Neutral Citation Number :**[2020] EWHC 3656 (Comm)**
Case No: CL-2020-000023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 18 December 2020

BEFORE:

MR JUSTICE CALVER

BETWEEN:

(1) BLOCKCHAIN OPTIMIZATION S.A.
(2) PETROCHEMICAL LOGISTICS LIMITED

Claimants

- and -

(1) LFE MARKET LIMITED
(2) LFE GROUP HOLDINGS LIMITED
(3) JAMES (AKA JIM) AYLWARD
(4) BENJAMIN LEIGH HUNT
(5) WHITE TIGER GLOBAL OPPORTUNITIES FUND
(6) WHITE TIGER ASSET MANAGEMENT LTD

Defendants

NEHALI SHAH (instructed by Enyo Law LLP) appeared on behalf of the Claimants
ROWAN PENNINGTON-BENTON (instructed by Pinder Reaux) appeared on behalf of the First, Second and Fourth Defendants

JUDGMENT
(As Approved)
(**Remote Hearing**)

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(Official Shorthand Writers to the Court)

1. MR JUSTICE CALVER: This is the application of the claimants for an order that unless D1, D2 and D4 pay the costs orders against them under paragraph 8 of the order of Sir William Blair dated 28 July 2020 ("the strike out costs order") and paragraph 4 of the order of Foxton J dated 16 October 2020 (together the "outstanding costs orders") within seven days, then their Defences shall stand struck out and they shall be debarred from defending the claim.

2. Pursuant to the outstanding costs orders, D1, D2 and D4 owe the claimants a total of £51,000. £40,000 of this sum has been due since mid-August and the defendant's application for an extension of time for payment of this sum was refused by Foxton J on 16 October 2020.

3. The claims in these proceedings concern representations allegedly made by D1, D2 and D4 relating to a start-up cryptocurrency project called the London Football Exchange. The claimants provided loans totalling some $2.2 million to companies associated with the project and they contend that they did so in reliance on what were fraudulent misrepresentations. The claimants also contend that D4 breached contractual obligations relating to the repayment of the loans through the provision of cryptocurrency tokens and payment for services. Finally, the claimants allege an unlawful means conspiracy by the defendants to defraud them and they claim against D3 for procuring breach of contract. The relief that they seek includes the payment of debts of $3 million to the first claimant and $2.2 million to the second claimant.

4. Proceedings were issued by the claimant on 16 January 2020 which was the day after a without notice freezing order was granted by Butcher J against all of the defendants (as they then were) D1 to D6, except for D3. As part of the asset disclosure under the freezing orders, on 22 January 2020, which was then updated in July 2020, D4 disclosed his ownership of assets worth in excess of $132 million which included, firstly, almost 100 per cent of the participating shares in D5, which is White Tiger Global Opportunities Fund, which was said to have a net asset value of $100 million; secondly 100 per cent of the outstanding shares in D6, White Tiger Asset Management Limited (although no longer a defendant like D5), but with a value unknown; and thirdly, 100 per cent of the issued and outstanding shares in Fortune Star Investments Limited, which in turn owns 100 per cent of the participating shares in Fortune Star

Digital Asset Fund SP. Fortune Star Digital Asset Fund SP is said to hold cryptocurrency tokens, LFE tokens, with an estimated value as of July 2020 of $32.16 million.

5. As for D6, the defendant's solicitors Roose+Partners, informed the court (I have the letter in exhibit BLH1 which was dated 22 January 2020 but the document itself is undated) that "the fifth respondent, White Tiger Asset Management limited" (which is D6) "does not own any assets above £15,000 in value."

6. About a week before the return date hearing, the claimants informed the defendants that they wished to withdraw the claims against D5 and D6 and so Sir William Blair made an order dated 15 July 2020 giving effect to that, and an order that the claimants pay D6's costs of the proceedings, as if on a discontinuance, to be the subject of detailed assessment if not agreed.

7. Sir William Blair also heard various applications at the hearing on 15 and 16 July 2020, which included the defendants' application to discharge the freezing order for material non-disclosure and the defendants' application to strike out large parts of the claim. He gave judgment on 28 July 2020 in which he dismissed the discharge of the freezing order application but sanctioned the claimants in costs for what he held to have been a substantial non-disclosure on the part of the claimant's former solicitors (paragraphs 9(a) to 9(c) of his order). Sir William Blair also dismissed at paragraph 3 of his order the strike out application, save in a minor respect. At paragraph 8 of his order, in which he deals with the strike out costs order, he ordered the first, second and fourth defendants to pay the costs of the strike out costs order, which he summarily assessed at £45,000 to be paid within 14 days of the date of the order, which meant it had to be paid by 11 August 2020 - so a considerable time ago.

8. The defendants' solicitors sought a consensual extension of time for compliance with the strike out costs order, they said because of the D6 costs order. They said in a letter dated 6 August 2020 to Enyo Law:

> "The costs liability of your clients to WTAM is going to be more than the amount summarily assessed [under the strike out costs order] and therefore for the sake of proportionality, we suggest

> your clients agree to a 14 day extension so as to allow the costs issue concerning WTAM to be canvassed and hopefully dealt with."

9. They went on to say that they made that suggestion in the full knowledge that there is no direct interplay between the costs due to WTAM and the paragraph 8 costs (the strike out costs order) given that they deal with different facets of the claim.

10. It follows that D1, D2 and D4 failed to comply with the strike out costs order and they did not apply for an extension of time before 11 August 2020 deadline. They failed to answer questions raised in correspondence as well about the identity of their litigation funder. Mr Jones in his second witness statement, paragraphs 23 to 24, explained that D4 had previously told the claimants that he was paying the defendants' legal fees which were being funded by borrowings from a third party. However, the defendants have repeatedly refused to reveal the identity of the funder and, in answer to a question from me today, Mr Pennington-Benton states that he had no instructions as to the identity of the funder.

11. On 25 August 2020, the defendants applied for permission to appeal Sir William Blair's refusal to discharge the freezing order against the defendants, the judge having refused permission. They did not seek permission to appeal his order on the strike out application, nor the strike out costs order. However, despite that, they applied for a stay of the strike out costs order. Their reasons in favour of the stay application did not include any suggestion that D1, D2 or D4 were not able to make payment of the strike out costs order. Males LJ refused permission to appear on 24 November 2020.

12. Although in correspondence on 21 August 2020 the defendants' solicitors said that their clients were making arrangements to honour the payment of £45,000 due under the strike out costs order between 28 August and 4 September 2020, and despite Enyo specifically reserving the claimants' right to apply for an unless order in their letter to the defendants' solicitors dated 19 August 2020, no payment was made. Paragraph 3 of Enyo's letter reads:

> "Payment of the £45,000 must be made to us by close of business on Friday, 21 August 2020. If it is not, our clients reserve the right to apply without further notice to you for an unless order,

requiring payment of the costs to be made, failing which the first, second and fourth defendants' Defence will be struck out and for a non-party funding disclosure order."

13. What then happened was that on 25 August 2020, the defendants applied for relief from sanctions and for a retrospective extension of time to comply. The application notice in support of that application, which contained the evidence relied upon, did not again state that D1, D2 or D4 were unable to comply with the order. Instead it said that it falls to WTAM (that is D6) to raise the funds to comply with para 8 of the order and that WTAM requires more time to comply with paragraph 8 of the order, in order that WTAM can deal with the unravelling of WTAM being wrongly joined to the freezing injunction, something to which Mr Pennington-Benton reverts in his skeleton argument before me.

14. However, the strike out costs order of course was not against D6, and the evidence did not suggest that the only source of funds available to D1, D2 or D4 was D6. In any event, as I have mentioned earlier, D4's affidavit of assets said that D6 had no assets exceeding £15,000 in value, and so if that is true it is difficult to see how D6 could be a source of funds.

15. The next step in the proceedings was that Foxton J heard the defendants' application for relief from sanctions and an extension of time on 16 October 2020. He dismissed the application. He granted a small interim payment of £5,000 to the defendants in relation to the costs of preparing D4's first witness statement (that was pursuant to paragraph 9(a) of Sir Williams Blair's order dated 28 July 2020). That sum was to be set off against the £45,000 owed by the defendants under the strike out costs order so that meant that £40,000 under that order remained due and owing. In addition, Foxton J made the further order that D1, D2 and D4 should pay the claimants' costs of defending that application before him which he summarily assessed at £11,000 payable within 28 days, that is by 13 November 2020. That meant that by that date £51,000 was now owed by the defendants, D1, D2 and D4.

16. Following requests for payment by Enyo on 19 and 23 October, the defendants' solicitors stated on 29 October that their client "is currently arranging for funds to be secured in order that payment can be made by close of play at the end of the working

week next week", which clearly suggested that the defendants had access to a source of funding. The payment, however, was not made by 6 November 2020 as promised and no explanation was provided as to why that funding was not made available or utilised.

17. A CMC then took place on 13 November 2020 before Cockerill J. It was now some three months since the costs order of Sir William Blair had been made against the defendants. Paragraph 27 of the claimants' skeleton argument before Cockerill J reserved the right to apply to strike out D1, D2 and D4's Defence and they said, "The claimants expect to hear an update from the defendants at the CMC as to why payment has not yet been forthcoming and when it can be expected."

18. At the hearing before Cockerill J, and we are fortunate enough to have the transcript of that, Mr Pennington-Benton on behalf of the defendants was asked to explain why the strike out costs order had not been paid and whether the relief from sanctions costs order of Foxton J would be paid later that day because the CMC took place on 13 November, the last day of the period that Foxton J gave the defendants for payment of the sanctions costs order. The transcript is instructive as to the answer that Mr Pennington-Benton gave at pages 297 to 298 of the bundle. What he said was this:

> "I am afraid I do not have any further instructions in respect of those [costs orders] other than the client repeating that he will pay within 14 days from today the outstanding Sir William Blair costs order, but I appreciate that it is going to fall upon some fairly tired ears, but the instructions I have in that regard are the instructions I have. Of course I appreciate these are orders and these have to be paid."

A little further down he said:

> "I make the simple point that if two applications are pending by or will shortly be made rather by the claimant, at least some costs will necessarily be incurred and legitimately payable by the claimants in responding to those applications. It is not -- they may not necessarily be huge, but at the very least we would be entitled to the costs of amending the defence and so on, but look, these are not defences to not paying a court order, I do not suggest that they are, but equally I have the instructions that I have and all I can say is that it is being said that they will be paid, but I appreciate that what they really want is for them to be paid."

19. That was a realistic acceptance on the part of Mr Pennington-Benton for the defendants that the fact that there may be some applications in the future that the claimants might make, such as amending their pleading in relation to various matters and so on, and that those might give rise to costs orders in the defendants' favour, did not amount to a reason why these long overdue costs payments that ought to have been made by the defendant should not be made.

20. But despite that, no payment has been made of either the strike out costs order or the relief from sanctions costs order and indeed no explanation for the non-payment has been provided, and I will come back to that.

21. Finally, on 24 November 2020 the claimants made their application for an unless order. The first, second and fourth defendants did not file evidence in response to that application. They did not respond to the email from Enyo on 9 December 2020 referring to the fact that their evidence had not been received and asking for confirmation as to whether they would be represented at the hearing. In fact, they have put in a short skeleton on this application, having done so yesterday and have attended by Mr Pennington-Benton.

22. The last point to make in terms of the history is that on 11 December 2020 the defendants' solicitors sent a letter stating that, in accordance with paragraph 8 of the order made by Cockerill J at the CMC, the defendants confirmed that the applicable law of the claims for fraudulent misrepresentation, conspiracy and inducing breach of contract was English law and the claimants make the point that the defendants are willing to engage in the substantive proceedings and incur costs in doing so when it suits them, but at the same time ignoring court orders against them as to costs.

23. So far as the legal principles are concerned on this application they are common ground between Ms Shah and Mr Pennington-Benton. CPR 3.1(3) provides that when the court makes an order, it may make it subject to conditions and specify the consequence of failure to comply with the order or a condition. Moore-Bick LJ summarised the relevant principles in *Marcan Shipping v Kefalas* [2007] EWCA Civ 463, where he cautioned that:

> "… before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified."

24. What one must also take into account, as Popplewell J (as he was) said in *Orb ARL v Ruhan* [2016] EWHC 850 is that:

> "Maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself …"

25. The principles to be applied on an application to debar a party from participating in proceedings as a result of non-payment of costs orders have been summarised by Sir Richard Field in *Michael Wilson v Sinclair* [2017] EWHC 2424 where he said:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
>
> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time … that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR [a point not taken here]; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question …"

(c) does not arise in this case.

> "(4) a submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice … should be supported by detailed, cogent and proper

> evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability."

The strength of the test that must be satisfied in that respect is emphasised by Sir Richard Field and I agree with it.

> "(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

26. So far as the facts of this case are concerned, as the claimants point out, the first, second and fourth defendants are in continuing breach of two separate court orders as to costs. Those costs orders should have been met by 11 August and 13 November respectively. The first, second and fourth defendants are clearly aware of the outstanding costs orders. In his skeleton argument at paragraph 6, Mr Pennington-Benton says that:

> "The unless orders in the terms sought by the claimants are not appropriate in this case for the following reasons:
>
> (1) the defendants did not shirk from responsibility to pay the orders, but the primary reason why D4 cannot secure cash funds with which to pay the costs remains the effect of the freezing order, albeit since discontinued. This is the claimants' fault.
>
> (2) Immediately prior to the CMC, the claimants intimated a series of imminent applications to amend the statement of claim to join Mr Ghertsos, to further amend to reflect an assignment of the claim from C1 to C2. It is inevitable that these applications, if successful, will require the claimants to pay the costs to the defendants. At the very least the defendants would be entitled to their costs of the amendments and the late decision to join and file a claim against Mr Ghertsos and to deal with the assignment. If the first claimant is to exit the proceedings, then the first

claimant's potential liability for the costs of the claim will need to be addressed."

27. Notwithstanding those applications, he says, the claimants have taken no steps to regularise their position. Should they do so, it is clear the defendants will incur costs and these will have to be paid by the claimants. Given this movement on the immediate horizon, the better and more proportionate order is for the payment by the defendants of interest on the outstanding costs. He then says that if the court is minded to proceed with what he terms the "nuclear" option, then the defendants would ask for a period of 42 days within which finally to pay the costs.

28. It can be seen from Mr Pennington-Benton's submissions in paragraph 6 of his skeleton argument that he essentially makes two points. The first is that the reason that D4 cannot secure cash funds with which to pay the costs is as a result of the effect of the freezing order which he says is the claimants' fault, and secondly that since on the horizon are potential costs orders to be made against the claimants, that that should be taken into account in deciding whether or not to compel by an unless order the defendants to pay the outstanding costs, and that rather the defendant should be simply ordered to pay interest on the outstanding costs.

29. It can be seen immediately that those two excuses for non-payment are identical to those put forward by the defendants at the hearing before Cockerill J in the transcript extract which I read out earlier. Indeed, those arguments were also advanced at the hearing before Foxton J, and at the hearing before Cockerill J as I have already indicated, Mr Pennington-Benton rightly and realistically recognised that these were not really excuses at all for non-payment of long-outstanding costs orders. The fact that the claimant may have to pay some of the defendants' costs in the future is, in my judgment, clearly no reason to refuse to pay crystallised costs orders which have been outstanding since 11 August and 13 November respectively. Moreover, the evidence before the court as to the alleged impecuniosity of the defendants comes nowhere near a detailed, cogent and proper case and full and frank disclosure of the defendants' financial position and of their prospect of raising the necessary funds where it is alleged that their cash resources are insufficient to meet the liability. They clearly have funding from whatever source. They refuse to say what the source of that funding is and, in my judgment, they have made their bed therefore and they have to lie on it.

30. The defendants therefore have put forward no good reason, in my judgment, why they cannot comply with these costs orders. Indeed, I consider they clearly can in the light of the fourth defendant's assets which are on any view substantial and the claimants say in excess of $132 million. Their previous assurances that payment would be made and their continued funding of their own lawyers, as I say, in these proceedings also confirm that view. The latter has included filing an amended defence on 28 September 2020, after 11 August deadline had passed; making the application for relief from sanctions and an extension of time; preparing for and attending the CMC; and lodging appeal documents and corresponding, as I have already indicated, recently in relation to the applicable law.

31. The defendants were warned in no uncertain terms by Cockerill J at the case management conference of the potential consequences of their continued breach of the court's costs orders. In my judgment, this is one of those cases where it is extremely important that public confidence is maintained in the court's ability to secure compliance with its orders and the importance of litigants obeying orders of the court is, of course, self-evident. There is no practical alternative means of enforcement available to the claimants. Given that D1, D2 and D4 have no known assets in the jurisdiction and have not adduced anywhere near sufficiently cogent evidence of their impecuniosity, the court is entitled to require payment by the defendants of the outstanding costs orders as the price for their being allowed to continue to contest the proceedings, and there are no strong reasons for not so ordering. There is no evidence either that enforcement of the costs orders would drive the defendants from access to justice.

32. In the circumstances I grant the application, but in view of the fact that seven days, as Mr Pennington-Benton points out, would mean that compliance has to take place by Christmas Day, I give the defendants until 4 pm on 28 December 2020 to comply with the order. I have a draft order before me and, subject to that change to paragraph (1) "Unless by 4 pm on 28 December 2020 …", then "the first, second and fourth defendants pay the unpaid costs, the defences are struck out", I approve the draft order unless Mr Pennington-Benton has anything to say about it, although there remains the question of the claimants' application for the summary assessment of its costs of this

application on an indemnity basis. I have the statement of costs before me in the total sum of £18,580 and I will hear submissions from both parties as to that.

(**After further submissions**)

JUDGMENT ON COSTS

33. I have had submissions addressed to me on the basis and the amount of costs. As far as the basis is concerned, Ms Shah asks for costs on the indemnity basis; Mr Pennington-Benton opposes that. In my judgment, this is a case for indemnity costs. The conduct of the defendants is such that the court has been troubled with this on a number of occasions. These Defendants are in repeated breach of the court's costs orders and they remain in breach as of today. Therefore the court has little sympathy with their position.

34. The breach is serious. We are now at the stage of an unless order being granted by the court and this is undoubtedly a case for indemnity costs.

35. As far as the amount is concerned obviously I have decided that it should be a case of indemnity costs and therefore the claimants are entitled to their costs unless they can be shown by the Defendants to be unreasonable in amount. I found both the skeleton and the submissions and appearance of Ms Shah to be extremely helpful. She argued the case in a helpful and understated way and I think she should get her fee in full. It was necessary for Mr Jones to prepare a witness statement going through the history of events, and I know that statements such as that do take time.

36. Overall, whilst these things are always a bit rough and ready, in my judgment the appropriate sum to order is £15,000. So I order that the first, second and fourth defendants shall pay the claimants' costs of the application on the indemnity basis, summarily assessed in the sum of £15,000 by bank transfer to the bank account of the claimants' solicitors, by 4 pm on 31 December 2020.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge