Neutral Citation Number: [2019] EWHC 2319 (Comm)

Claim No. CL-2013-000683

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

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Thursday, 29th August 2019

Before:

MR. JUSTICE PHILLIPS

- -

Between:

(1) KAZAKHSTAN KAGAZY PLC **(2) KAZAKHSTAN KAGAZY JSC** **(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP** **(4) PEAK AKZHAL LLP** **(5) ASTANA - CONTRACT JSC** **(6) PARAGON DEVELOPMENT LLP**	**Claimants**
- and -	
(1) BAGLAN ABDULLAYEVICH ZHUNUS **(formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)** **(2) MAKSAT ASKARULY ARIP** **(3) SHYNAR DIKHANBAYEVA** **(4) SHOLPAN ARIP** **(5) LARISSA ASILBEKOVA**	**Defendants**
- and -	
HARBOUR FUND III LP	**Additional Party**

- -
- -

MR. JONATHAN MILLER (instructed by **Allen & Overy LLP**) appeared for the **First, Second, Third** and **Fourth Claimants.**

- -

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE PHILLIPS :

1. This is an application to commit the second defendant, Mr. Arip, for contempt of court. It was listed for hearing today, in court 16 in the Royal Courts of Justice, Strand. For various reasons, it has, in fact, been moved to court 15, next door. That, in itself, is no impediment. However, I am informed that Mr. Arip had mistakenly been informed, in various communications, that the hearing was taking place in court 16 in the Rolls Building; and there is a concern (but which, I shall explain is, in my judgment, theoretical only) that Mr. Arip might have gone to that court, rather than to this one and not have been directed here.

2. These are long-running proceedings, in respect of which judgment has been entered against Mr. Arip for a sum approaching US$300 million. Although represented by solicitors throughout most of the proceedings, he is now unrepresented, and has, of late, disengaged from these proceedings. He did not appear at the hearing at which the order of Jacobs J, in respect of which he is alleged to be in contempt, was made; he has not appeared at various hearings for his oral examination as a judgment debtor; and did not appear or engage with another application for committal for contempt before Moulder J last week. I am entirely satisfied that it is highly unlikely that he will have attended in person at court 16 in the Rolls Building; and, furthermore, in any event, steps have been taken to post somebody who recognises him at that court and now to post a notice at that court directing him here. In my judgment, it is vanishingly unlikely that, by some mischance, he arrived at court 16 at the Rolls Building and has not been directed to this court.

3. In the circumstances, it is entirely appropriate to continue with the hearing on the basis that Mr. Arip has deliberately not attended, despite being on notice of the hearing.

[Further argument]

JUDGMENT (RE CONTEMPT AND SENTENCE)

MR. JUSTICE PHILLIPS:

4. This is an application brought by the first to fourth claimants ("the claimants") against the second defendant, Mr. Arip, for committal for contempt of court.

5. In February 2018, Picken J granted the claimants judgment against Mr. Arip for various sums which totalled US$298,834,593, following extensive Commercial Court proceedings, in which Mr. Arip was represented by solicitors. Thereafter, the claimants have been engaged in enforcement proceedings.

6. The application arises from an order of Jacobs J, made on 28 June 2019, in which he ordered that Mr Arip do:

> "1. … deliver up to the claimants by 4 p.m. on 12th July 2019 all wristwatches worth in excess of £5,000 belonging to him, including: (a) each of the watches in his wristwatch collection identified in exhibit MAA1 to the first witness statement of [Mr. Arip] dated 2nd September 2013; (b) each of the watches in his wristwatch collection identified in exhibit MAA2 to the affidavit of [Mr. Arip] dated 13th April 2018; and (c) the 'Richard Mille' wristwatch purchased from Kattan Jewellery LLC on 10th February

2015 for US$225,000, such delivery to be made to the offices of the English solicitors for the claimants, Allen & Overy LLP".

7. That order was endorsed with a penal notice and, pursuant to the order of Jacobs J, was served on Mr. Arip's then solicitors, Charles Fussell & Co LLP both by e-mail and delivery by hand.

8. The simple and unanswerable ground of contempt is that Mr. Arip has not complied with that order to any extent. He has not delivered any of the watches, whether by 12 July 2019 or at all, notwithstanding ample notice of the express order that he do so, both following the order and in substantial subsequent correspondence directed to him at his known personal e-mail address.

9. I am entirely satisfied, so that I am sure to the criminal standard and well beyond, that Mr. Arip has breached the order of Jacobs J and is thereby in contempt.

10. The question arises as to whether or not it is nevertheless appropriate to proceed with this application in the absence of Mr. Arip. I am satisfied that it is, having considered the criteria for so doing, in particular as summarised by Warren J in Taylor v Van Dutch Marine Holdings Limited, [2016] EWHC 2001 Chancery. In paragraph 54 of that judgment Warren J listed a number of factors, all of which, in this case, point to proceeding with the hearing against Mr. Arip. First, he was served with all relevant documents, including the notice of this hearing. I have already dealt, in a short preliminary judgment, with the immateriality of the fact that this hearing has taken place in a different court within the Royal Courts of Justice than he was notified by e-mail. Second, he has had plenty of notice to enable him to prepare for this hearing, had he intended to do so, and certainly more than sufficient time to comply with the order and rectify his failure to do so. Third, he has advanced no reason for non-attendance. Fourth, it is entirely reasonable to conclude that he has waived his right to participate in this hearing. Fifth, an adjournment would not secure his attendance or facilitate him being represented. He has disinstructed his solicitors and completely disengaged from the proceedings. Sixth, there is no disadvantage to Mr. Arip in not being able to present his account of events. His failure to comply with the order of Jacobs J is plain and undisputable. If he had an explanation, such as that he no longer has the watches or cannot deliver them up for some reason, he could have communicated it at any point prior to this hearing. Very simply, he has not done so. Seventh, whilst a short adjournment might not prejudice the claimants very greatly, it would certainly prejudice them in costs, and any such prejudice plainly outweighs the complete absence of any prejudice to Mr. Arip in proceeding. Eighth, there can be no prejudice to the forensic process if the application proceeds. There is nothing, in my judgment, that Mr. Arip would be able to say in defence of this application, other than to comply with the order, which he has plainly failed and refused to do.

11. Finally, in terms of the overriding objective, it is entirely just, expeditious and fair to proceed in the absence of Mr. Arip.

12. Mr. Miller, who has appeared for the claimants today, has very fairly attempted to identify any arguments which Mr. Arip might be able to advance in defence of the application. He has identified that the Civil Procedure Rules, at 81.4(5), refer to a requirement that an order for delivery of goods must give the defendant the option either to deliver the goods or to pay their assessed value. However, it is also apparent from

CPR 83.14(1), "Enforcement of the High Court of a judgment or order for delivery of goods", that an order may be made for order of delivery of specific goods which does not give a person the alternative of paying the assessed value of the goods and that that may be enforced by the High Court by, amongst other means, an order for committal. I see no arguable defence to this application on the basis of the wording of the order of Jacobs J, which is clear on its face, requiring the delivery of specifically identified watches.

13. Mr. Miller also has pointed out that the notice of these proceedings and the details concerning this application have been provided to Mr. Arip by e-mail, as permitted by various court order. Given correspondence with his former solicitors, it is entirely apparent that the e-mail address used for those purposes is that of Mr. Arip and is the one which his own solicitors had been using and would continue to use in contacting him -- his former solicitors. There has been no bounce-back or rejection of e-mails sent to that address, and I am entirely satisfied, beyond all reasonable doubt, that Mr. Arip has received such notice by e-mail and is well aware of the order, these proceedings for contempt, and of this hearing.

14. In the circumstances, I find, and will declare, that Mr. Arip is in contempt of court and liable to committal for breach of the order of Jacobs J of 28 June 2019.

15. The further question then arises as to whether it is appropriate to proceed immediately to sentence, or whether to adjourn to permit Mr. Arip a further opportunity to comply with the order and/or to obtain representation and/or to appear to make representations as to the question of sentence.

16. The principles applicable on such an issue arising were, again, considered by Warren J in the Taylor v Van Dutch Marine Holdings Limited case. At paragraph 58, Warren J referred to the judgment of Briggs J in JCS BTA Bank v Solodchenko, [2011] EWHC 1613 Chancery, to the effect that it is appropriate, where a serious contempt has been proved in a respondent's absence for the court to pause before proceeding immediately to sentence and to consider whether the matter should, in the alternative, be adjourned. However, in that case, Warren J did not adjourn, stating that he saw little point in taking this course, since it was unlikely that the respondents in that case would in fact avail themselves of that opportunity.

17. In my judgment, exactly the same consideration arises in this case. It is plain that Mr. Arip has now entirely disengaged from these proceedings. He has not attended appointments for his cross-examination, for his oral examination as to his assets as a judgment debtor, resulting in an order last week by Moulder J, requiring him to attend or otherwise be imprisoned for 14 days. He did not attend or make representations on that hearing, which took place on 21 August 2019; neither has he engaged in any way with this application or responded to correspondence.

18. In my judgment, it is entirely unlikely that Mr. Arip would avail himself of any opportunity to make submissions on sentence, either in person or through representatives, and there would be no point whatsoever in adjourning for that purpose. Neither is there any prospect that he would belatedly comply with the order of Jacobs J in order to affect that sentence. I therefore propose to proceed to consider sentence immediately.

19. The question of sentence is entirely a matter for the court, but Mr. Miller has, helpfully, referred me to a number of authorities on the approach to be taken. In particular, in JSC BTA Bank v Stepanov, [2010] EWHC 794 Chancery, Roth J considered the appropriate sentence for contempt of court in circumstances where there is a continuing contempt, as indeed is the case here. Roth J cited the decision of the Court of Appeal in Lightfoot v Lightfoot [1989] FLR 414, in which Lord Donaldson MR said as follows:

> "Sentences for contempt really fall into two categories. There is the purely punitive sentence where the contemnor is being punished for a breach of an order which has occurred but which was a once and for all breach. A common example, of course, is a non-molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category. There is a second category which I might describe as a coercive sentence, where the contemnor has been ordered to do something and is refusing to do. Of course, a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing, but nevertheless it also has a coercive element. Now, it is at that point that it is necessary to realise that in earlier times the courts would in such circumstances have imposed an indefinite sentence. That is to say a man would be committed to prison until such time as he purged his contempt by complying with the order. Under the Contempt of Court Act 1981 a limit has been placed on such sentences, that limit being two years. It would be consistent with the previous practice of the courts and give full effect to the modification required by statute, if the courts considered imposing a two-year sentence when the contemnor was in continuing and wilful breach of court orders. Whilst there might be cases in which such a sentence would be disproportionately severe, any wilful defiance of the court and its orders is necessarily a very serious offence and if the contemnor is aggrieved he has a remedy in his own hands he can seek his immediate release by ceasing his defiance, complying with the order and thereby purging his contempt."

20. In the Stepanov case, the respondents to the committal application had wholly failed to comply with disclosure obligations imposed in two orders for injunctions. Roth J held that there had been a flagrant disobedience of the court's orders; that there had been no attempt whatever to explain or excuse that disobedience; that there had been judgment for very significant sums of money against the defendant, and the orders in question were in support of the claimant's rights resulting from that judgment; and finally, the defendant was, until very recently, represented by experienced solicitors but now had withdrawn instructions from them after these proceedings for contempt were served and made no attempt to appear or be represented before the court.

21. Roth J took the view that it was therefore entirely appropriate to impose a two-year sentence of imprisonment, given the seriousness of the circumstances, with an express provision that the defendant can apply to vary or discharge that order.

22. In my judgment, the very same factors arise in this case. There is a flagrant breach or disobedience of the court's order, with no attempt to explain or excuse the disobedience. There is a judgment for a very significant sum of money, and these orders are an attempt to enforce the claimants' right resulting from that judgment. Again, Mr. Arip has, until recently, been represented by experienced solicitors, but has withdrawn instructions from them, following the order made by Jacobs J in respect of which he is in breach.

23. I will, therefore, make an order that Mr. Arip be committed to prison for two years for his contempt, but I will include a provision (as did Roth J) that the defendant can apply to vary or discharge that order. The intent of that is, of course, that he can do so if and when he complies in whole or in part with the order or, alternatively, provides an explanation as to why he has been unable to do so.

24. I will, therefore, make that order, and will hear from Mr Miller as to its precise terms.

[Further argument]

- - - - - - - - - -