids KCM from making payments in two categories. The first is in relation to the declaring or paying of any dividends to KCM's shareholders subject to a specific exception in respect of any outstanding payments as at the date of the Settlement Agreement. The second relates to any other payments to the Vedanta Group, including management fees. This second category is not subject to the same specific exception as the first and is not qualified in any way. The objective meaning of Clause 7.4(ii) is that KCM is forbidden from making any payment to the Vedanta Group, whether its obligation to do so arose before or after the date of the Settlement Agreement. This objective meaning is consistent with the other parts of Clause 7. The parties clearly intended that any liability of KCM to the Vedanta Group would be subordinated to its liability to ZCCM under the Settlement Agreement.

19. KCM admits that part of the April 2013 payment to Vedanta comprised management fees. In my judgment this payment of management fees is prohibited under the express terms of Clause 7.4(ii).

20. KCM asserts there are background facts that have a bearing on the issue of construction and that these facts should be aired and tested at trial. The thrust of KCM's argument is that it was agreed between the parties that the Settlement Agreement would permit KCM to make payments to Vedanta in respect of liabilities outstanding as at the date of the Settlement Agreement. KCM relies in this regard upon the statement of Mr Gargiya, who was KCM's CFO up until November 2012, and then again from January 2015. Mr Gargiya refers to and relies upon meetings held before the Settlement Agreement was concluded and correspondence exchanged after its conclusion. KCM claims that this evidence forms part of the background facts or knowledge that can be taken into account when construing the Settlement Agreement.

21. First, Mr Gargiya refers to and relies upon a meeting between the parties in August or September 2012 in which he says he communicated his understanding that the agreement should permit KCM to make payments outstanding as at its date and that he understood that ZCCM had agreed to this. He observes that Clause 7.4 of the Settlement Agreement reflects that understanding. Mr Gargiya was not in post at the time that the details of the Settlement Agreement came to be finalised and is not in a position to give any evidence about what was, or was not, agreed at that time. In any event, these alleged pre-contractual discussions and declarations of subjective intent do not form part of the admissible background to the construction of the contract: see *I.C.S. Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913, per Lord Hoffmann. They are simply irrelevant. Miss Mallinckrodt made clear that she was not asking for the Settlement Agreement to be rectified. Furthermore, Mr Gargiya's evidence does not assist KCM because Mr Gargiya expressly (albeit inadmissibly) states that Clause 7.4 as eventually agreed reflects his understanding. Finally on this point, it is relevant to note that the Settlement Agreement contains an Entire Agreement clause in the shape of Clause 14. The effect of this is to extinguish any prior undertakings, representations, warranties, conditions and arrangements of any nature, whether in writing or oral.

22. Secondly, Mr Gargiya relies upon an exchange of correspondence between the parties in

March and April 2013, that is to say after the conclusion of the Settlement Agreement and before the date of the April payment. In brief summary, on 11 March 2013 ZCCM reminded KCM of their obligations under the Settlement Agreement. By letter dated 4 April 2013 KCM advised that it had not paid any debts, dividends or other payments to any Vedanta Group companies and that "*Clause 7.4 prohibits such payments subject to an exception for any outstanding payment as at the date hereof. Please note that such outstanding payments will be made according to the normal process*". Mr Gargiya asserts that KCM proceeded to make the relevant payments to Vedanta when ZCCM did not communicate any disagreement with the 4 April 2013 letter. Mr Gargiya was not in post at the time and had no involvement in this correspondence. KCM nevertheless argue that the correspondence is part of the factual matrix. This is misconceived. Post-contractual correspondence is not admissible as an aid to the construction of the Settlement Agreement. The Court is not entitled to look at the subsequent conduct of the parties to interpret a written agreement: see *Lewison on the Construction of Contracts* (6th Ed.) at [3.19].

23. I do not consider the evidence of Mr Gargiya to be either relevant or admissible to the proper construction of the Settlement Agreement. The payment by KCM of management fees on 11 April 2013 was a clear breach of Clause 7.4 of the Settlement Agreement, the effect of which was to accelerate ZCCM's entitlement to payment pursuant to Clause 6.3.

Clause 7.3

24. It is not strictly necessary for me to consider the parties' submissions on KCM's alleged breaches of Clause 7.3 given my conclusions in respect of Clause 7.4. I nevertheless do so in deference to the detailed submissions of the parties.

25. The effect of Clause 7.3 is to prohibit KCM from repaying any "Debt" owed to the Vedanta Group while any amount remains due to ZCCM under the Settlement Agreement. Debt is comprehensively defined in Clause 1 of the Settlement Agreement. Four of the eleven categories of Debt as there defined are relevant to the parties' arguments, as follows:-

> "..."**Debt**" means any indebtedness in respect of:
>
> monies borrowed ...
>
> ...
>
> (f) any amount raised under any other transaction (including any forward sale or purchase agreement) having the commercial effect of a borrowing ...
>
> ...
>
> (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution ...

...

(k) (without double counting) the amount of any liability in respect of any guarantee or indemnity for any of the claims referred to in paragraphs (a) to (j) above ..."

26. ZCCM submits that the words "in respect of" are to be widely construed and that the indebtedness referred to in the definition of Debt need not arise directly pursuant to, by or under one of the listed categories but may instead be incurred under a separate, albeit related, transaction. It argues that:-

(1) The sum paid in respect of corporate guarantee commission was paid in respect of moneys borrowed (category (a)) or in respect of a guarantee of or indemnity for moneys borrowed (category (k)); and

(2) The payment in respect of employee stock options and expenses effectively constitute the repayment of a loan from Vedanta to KCM and therefore fall within category (a) or category (f).

27. KCM contends that the categories of Debt are to be construed narrowly, that repayment of a Debt will only be prohibited if it falls squarely within one of the defined categories, and that none of the April payments fell within these defined categories. KCM further submitted that the nature of the payments made needed to be investigated at trial and that it is not appropriate for me to seek to determine whether or not they fall within the definition of Debt on an application for summary judgment. This is not an attractive position for KCM to take, given that it had been ordered by the Court to provide a full narrative account of all payments that it had made and did not fully comply with that obligation. There is, however, enough evidence before the Court to enable me to reach a conclusion in respect of three elements of the April payment, namely the corporate guarantee commission, employee stock options and expenses.

28. As to the corporate guarantee commission, Mr Jimuliya explains in his witness statement that the payment of this sum was due because Vedanta had charged KCM a commission for guaranteeing KCM's liabilities to banks and to other third parties. In my view such a payment falls within category (k). This indebtedness in respect of commission was a liability in respect of a guarantee for monies borrowed.

29. As to employee stock options and expenses, KCM asserts that these were sums that Vedanta, as agent, had paid or incurred on its behalf. Beyond this bare assertion, however, KCM has adduced little or no evidence to explain just how and why these payments came to be made. The facts spoken to by KCM strongly suggest that KCM was repaying monies that had in effect been loaned to it by Vedanta. Such payments fall within category (a) and/or category (f). It is consistent with the underlying purpose of Clause 7 as a whole that the repayment of such sums to Vedanta should be subordinated to KCM's liability to ZCCM under the Settlement Agreement.

30. It follows from this that the payment by KCM to Vedanta of corporate guarantee commission, employee stock options and expenses each constitutes a clear breach of

Clause 7.3 of the Settlement Agreement, the effect of which was to accelerate ZCCM's entitlement to payment pursuant to Clause 6.3.

The Penalty Defence

Introductory

31. KCM's alternative argument is that Clause 6.3 is an unenforceable penalty clause. KCM contends that the obligation to make accelerated payments of all Part A and Part B Instalments and to pay interest at LIBOR + 10% on those amounts is out of all proportion to any legitimate interest of ZCCM in the enforcement of KCM's primary obligations under the Settlement Agreement.

32. Both parties referred me to the recent decision of the Supreme Court in *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [2016] AC 1172. In summary:-

(1) The question of whether a damages clause is a penalty falls to be decided as a matter of construction as at the time that it is agreed: see Lords Neuberger and Sumption at [9] and [87]; Lord Hodge at [243];

(2) The test for a penalty was variously described by their Lordships as follows

- "...The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation…", per Lords Neuberger and Sumption at [32];
- "...What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable ...", per Lord Mance at [152];
- "...I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract...", per Lord Hodge at [293].

Acceleration

33. The first question for me to consider is whether the right to accelerate future payments under the Settlement Agreement imposes a detriment on KCM which is out of all proportion to any legitimate interest of ZCCM and/or provides ZCCM with a remedy that is in all the circumstances extravagant, exorbitant or unconscionable. In answering that question I am required to look at the legitimate interests of ZCCM in the

performance of the contract and also to look at the circumstances in which the contract came to be concluded, including matters such as the relative bargaining power of the parties and whether KCM had legal advice at the time the contract was concluded.

34. I have no hesitation in rejecting KCM's assertion that the right to accelerate future payments constitutes a penalty. The Settlement Agreement in effect operated as a loan pursuant to which KCM was, subject to compliance with certain agreed terms, granted yet further time in which to discharge its admitted liability to ZCCM. An accelerated payment clause in a loan agreement entitles the lender to immediate repayment of the sums that he has lent: ie to the repayment of his own money. As Neill LJ observed in *The Angelic Star* [1988] 1 Lloyd's Rep. 122 at p.126:

> "...I know of no rule that prevents a lender from stipulating that in the event of a failure to make an instalment payment on the due date the whole loan becomes due and repayable forthwith..."

There is to my mind nothing extravagant, exorbitant or unconscionable in requiring a commercial party under the terms of a settlement agreement such as the present immediately to pay the full amount of the loan in the event of any non-compliance with its terms. ZCCM had a legitimate interest in requiring strict compliance with the Settlement Agreement and KCM knew exactly what it was signing up to when concluding this arms' length agreement with the benefit of expert legal advice.

Interest

35. The second question that I have to consider is whether the interest rate of LIBOR plus 10 per cent imposed by Clause 6.3 is disproportionate or unconscionable. I do not consider that it is.

36. The parties agreed that interest would become payable at LIBOR plus 10 per cent in the circumstances envisaged by Clause 5.5 of the Settlement Agreement. The default judgment of US$103,327,244 ordered by Mr Ali Malek QC included some interest calculated at LIBOR + 10 per cent. It is in my judgment both absurd and illogical to suggest, as KCM effectively does, that an interest rate which is agreed to be legitimate when imposed as part of its primary obligations under the Settlement Agreement nevertheless becomes exorbitant or unconscionable when imposed as a secondary obligation for breach of that same agreement.

37. It was also in my judgment reasonable for ZCCM to require, and KCM to agree, to increased rates of interest in the event, and from the time, of default – a borrower in default is not the same credit risk as a prospective borrower: see *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at pp763-764, cited with approval by Lord Mance JSC in *Cavendish* (above) at [146].

38. Finally, I have seen no evidence to suggest that the agreed rate of LIBOR plus 10% was evidently extravagant. Miss Mallinckrodt suggested that an interest rate of 5% would be appropriate. That is less than the current judgment rate. Such evidence as there is before

me shows that rates of up to 14% were paid in respect of ZCCM's shareholder loans.

Conclusions on the Penalty Defence

39. In conclusion, I reject the argument that Clause 6.3 is an unenforceable penalty clause.

Conclusion

40. For the reasons given above ZCCM is entitled to summary judgment for the full amount of its claim. I would be grateful if the parties would draw up a draft Order which gives effect to this judgment.