Neutral Citation Number: [2013] EWCA Civ 1307

Case No: A3/2013/0429

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
Mr L BLOHM QC
HC10C02701

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th October 2013

Before :

LORD JUSTICE RIMER
LORD JUSTICE LEWISON
and
LORD JUSTICE BRIGGS

- -

Between :

CHILUKURI & ANR	**Appellant**
- and -	
RP EXPLORER MASTER FUND	**Respondent**

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- -

DAVID CAVENDER QC (instructed by **FASKEN MARTINEAU LLP**) for the **Appellant**
JEFFREY GRUDER QC and ANNA DILNOT (instructed by **FARRER & CO LLP**) for the **Respondent**

Hearing dates: 16th October 2013

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Approved Judgment

Lord Justice Briggs:

1. This is an appeal from the order of Mr Leslie Blohm QC sitting as a deputy judge of the Chancery Division made on 30th January 2013, whereby he ordered the first defendant Ravi Chilukuri to pay US$5,894,858.80 to the claimant by way of damages for breach of contract. The appeal relates purely to the judge's findings on quantum. It is an entirely factual appeal. I therefore bear in mind the principles as to the correct approach of an appellate court to findings of fact set out by Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1WLR 577 at paragraphs 14 to 17, approved as a correct statement of the law by Lord Mance in *Datec Electronics Holdings Limited v United Parcels Service Limited* [2007] UKHL 23; [2007] 1WLR 1325 at paragraph 46.

2. The contractual obligation of which, as is now common ground, Mr. Chilukuri was in breach was contained in an escrow deed dated 19th December 2007, by which in substance he promised to transfer to a nominee company his 26% shareholding in SRM Exploration PVT Limited ("Exploration") to be held for the benefit of the claimant RP Explorer Master Fund, as security for repayment of an investment of some US$81million-odd. The judge decided (and this is not in dispute either) that the quantification of the claimant's loss flowing from Mr. Chilukuri's failure to transfer his 26% shareholding in Exploration was to be identified by ascertaining the value of those shares on 1st July 2009 ("the Valuation Date").

3. The judge's approach to that valuation exercise may be summarised, in bare outline, as follows:

    1) He sought to identify the net asset value of Exploration as at the Valuation Date, by reference to the then value of its significant assets and liabilities.

    2) He then identified the value of Mr. Chilukuri's shareholding in Exploration as 26% of that net asset value, less a 10% minority shareholder's discount.

4. Putting a little flesh on those bones, the main asset of Exploration which the judge identified consisted of what he described (in paragraph 240 of the judgment) as a "51% interest in Bitumen Deposit, DRC", to which he ascribed a then value of US$32,000,000. To this he added the aggregate value of three other assets of US$655,378. The values of those assets were not in dispute or, worthy of dispute, on this appeal. From the aggregate asset value of US$32,655,378 he then deducted his own estimate of the value of a contingent guarantee liability of Exploration, namely US$8,721,675. This produced a net asset value of Exploration at the Valuation Date of US$23,933,693. 26% of that was US$6,222,760.20 so that after applying what he called a "minority and marketability discount of 10%" the resultant figure was $5,600,484.20 as damages for breach of contract.

5. Most of the dispute about quantum, both at trial and appeal, concerned the judge's valuation of Explorer's 51% interest in the Bitumen Deposit. It was in fact a 51% (and therefore controlling) shareholding in a company incorporated under the law of the Democratic Republic of Congo ("DRC") called Cobit-SRM SPRL ("Cobit"), which was reputed to hold valuable rights to mine bitumen in the western (coastal) part of the DRC, pursuant to a joint venture agreement with the DRC dated 1st November 2006 ("the JVA"). I say 'reputed' because one of the points taken both at trial and on

appeal on behalf of Mr. Chilukuri is that the JVA had not, as at Valuation Date, even come into force, due to the non-satisfaction of a requirement for the issue of a presidential decree approving the JVA.

6. The judge's identification of $32,000,000 as the value of Exploration's 51% shareholding in Cobit flowed directly from his acceptance, without qualification but after a lengthy analysis of the issues, of a discounted cash flow ("DCF") valuation of Cobit's rights under the JVA in July 2009 by the claimant's expert in the sum of US$62,400,000, rounding up 51% of that sum (US$31.824million) to US$32million. That conclusion required the judge to resolve a large number of valuation issues, none of which had been foreshadowed in the parties' Statements of Case. In the claimant's Particulars of Loss there is a bald claim for the "market value of the Shares" (i.e. the 26% which Mr. Chilukuri held in Exploration), at various alternative dates, one of which was "as at, in, or about the end of July 2009". Mr. Chilukuri's defence merely put the claimant to proof of "the fact and quantum of any loss for which claim is made". Following those unhelpful pleadings, the quantum issues began to emerge in detail from an exchange of experts' reports in March 2012, and were amplified by an expert's joint statement which it appears became available to the parties on 11th May, the last working day before the beginning of the trial on Monday 14th May, although it appears that it was only signed by Mr. Chilukuri's expert Mr. Singhi on the Monday. Some further limited assistance was provided to the judge by the preparation and amendment, from time to time, of a List of Issues.

7. A particular disadvantage of the very late stage at which the quantum issues crystallised was that the parties' disclosure, and that of Mr. Chilukuri in particular, was undertaken before either side had any real appreciation of the way in which their opponents would be putting the case on quantum. No order was sought or made for a split trial, for further disclosure or an adjournment for that purpose. The result was that both the judge and the experts were required to deal with quantum issues of considerable complexity on the basis of seriously inadequate documentation. Furthermore, the judge derived little assistance from the oral evidence of Mr. Chilukuri himself, mainly because of adverse findings as to his credibility. Those findings are not challenged on this appeal, but Mr. David Cavender QC, who appeared for Mr. Chilukuri both at trial and on appeal, submitted that Mr. Chilukuri's credibility was of no real relevance to the quantum issues.

8. The valuation at a historic date of a minority shareholding in an overseas company, the principal asset of which is a bare majority stake in another overseas company which owns an unexploited mining concession in the DRC, is as obvious an example of a judicial task requiring an assessment and weighing of competing considerations as it is possible to imagine. I therefore approach this appeal with a ready disposition to respect the judge's overall conclusion unless satisfied that it lies outside the bounds within which reasonable disagreement is possible.

9. The main bone of contention between the parties and their experts at trial, renewed on this appeal, was whether a DCF valuation of Cobit's rights under the JVA was at all appropriate. If it was not, then the only alternative basis of valuation proffered at trial was a cost (or book) valuation which, it was common ground at least on appeal, would have yielded an insufficient sum, when aggregated with the modest value of Exploration's other assets, to overtop its contingent liability represented by the

guarantee debt. Accordingly, unless a DCF valuation of Cobit's rights under the JVA could be justified, the 26% shareholding in Exploration was valueless.

10. As its name implies, a DCF valuation seeks to attribute a present value to an assumed future cash flow arising from a business asset. To the arithmetical aggregate of the annual cashflows, there are applied discounts reflecting both the time value of money and certain types of risk which the valuer considers may impact upon the realisation of that cashflow. As Mr. Philip Haberman FCA the claimant's expert readily acknowledged, both in his report and in more detail in cross-examination, the DCF of a business which has yet to commence has to be based upon a number of assumptions, one of which is that there are no impediments to the commencement and conduct of the business such as, for example, some defect in title to the relevant rights, or inability to comply with any contractual conditions upon which the exploitation of those rights is dependent. Mr. Haberman accepted, and the judge noted, that risks of defects or impediments of that kind could not generally be provided for as part of a DCF discount rate, unless they were of such little substance as to fall within a commonly used residual risk contingency discount of up to 5%.

11. Mr. Haberman also acknowledged in his oral evidence that if the aggregate discount (for time value of money and risk) which was required to be factored into a DCF valuation exceeded 40%, then this undermined the validity of a DCF valuation in relation to the business in question, so that some other type of valuation would then be required.

12. Mr. Haberman's discount rate for the purpose of valuing Cobit's rights under the JVA was, for 2009, 30%. It included elements for a risk free rate for the DRC, an equity risk premium for the DRC and a 4% premium to allow for residual risk. It assumed that the bitumen extraction process could be commenced immediately, and that there were no title, contractual or other obstacles, or a real (rather than residual) risk that they might exist. Notwithstanding a vigorous cross-examination focussing upon a number of alleged risks of that kind, Mr. Haberman's final position was that nothing caused him to depart from his DCF valuation of Cobit's rights under the JVA, as both an appropriate method, and as generating a correct outcome. This the judge accepted.

13. The judge's main reason for accepting Mr. Haberman's valuation evidence in its entirety was that, having read both his reports and those of Mr. Singhi, Mr. Chilukuri's expert, and seen both of them giving oral evidence, he considered that Mr. Haberman was the more reliable expert. He found that Mr. Haberman was much the more experienced of the two in the use of DCF valuations, and in valuations generally. He found that whereas Mr. Haberman was cautious in his assessment of material and ready to make concessions when pressed in cross -examination, Mr. Singhi tended to be dogmatic, prone to technical error and undermined by his limited access to relevant documents.

14. The gist of Mr. Singhi's evidence was that the uncertainties surrounding the exploitation of the JVA by Cobit under the control of Exploration were so numerous and varied that it was impossible either to identify a reasonably reliable future cash flow, or to place a capital value on it by a DCF valuation. The judge was, of course, better placed than an appellate court to form a view of the relative reliability of Mr. Haberman and Mr. Singhi as experts, and that part of his judgment was not attacked on appeal. Nonetheless this did not absolve the judge from forming his own view

about the numerous valuation issues contested both between the experts and the parties, nor indeed did the judge treat himself as absolved. His decision to accept Mr. Haberman's DCF valuation in full was the result of his own analysis of the main valuation issues, set out in a judgment which, although delivered eight months after the end of the trial, cannot be criticised in lacking either in care or in detail on the quantum issues, bearing in mind in particular that quantum formed only one segment of a multi-faceted dispute.

15. The gist of Mr. Chilukuri's appeal was first, that the judge either underrated or ignored a number of specific risks and contingencies standing in the way of the exploitation by Cobit of its rights under the JVC and secondly, that the judge failed to stand back and take a common-sense business view of the value of the 26% shareholding in Exploration, considering all relevant factors in the round, including in particular the financial and commercial implications arising from the fact that, by the Valuation Date, there had been issued a petition for the winding up of Exploration in the Indian courts, on the grounds that it was insolvent and unable to pay its debts as they fell due. These suggested defects in the judge's analysis were propounded by Mr. Cavender in written and oral argument, and responded to by Mr. Jeffrey Gruder QC and Ms Anna Dilnot, with a wealth of detail and tenacity. It is a tribute to counsel that the hearing was concluded within a single day. I intend no disrespect to any of their careful submissions by dealing only with the most important of them in this judgment.

16. The alleged risks and uncertainties relied upon by Mr. Cavender may loosely be categorised under three headings:

a) Those directly affecting Cobit's exploitation of its mining rights under the JVA;

b) Those affecting Exploration's 51% interest in, and control of, Cobit;

c) Those affecting the value of the 26% shareholding in Exploration in the appraisal of any potential purchaser in July 2009.

Those categories are by no means wholly independent from each other. In particular, risks and uncertainties affecting the solvency and management of Exploration could plainly affect the practical ability of Cobit, a joint venture company led and managed by Exploration, to make a prompt start upon the mining of the bitumen deposit. As I have said, a central assumption in Mr. Haberman's DCF valuation was that there was no impediment to such a prompt start, so that his cashflow could properly be based upon a commencement of operations on or shortly after the Valuation Date. Nonetheless I shall address Mr. Cavender's submissions broadly in that order.

(a) Risks and uncertainties directly affecting Cobit's exploitation of its mining rights under the JVA

Presidential decree

17. Mr. Cavender's main point under this first category was that, as at the Valuation Date, the JVA had simply not come into force, because this was conditional upon the issue of

a presidential decree approving the JVA, which had not occurred during the more than two and a half years following the making of the JVA.

18. When writing his report in March 2012, Mr. Haberman assumed that all conditions precedent to the exploitation of the mining rights conferred by the JVA had been complied with. Mr. Singhi did not in his March 2012 report suggest otherwise, but he raised as an obstacle the absence of the presidential decree at the experts' joint meeting, as is reflected in the statement of his views in the experts' Joint Statement prepared just before the start of the trial. In cross-examination, Mr. Haberman accepted that he had seen no evidence of a presidential decree, and that he had made no allowance for any risk that its absence might adversely affect Cobit's right to mine. When presented in re-examination with a summary of the oral evidence of Mr. Chilukuri, to the effect that the fee for the decree had been paid by Cobit, and a receipt received from the DRC's Treasury Department, but that the decree had not yet been issued by March 2008, Mr. Haberman said that:

> "From that description it sounds to me as though the issue of the presidential decree was very much an administrative process… a bureaucratic step that would have to take place, would in due course take place and then the decree would be in place. It doesn't sound as though there is anything of substance which prevents it from happening. On that basis I would not expect there to be a further discount to make allowance for it."

19. The judge dealt with this point at some length, in paragraphs 229 (3) and 234 (2) and (3) of the judgment. In summary he concluded that the parties to the JVA were treating the agreement as being in force, but with a deferred five year operative period, which would only commence when the decree was issued, which it had not been on the Valuation Date. He found that the decree had been paid for, that there was no reason why the DRC government would not issue it when and if asked to do so, and that Mr. Haberman's evidence in re-examination was "really no more than a statement that the market would assume that the decree would follow as a matter of course." He decided that Mr. Haberman was "entitled to take the view that the market would consider the requirement a matter of administration, and make no further adjustment to its valuation of the asset." The judge was clearly influenced in his view that this was a negligible risk by the fact that it had been raised on Mr. Chilukuri's behalf at a very late stage in this litigation, after he himself had issued a letter of warranty in March 2008 on behalf of Exploration, to the effect that (inter alia) "all regulatory approvals, permits and licences required to allow continuity of future operations and production from the evaluated properties are in place…".

20. There are to my mind a number of difficulties with the judge's optimistic analysis. The starting point is the JVA itself. Article 1.9 provides as follows:

> ""DATE OF ENTRY INTO FORCE": The date when the Presidential Decree approving the Agreement comes into force; however, if the necessary Exploration Permit has not yet been issued by then, the Date of Entry into Force shall then mean the date when such a Permit is issued."

Article 17.1 headed "Approval of the Agreement" provides:

> "After its signature by the Parties, the present Agreement shall be approved by Decree of the President of the Republic."

Clearly, the JVA contemplated that the decree should have been issued immediately, or at least shortly, after the making of the agreement, rather than be outstanding more than two and a half years later.

21. The "market" to which the judge referred in the passage quoted above was a market for investment in the bitumen mining project, rather than for the purchase of Cobit's rights under the JVA. It was common ground that the project could not be undertaken without substantial hard currency investment, in order to fund the capital expenditure on machinery and infrastructure necessary to conduct large-scale open cast mining operations in the jungle. There is an issue (to which I will have to return) about whether this necessitated an investment of US$130 million or US$25 million, but an investor of either amount would be likely to conduct significant due diligence into matters going to Cobit's title to exploit the rights conferred by the JVA. Such a due diligence would inevitably have included a request for sight of the mining permit and presidential decree. If the decree had not been produced in July 2009, it seems to me that a prudent investor would by no means have assumed that its issue was a mere formality, merely from an assertion on behalf of Cobit or Exploration that it had been paid for, and even if backed by a DRC treasury receipt.

22. Nor was Mr. Haberman's evidence in re-examination (quoted above) reasonably to be taken as his considered opinion of what the market would assume. Rather it was his own personal assessment, when presented with fresh information for the first time while in the witness box, about a matter which, as he had acknowledged in cross-examination, lay entirely outside the scope of a DCF valuation, and therefore outside the particular expertise for which he was proffered as a witness. In short, the implications arising from the absence of the requisite presidential decree were a matter for lawyers, or for anxious discussion with the DRC government, rather than for accountants.

23. There was no direct evidence before the court as to why the presidential decree had not been issued. Little reliance could be placed on Mr. Chilukuri's March 2008 warranties, which were plainly untrue if, as the judge assumed, the decree had probably not been issued. Nor could the existence of an undoubted contractual obligation on the DRC to procure the issue of the decree be assumed to give much comfort to an investor, without careful enquiry as to whether the DRC government still supported the project in mid-2009 in the changed political and economic circumstances to which I shall shortly refer.

24. If the question for the judge had been whether in fact, on the balance of probabilities, the issue of the decree had been deferred by mutual agreement so as to postpone the requirement to commence work and expenditure on the project until all members of the Cobit joint venture were ready to do so, and the funds in place, then a positive conclusion on that question, albeit on the basis of scanty primary facts, might well have been justified. But the question was, as the judge recognised, one about market perception in 2009, and the effect of that perception upon the likelihood (assumed by Mr. Haberman without qualification) that investment funding for the project would then have been readily available.

25. The result therefore is that, on this point, there was in my view no sufficient evidence, or basis in primary fact, upon which the judge's conclusion that the market would have

assumed that the obtaining of a presidential decree was a mere formality could reasonably be based. The uncertainties arising from the absence of the decree could not therefore be regarded as within the category of remote or residual risks properly catered for by a 5% discount, and Mr. Haberman's DCF valuation did not therefore take them into account.

Adverse political and economic changes by mid-2009

26. The commencement of the mining operations on or shortly after the Valuation Date was, as I have said, an essential assumption in Mr. Haberman's DCF valuation, and this was itself wholly dependent on raising investment finance for the project. Article 3 of the JVA set out a work programme with which Cobit was obliged to comply, requiring the expenditure of US$54 million within the first four years after the coming into force of the agreement. Mr. Haberman's report, at paragraph 3.45, identified total capital expenditure of US$130 million, including the acquisition of fifteen processing machines from Sweden for a total price of US$112.5 million. Mr. Haberman's cashflow (and evidence during cross-examination) assumed that all but US$25 million-odd of the capital expenditure could be financed out of income from bitumen sales, by staging the acquisition of the requisite machinery over three years. He appears to have assumed that, although Cobit would be paid for bitumen sales (primarily aimed at the domestic market in the DRC) in Congolese francs, it would have no difficulty in converting that income into hard currency for the purpose of funding capital expenditure. In cross-examination, Mr. Haberman suggested that a currency conversion difficulty would only arise, if at all, in relation to exporting Cobit's profit to investors outside the DRC, but this evidence ignores the requirement to convert income to hard currency for the funding of capital expenditure as assumed in his cash flow.

27. The judge did not deal with this point specifically, save in the general sense that he must be taken to have accepted Mr. Haberman's analysis more or less lock, stock and barrel. Mr. Gruder sought to rescue Mr. Haberman by reference to article 11.1 of the JVA headed "Currency Exchange Conditions" which provides that:

> "The STATE guarantees to COBIT-SRM SPRL, and to any foreign natural person or legal entity working for it as an Agent or Sub-contractor, within the framework of the present Agreement, the benefit of any more favourable legislative or regulatory provisions, in monetary matters; granted to another Enterprise carrying out similar activities in the Democratic Republic of Congo."

In my judgement, as the sub-heading for article 11.1 makes clear, this was merely a qualified undertaking not to inhibit Cobit's export of hard currency from the DRC by exchange control or other regulations. I regard Mr. Gruder's submission that it amounted to a positive guarantee by the DRC to provide hard currency in exchange for Congolese francs whenever requested by Cobit as wholly misconceived.

28. The result of this analysis is that, in the real world in 2009, Cobit could not expect to be able to undertake the bitumen mining project authorised by the JVA without investment of at least the bulk of its capital expenditure requirements from an investor prepared to risk hard currency. Mr. Haberman's DCF valuation made the unqualified assumption that this investment would be available, albeit spread over three years.

29. There was, as Mr. Cavender submitted, abundant evidence available to the court to suggest that, in the real world by mid-2009, no such assumption could be made. Cobit had in 2008, under Exploration's management, sought investment finance from Deutsche Bank but without success. The evidence disclosed no continuing investigation of investment finance after that. In the meantime, the Lehman crash had, on any view, had a fundamentally adverse effect on the obtaining of investment finance, even if the credit crunch which had precipitated that crash had started some time earlier. Meanwhile, there was material in the form of the DRC Spring 2009 Economic Report to suggest a major deterioration in the DRC as a place for investment. In summary, war had broken out in the east of the country, necessitating increased military expenditure by government. Extractive industry (mining and oil) was contracting, thereby causing both a fiscal deficit and an acute scarcity of foreign currency reserves. The government's priorities had become focussed upon addressing the basic social needs of the population, and international donors were concentrating emergency funds on the provision of imports of critical goods and commodities, teachers' salaries and costs for basic utilities such as water and electricity.

30. By contrast, the bitumen extraction project authorised by the JVA was aimed primarily at providing bitumen for use within the DRC in a large government-funded road-building programme contemplated in 2006, with exports regarded as only a second-best alternative, due to the local premium price payable for bitumen within the DRC.

31. To the extent that he addressed it all, Mr. Haberman's evidence was that the ups and downs of political and economic considerations in any particular country were properly reflected in the Risk Free Rate for the DRC incorporated in his report, which rose from 9.2% in January 2008 to 15.3% in July 2009. But this increase in discount was nonetheless based on an assumption that investment finance would be available, whereas the harsh realities disclosed by the evidence suggested at least a serious uncertainty whether that would be so, if not indeed a real probability that investment would not be available for this project. Indeed the fact that the evidence disclosed no resumption by Exploration or Cobit of efforts to find investment after the failure of the negotiations with Deutsche Bank in 2008 was of itself a powerful indication that the project had become stalled by mid 2009 due to lack of investment, with complete uncertainty as to when it might be commenced thereafter. This is not a case in which, in the real world, the valuation of the 26% shareholding in Exploration could be predicated upon an assumption that Cobit's mining rights under the JVA were themselves available on the market, either to an investor with the requisite funds, or to a purchaser able to find such an investor. The purchaser of the 26% shareholding in Exploration in July 2009 would have to proceed on the basis that Exploration's main asset consisted of a 51% share in a mining project for which finance had been sought unsuccessfully, and which was, at the Valuation Date, inactive, and likely to remain so.

32. It is central to a realistic understanding of the value of the 26% shareholding in Exploration in mid 2009 that it conferred no right to take over the management of Exploration, or even a right to representation on its board of directors, still less any right or influence in the management of Cobit's project. There was therefore nothing which a purchaser of the 26% could be sure of being able to do to spur the management of Exploration or Cobit into a more active pursuit of investment than appeared to be happening on the ground as at the Valuation Date.

33. I have not found any satisfactory answer to these formidable difficulties, either in the judgment at paragraph 234(5) or in Mr. Gruder's submissions. They could not reasonably be accommodated within the types of discount used by Mr. Haberman, not least because the investment difficulties facing Cobit were so specific to the bitumen project, rather than difficulties of a generic type upon which the DCF discounts were inevitably based. It is one thing to assume, as Mr. Haberman did, that if a DCF valuation produces a return which is, in monetary terms, attractive to investors generally, then investment may be assumed. It is quite another thing to apply that assumption to a project in relation to which investment had been sought without success at a time when economic conditions had been more favourable, and where the particular aspects of the political and economic deterioration which had then occurred undermined the whole basis upon which this particular project had been assumed to generate a satisfactory return.

34. It follows that, upon this issue, I have also reached the conclusion that the judge's optimistic assessment was out-with the boundaries of reasonable analysis.

(b) Risks and uncertainties affecting Exploration's 51% interest in Cobit

35. The only significant candidate advanced by Mr. Cavender under this heading was litigation reputed to concern a challenge by or on behalf of another SRM company to Exploration's title to its 51%, extant as at the Valuation Date. Plainly, if there was a serious and sustained challenge to Exploration's right to that 51% share in Cobit, and therefore also to its right to control Cobit's activities, then this would give rise to a serious threat both to Cobit's ability to pursue the bitumen project for as long as Exploration's management rights remained uncertain and, even more obviously, a serious uncertainty whether the 26% shareholding in Exploration conferred any certain rights to a share, through Exploration's 51% in Cobit, in the value of the bitumen project. Again, these matters were not provided for in Mr. Haberman's DCF valuation, save in the sense that, if they were no more than residual risks, they were accommodated in the 4 or 5% additional discount. Nor did the judge apply any risk discount in his assumption that, whatever the value of the mining rights in the JVA, Exploration was entitled to a 51% share in them.

36. The judge's conclusion was, however, on the very limited evidence about this litigation, that the risk was no more than "ephemeral", not least because Mr. Chilukuri, in whose interests it was to maximise its adverse effect upon the alleged value of the 26% in Exploration, had done nothing significant to demonstrate that the litigation represented a real threat, despite what the judge concluded was his close involvement in the affairs of Exploration, at least until 2008.

37. There were three slender strands of evidence about this litigation available to the court. The first was a passage in Mr. Singhi's report, giving as the reason for there having been no start on the bitumen project:

> "A dispute between two of the former promoters who colluded with the 49% shareholder to try and take it to their personal

> names in 2008. This was litigated in the Belgian courts and the Luxembourg courts and won."

Mr. Singhi gave no explanation as to the source of his information, nor as to the parties to that litigation or the dates of its commencement and successful conclusion. The implication is however that the winner was Exploration.

38. The second strand was to be found in a report for the claimant by Kroll, prepared in June 2008 which, at paragraph 3.1.4, stated that:

> "Kroll's legal sources in India identified one legal case in which SRM Exploration is involved. The case, an ongoing civil suit, was filed by SRM Exploration against Mohinder Kumar Verma in the Delhi court in 2008."

Kroll do not explain what that litigation was about, and the date of the report makes it impossible to know whether it was still pending by mid 2009.

39. The third strand consists of an email from Mr. Chilukuri to two colleagues of his dated March 4th 2008, which provides some detail about what he calls a fraudulent attempt by Mr. Verma and another to treat SRM Luxembourg as though it rather than Exploration was the rightful owner of 51% of Cobit. It refers to criminal charges filed against Mr. Verma and his co-conspirators by "the Indian company" (which appears to be a reference to Exploration), and also to proceedings taken in Europe against the same defendants for fraud by Mr. Chilukuri and others as majority owners of SM Luxembourg, again relating to the true ownership of the 51% in Cobit, described as "the asset in Congo". The email suggests that in March 2008 Mr. Chilukuri had very considerable knowledge, and documents, relevant to those proceedings.

40. Mr. Chilukuri disclosed no documents about that litigation in these proceedings, and said nothing about it in his evidence. Mr. Cavender sought to deal with this by submitting that until receipt of Mr. Haberman's report in March 2012, there was no way in which Mr. Chilukuri could understand how the damages claim was being put. While that may be a persuasive submission in relation to the presidential decree, it seems to me to be a weak explanation in relation to this litigation about the 51% since, if it represented a serious challenge to Exploration's interest in Cobit in mid 2009, it was on any view highly relevant to the value of the 26% shareholding in Exploration.

41. The judge's treatment of this point in paragraph 234(1) of the judgment appears to derive from his recollection that the March 2008 email was the only piece of evidence about this litigation. He may by then have forgotten about Mr. Singhi's reference to it, and the Kroll report. His conclusion is as follows:

> "The evidence of such a claim, amounting to correspondence in 2008, is ephemeral, and I have no doubt that if a substantial asset had been so claimed, SRM Exploration would have litigated the point, and would not have been as assiduous as it

has been in challenging the Czech guarantee claim (which of itself presupposes that SRM Exploration is of significant value – and I have not heard it suggested that it has acquired further assets in the interim). Although Mr. Chilukuri in correspondence referred to criminal proceedings for fraud being brought, the lack of information about this claim strengthens my view that it was in all probability a matter of little weight."

42. The Kroll report and Mr Singhi's evidence both suggested that Exploration was indeed actively involved in the litigation about this matter. Nonetheless in my view the judge's overall conclusion about this was correct. Although he appears to have forgotten about the fact that the Kroll report clearly identifies Exploration as a party to that litigation, the rest of his analysis seems to me well supported by the evidence, and in particular to be justified by Mr. Chilukuri's failure properly to deal with this litigation, if it was still a serious matter in 2009, either in his disclosure or in his evidence.

(c) Risks and uncertainties directly affecting the value of the 26% shareholding in Exploration

43. The main candidate under this heading is the winding up petition which the judge found had been presented against Exploration by the Valuation Date, based upon an unsatisfied statutory demand for the Czech Koruna equivalent of approximately US$11.6 million-odd.

44. There was no challenge on appeal to the judge's findings of primary fact about this claim, set out at length in paragraphs 241 to 251 of the judgment. I can therefore summarise them briefly. The claim arose from an alleged guarantee by Exploration of certain liabilities of a Czech company in respect of a share purchase transaction. The statutory demand had been issued and served on May 1st 2009 and not complied with by Exploration. As I have said, the judge concluded that the petition had also been presented and served by the Valuation Date, and there appears to have been expert evidence about Indian law which concluded that, as under English law, the effect of the issue of the petition was to invalidate any subsequent transfers of shares in Exploration. Application was also made for the appointment of a provisional liquidator of Exploration.

45. Exploration challenged the petition (I assume by means of a strike-out application), alleging that Mr. Chilukuri had executed the guarantee without Exploration's authority. This was dismissed at first instance by the Delhi High Court on March 4th 2011, and an appeal against that judgment was itself dismissed on 21st March 2012. We were told (in response to our enquiry) that Exploration has since been wound up, but it is not clear whether this was pursuant to that petition.

46. Audited accounts for Exploration were prepared and completed after the Valuation Date in which the guarantee claim was mentioned, but no provision was made in respect of it.

47. The appeal on this issue relates solely to the judge's treatment of those facts in his valuation of the 26% shareholding in Exploration. Having concluded that "the market" would have been aware of the existence of the petition, and the putative guarantee, at the Valuation Date, when the claimant sought to sell the 26% shareholding, he continued (at paragraph 252):

> "At that stage it would have been left with the option of challenging the petition and the underlying liability or they could have sought to cause SRM Exploration to come to an arrangement with the creditor company."

He then referred to the contrasting views of the valuation experts. Mr. Haberman relied heavily on the lack of any provision for the guarantee liability in Exploration's subsequent audited accounts, whereas Mr. Singhi's opinion was that full provision would have needed to have been made for the debt.

48. The judge continued (at paragraph 255):

> "I agree with Mr. Singhi that a purchaser of shares, properly advised, and aware of the claim, would have independently investigated the validity of the claim arising under the guarantee. He would have reflected the potential liability in his valuation of the shares. He would have given some weight to the contention of the directors of SRM Exploration that the guarantee was not valid, but I do not think a substantial amount. He would have regarded the legal arguments as giving an opportunity to negotiate a settlement of the guarantee at a discount. Doing the best that I can, I am of the view that he would have assessed the value of the guarantee at 75% of the sum outstanding, or 161,351,000 CzK. At a dollar exchange rate of 18.5 to the Czech Koruna, the potential liability would be some US$8,721,675."

The judge then simply deducted that sum from his earlier calculation of the aggregate value of Exploration's assets.

49. I must confess to having been baffled, from start to finish, by that analysis. In my view, the obvious implications of the winding up petition, once it came to the intention of a potential purchaser of the 26% shareholding in July 2009, would have been broadly as follows:

    i) If the petition was well founded then Exploration was insolvent, in the sense that it had no liquid assets with which it could pay a debt due and owing. Its main asset (namely the 51% shareholding in Cobit) was highly illiquid and the other assets were plainly insufficient to pay the debt, even if they could be realised.

ii) The attitude of Exploration's management in June 2009 was not to seek to deal with the petitioning creditor by negotiating some reduced payment to settle the debt. On the contrary it was to fight the petition upon the basis that the debt was disputed. There was in any event no evidence that the owners of the remaining 74% of Exploration's shares had either the resources or the inclination to put Exploration in sufficient funds to pay the debt, or any reduced sum in settlement of it.

iii) Accordingly, the only secure basis upon which the interested purchaser could deal with an otherwise potentially deadly threat to the continued existence of Exploration was by settling the debt from its own resources. Even if the creditor were prepared to take 75% of his alleged debt, as the judge concluded, this would require an upfront payment of US$8.7 million-odd in addition to the purchase price of the shares. Even if that payment restored Exploration's net assets to the US$32.6million aggregate, that would only increase the value of the shares by 26% of the US$8.7 million upfront payment. In short, 74% of the upfront payment would benefit Exploration's other shareholders

iv) In the absence of an upfront payment of that kind, there was an unquantifiable risk that (as in fact would eventually occur) Exploration would be driven into insolvent liquidation. A liquidation sale of the 51% interest in Cobit would not conceivably produce an amount anything approaching 51% of the DCF valuation by Mr. Haberman of Cobit's mining rights under the JVA.

50. Again, central to any analysis of the implications of the winding up petition is the fact that the acquisition of the 26% minority shareholding in Exploration would give a purchaser no right to management, nor even participation in management, no right to dividends, unless management and the majority shareholders decided to pay them, and no right to realise its investment by requiring Exploration to sell its stake in Cobit and distribute the proceeds among its shareholders. A 26% acquisition would still leave Exploration under the control of a small number of private individuals with a wholly unproven track record in corporate management, let alone the management of mining projects in the DRC, the successful conduct of which was a necessary pre-requisite for the realisation of any value from Cobit's rights under the JVA. Such evidence as there was about the competence of Exploration's management would have appeared entirely unsatisfactory. Not only had management failed to obtain funding for the Cobit project for more than two and a half years since its inception, but it had exposed Exploration, or allowed it to become exposed, to a potentially terminal liability without the liquid assets with which to meet it.

51. In all those circumstances it seems to me quite inconceivable that any prudent well-advised potential purchaser of the 26% shareholding would have proceeded beyond a discovery of the existence of the winding up petition. Mr. Gruder gamely tried to persuade us that a purchaser might have made the necessary upfront payment and then persuaded his new fellow shareholders to refund their 74% share of the cost. I can only say that, on the facts as they have been deployed on this appeal, that seems to me an entirely speculative and indeed fanciful proposition.

Conclusions

52. It is axiomatic that in any complicated process of valuation, the valuer must take the relevant aspects of the world as he finds them (unless constrained by his instructions), and that he must, after looking at each element of the process, stand back and ask himself whether his provisional valuation makes commercial or business sense, viewed in the round.

53. Standing back therefore, the putative market for this shareholding in July 2009 would have been offered a 26% minority holding in an apparently incompetently managed Indian company, the majority shareholders of which were close-knit private individuals with no reason to take any notice of the purchaser's views about the conduct of the company's affairs, with a track record of mismanagement, or non-management, of its principal asset which they had allowed to become dormant, in a deteriorating political and economic environment in the DRC, and who had allowed a winding up petition to be presented and served, with the immediate consequence of prohibiting the completion of any share sale transaction in any event. The interested purchaser would have discovered, upon due diligence, that the supposedly valuable rights in the JVA were still inchoate as the result of the outstanding presidential decree, that attempts to fund the project had come to nothing, and apparently ceased a year previously, that the company lacked its own resources with which either to fund the project or to deal with its creditors, and that the commercial substratum upon which the JVA had been constructed, namely an immediate local demand in the DRC for bitumen needed in a large government road-building programme, had in all probability evaporated due to the deterioration in the political and economic state of that country.

54. In all the circumstances, I find myself quite unable to imagine any reasonably prudent and well-advised prospective purchaser paying anything for this 26% shareholding. In my judgment the only conclusion on the largely undisputed facts is that no such person would have touched these shares with a barge pole. It follows that, in my view, this appeal should be allowed, and that a substitution of nominal damages made for the substantial sum which the judge ordered.

55. I recognise that, at first sight, this outcome might appear to fall some way short of doing subjective justice as between the claimant and Mr. Chilukuri, in circumstances where (for example in relation to the guarantee) Mr. Chilukuri appears to have been a principal author of Exploration's travails, and where the full enormity of the risks and uncertainties to which the facts as they emerged at trial exposed the attribution of any value to the 26% shareholding could have been, but were not, revealed and deployed well before trial by Mr. Chilukuri, by proper compliance with disclosure obligations and the provision of more helpful evidence.

56. Nonetheless, where a creditor takes as security a minority shareholding in a private company, the value of its security is inevitably exposed to the quality or otherwise of that company's management, over which the secured creditor has no control, even after his security becomes exercisable. The question whether Mr. Chilukuri's conduct in this litigation may justify a departure from the ordinary costs consequences of the claimant having recovered only nominal damages is a matter about which submissions have yet to be received.

Lord Justice Lewison:

57. I agree with the comprehensive judgment of Briggs LJ. I add something of my own because we are differing from the judge who clearly took great care in reaching his conclusions.

58. There are two principal ways in which I think the valuation process went wrong. The first was that the judge's focus was distracted into concentrating on the valuation of the wrong thing. The expert evidence presented to him was principally concerned with valuing the bitumen deposit; and the judge devoted many pages to his conclusion on that topic. But the subject matter of the valuation was not the bitumen deposit; it was the minority shareholding owned by Mr Chilukuri. As Briggs LJ has comprehensively explained, the acquisition of that shareholding would give the purchaser precious little by way of control or influence over Cobit.

59. The second thing that went wrong is that the judge lost sight of the first and fundamental principle of valuation; namely that things are to be taken as they are in reality on the valuation date, except to the extent that the exercise requires a departure from reality. In the old cases this is summarised in the Latin phrase *rebus sic stantibus*. In the more modern cases it has been described as the principle of reality. In order to value the shareholding the judge had to hypothesise a sale. But the reality principle means that it is necessary to adhere to reality subject only to giving full effect to the hypothesis. In particular it is critical that any departure from reality must either be compelled by the hypothesis, or at least based on solid evidence rather than assumption or speculation. That the judge lost sight of this principle is demonstrated most clearly in his treatment of the winding up petition, as Briggs LJ has shown.

60. Accordingly, for the reasons given by Briggs LJ I, too, would allow the appeal.

Lord Justice Rimer:

61. I agree with both judgments.