Neutral Citation Number: [2021] EWHC 3259 (Comm)

Case No: CL-2018-000716

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2021

Before :

THE HONOURABLE MR JUSTICE BUTCHER

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Between :

(1) NOPPORN SUPPIPAT
(2) SYMPHONY PARTNERS LIMITED
(3) NEXT GLOBAL INVESTMENTS LIMITED
(4) DYNAMIC LINK VENTURES LIMITED **Claimants**

- and -

(1) NOP NARONGDEJ
(2) EMMA LOUISE COLLINS
(3) THUN REANSUWAN
(4) AMAN LAKHANEY
(5) KHADIJA BILLAL SIDDIQUE
(6) COLOME INVESTMENTS LIMITED
(7) KELESTON HOLDINGS LIMITED
(8) ALKBS LLC
(9) GOLDEN MUSIC LIMITED
(10) SIAM COMMERCIAL BANK PUBLIC COMPANY LIMITED
(11) ARTHID NANTHAWITHAYA
(12) CORNWALLIS LIMITED
(13) WEERAWONG CHITTMITTRAPP
(14) KASEM NARONGDEJ
(15) KHUNYING KORKAEW BOONYACHINDA
(16) PRADEJ KITTI-ITSARANON
(17) NUTTAWUT PHOWBOROM **Defendants**

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Anthony Peto QC and Peter Head (instructed by **Wilkie Farr & Gallagher (UK) LLP**) for the **Claimants**
Graham Dunning QC, Ciaran Keller and Benedict Tompkins (instructed by **Harcus Parker LLP**) for the **1st and 17th Defendants**
Ben Valentin QC and Joseph Farmer (instructed by **Signature Litigation LLP**) for the **2nd to 8th Defendants**
David Scorey QC, James Petkovic and Helen Morton (instructed by **CMS Cameron Mckenna Nabarro Olswang LLP**) for the **9th, 12th & 15th Defendants**
Jonathan Davies-Jones QC and Sarah Tulip (instructed by **Reynolds Porter Chamberlain LLP**) for the **10th Defendant**
Ruth den Besten (instructed by **Clyde & Co LLP**) for the **11th & 13th Defendants**

Hearing dates: 26 November 2021

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Judgment Approved by the court for handing down

The Honourable Mr Justice Butcher :

1. Last Friday I heard the fifth CMC in this case. Directions for the fifth CMC were given by Calver J by order dated 28 July 2021. That order provided for three items of business to be addressed: (i) whether there should be further disclosure by the 10th Defendant on Issue 26.2 of the List of Issues for Disclosure; (ii) the determination of the Claimants' application issued on 2 July 2021 to serve RRRAPoC and a Re-Amended Reply to the Re-Amended Defence of the 1st and 17th Defendants; and (iii) any other application if time should permit.

2. In the event, items (i) and (ii) were not in issue at the hearing. Instead, a considerable amount of the hearing, which was attended by representatives of all of the participating parties, was taken up in dealing with an application by the Claimants, issued on 19 November 2021, to make further amendments to their claims as set out in a draft RRRA Claim Form and draft RRRAPoC which accompanied the application. The main issues debated were as to how best to fit the further steps necessitated by these amendments into a timetable to trial which has already been amended to push back the dates which were set at the first CMC conducted just over a year ago, in circumstances where the trial is fixed to commence on 3 October 2022, with an estimate of 17 weeks, including two weeks' pre-reading.

3. In addition, the Claimants sought that the Court should give directions for the determination of a contempt application which they issued on 5 November 2021 against the 1st, 9th and 15th Defendants. For that part of the hearing only those Defendants were represented, and it is with the issue of whether the Court should give any, and if any what, directions for the contempt application with which this judgment is concerned.

4. As I have said, on 5 November 2021 the Claimants issued, and served on the respective legal representatives, an application to commit for contempt of court the 1st, 9th and 15th Defendants. The contempts alleged were, in brief summary, as follows:

   (1) 'Contempt 1' relates to the alleged disposal of consideration of approximately US$1.8 million payable in respect of shares in Wind Energy Holding Co. Ltd ('WEH'), by way of a payment made by the 16th Defendant to the 15th Defendant on 11 December 2018, which led to a reduction (on an unknown date between 11 December 2019 and 30 June 2021) of the amount recognised by the 9th Defendant as due to be paid to it by the 16th Defendant in respect of the transfer or disposal of the relevant shares pursuant to a share purchase agreement to which the 9th Defendant became a party on 8 August 2017 ('the GML/Pradej SPA'); this alleged disposal is said to be contrary to paragraph 1(c) of undertakings given to the Court by each of the 9th and 15th Defendants on 3 December 2018 and renewed by them on 19 March 2019, and separately the Claimants alleged that the 1st and the 15th Defendants acted in contempt by procuring or assisting the 9th Defendant's breach of these undertakings (and the 1st Defendant further acted in contempt by procuring or assisting the 9th Defendant's breach of these undertakings);

(2) 'Contempt 2' relates to the alleged disposal of consideration of approximately US$15.9 million to be paid in respect of transfer or disposal of WEH shares by way of the 9th Defendant reducing the amount which it recognised as due from the 16th Defendant in respect of those shares pursuant to the GML/Pradej SPA on an unknown date after 19 March 2019 but before 30 June 2021, alternatively by the 9th Defendant's exchanging a right to be paid that sum by the 16th Defendant for a right to be paid an equal sum by the 1st Defendant, namely a sum which the 1st Defendant owed to the 16th Defendant; this alleged disposal is said to be contrary to paragraph 1(c) of undertakings given to the Court by the 15th Defendant on 3 December 2018 and renewed by it on 19 March 2019, and separately the Claimants alleged that the 1st Defendant, alternatively the 15th Defendant, acted in contempt by procuring or assisting the 9th Defendant's breach of these undertakings;

(3) 'Contempt 3' relates to the 1st Defendant's swearing an affidavit on 17 July 2020 in which he swore he had no legal or beneficial interest in any relevant WEH shares, when, the Claimants contend, this was not the case; this is alleged by the Claimants to be a breach by the 1st Defendant of paragraphs 2(a) and 2(b) of the Order of Cockerill J made by consent on 15 June 2020;

(4) 'Contempt 4' relates to the 15th Defendant's swearing an affidavit on 15 July 2020 which failed to disclose that she did not hold the beneficial interest in certain shares of the 9th Defendant (and shares of WEH held by the 9th Defendant) because, as the Claimants contend, it was the 1st Defendant who held that beneficial interest; this is alleged by the Claimants to be a breach by the 15th Defendant of paragraph 2(b)(viii) of the Order of Cockerill J made by consent on 15 June 2020;

(5) 'Contempt 5' relates to the 1st Defendant's alleged executing a letter of indemnity on 23 January 2019 on behalf of WEH in favour of the 2nd to 8th Defendants; this is alleged by the Claimants to be a step which would diminish the value of the shares in WEH and thus to constitute a breach by the 1st Defendant of paragraph 1(b) of undertakings he gave to the Court on 1 December 2018.

5. On the same date as the Claimants issued their contempt application they issued an application for a Worldwide Freezing Order against the 1st, 9th and 15th Defendants. The Claimants sought the expedited hearing of that application, but not of the contempt application, at two hearings heard by HHJ Pelling QC on 12th and 17th November 2021. These culminated in HHJ Pelling QC ordering an expedited hearing of the application for a Worldwide Freezing Order to take place over two days on 7-8 February 2022, and in the meantime the relevant Defendants gave undertakings to the court in relation to any dividends on the WEH shares which might become distributable to the 9th Defendant.

6. It is also pertinent to record that a further substantial hearing in this case is scheduled to take place in January 2022. While I was not taken to the details, it is a hearing listed for 2 ½ days to consider issues of privileged documents, which will involve the Claimants and at least some of the Defendants, including the 10th Defendant.

7. The Claimants first made their proposals for directions in relation to the contempt application late on 22nd November 2021. Those proposals were for directions leading to the contempt application being dealt with at the same time as the application for a Worldwide Freezing Order. The Claimants' suggestion, as put in their Skeleton Argument for the hearing before me, was that 'if the court has availability, … the 2 day WFO hearing should be extended to a 4 day WFO plus contempt hearing from 7-10 February 2022 … and that 11 February should be held in reserve should additional time be required.' The Claimants contended that this would be the appropriate course, given that the contempt application would be based on the same facts and the evidence in support of them is contained in the same affidavit as for the Worldwide Freezing Order application.

8. The 1st, 9th and 15th Defendants objected to the Court making the directions thus sought be the Claimants for the contempt application. The principal grounds relied upon in the relevant Skeleton Arguments were as follows:

(1) The Claimants' suggestions represented a volte face from the express position which they had adopted in front of HHJ Pelling QC that expedition was not sought for the contempt application, but only for the Worldwide Freezing Order application.

(2) That alleged Contempts 3 and 4, as relating to allegedly false statements in affidavit evidence, would, to proceed, require permission from the court under CPR 81.3(5)(b); and the waiver of the requirement for a penal notice, as provided for in CPR 81.4(2)(e), given that the Order of Cockerill J of 15 June 2020 did not contain such a notice. The Claimants' proposed directions take no account of these requirements.

(3) That once the proposed amendments in the draft RRRAPoC, which were the subject of the Claimants' application of 19 November 2021, are made all the allegations relied on in the contempt application will also be issues in the main action; but will there form only a part of the wider issues, involving a greater number of Defendants, which will be involved in that trial. Accordingly, a pre trial contempt hearing would be of 'a series of discrete and out-of-context preliminary issues', which would have no potential of effectively resolving the trial.

(4) That, to the extent that the Claimants have legitimate interests that require addressing or protecting prior to the trial, the Worldwide Freezing Order application is the appropriate mechanism for that.

(5) That the proposed directions are unworkable, unfair and inefficient. The timetable up to trial is already very full and tight; the legal resources available to the relevant Defendants are finite and will be taken up in dealing with that timetable; and the hearing of the contempt application would be a substantial one. It would involve extensive fact evidence, expert evidence in relation to alleged Contempt 5, and detailed legal submissions on issues identical to some of those which will be canvassed at trial. The estimate given on behalf of the 1st Defendant is that it would require at least a two-week fixture.

9. At the hearing on 26 November 2021, Mr Peto QC for the Claimants argued that it was necessary for the alleged contempts to be adjudicated and, if established, sanctioned as soon as possible, for otherwise the message to the relevant Defendants would be that they could breach undertakings with impunity; there would be 'no rule of law'; and that it was necessary to uphold the court's orders and to preserve the assets. In response to questions about the practical difficulties of accommodating a hearing, and possibly also in response to the issues as to permission and waiver of a penal notice in relation to alleged Contempts 3 and 4, he argued that there should at least be a prompt hearing in relation to alleged Contempts 1 and 2 and that such a hearing could more readily be accommodated. He contended that, in relation to allegations that there has been dissipation of assets in breach of order of or undertakings to the court, the practice is 'always' or almost invariably to deal with such matters 'at once' or as soon as possible, and before the trial of the substantive issues. In this regard he referred to a number of authorities. He relied in particular on the statement of Lord Bingham CJ in M v M (Contempt: Committal) [1997] 1 FLR 762 at 764, approving an earlier statement of Stephen Brown LJ, that contempt proceedings should generally be dealt with 'swiftly and decisively'; statements in *Civil Fraud: Law, Practice and Procedure* (2018) para. 35-176, *Zuckerman on Civil Procedure: Principles of Practice* (4th ed), para. 24.18, *Gee on Commercial Injunctions* (7th ed), para. 20-010; and what was said by Gross LJ in JSC BTA Bank v Ablyazov (No. 7) [2012] 1 WLR 1988 at [41].

10. Mr Dunning QC and Mr Scorey QC contended that the question of when the contempt hearing should take place was essentially a matter of case management. They too pointed to JSC BTA Bank v Ablyazov loc cit at [41], pointing out that Gross LJ had said that:

> "[W]hether allegations of contempt should be determined before, during or after the main trial must be very much a case management decision for the judge, on the facts of the individual case."

11. They submitted that Mr Peto's modified suggestion was as objectionable as the original one, and that even a determination of 'Contempts 1 and 2' will involve significant issues, including as to the ownership of the 9th Defendant, the context of the GML/Pradej SPA, and whether there was a conspiracy. Mr Dunning QC said that it would still take more than a week of Commercial Court time and that there was no good reason why it should be dealt with at the same hearing as the application for a Worldwide Freezing Order, bearing in mind the different standards of proof. Furthermore, even concentrating on 'Contempts 1 and 2', they submitted there was an overlap with the matters which would be considered in the main trial. Reference was made to Daltel Europe Ltd v Makki [2005] EWHC 749 (Ch), where David Richards J agreed (at [78], [80]) with what Mann J had said on the permission application in that case, including:

> "One thing which has particularly concerned me is the extent to which there should be allowed to be satellite litigation, particularly at this stage of the proceedings, and particularly where that satellite litigation relates to matters which are serious issues in the proceedings and in the context of which those issues will be dealt with and considered at something short of a full trial. It is inherently undesirable to have satellite litigation which is time consuming and distracting

> when it comes to pursuing proceedings to a full trial, and is capable of occupying and using up an inordinate amount of court resources sometimes to no particular purpose."

12. These dangers of 'satellite litigation' had also been emphasised in KJM Superbikes Ltd v Hinton [2009] 1 WLR 2406 (CA) at [18] by Moore-Bick LJ. That these concerns were relevant in the context of allegations of breaches of freezing orders or undertakings in lieu was shown by what Gross LJ said in JSC BTA Bank v Ablyazov (No. 7) at [40], as follows:

> 'KJM Superbikes Ltd v Hinton was a case concerned with proceedings against a witness for contempt subsequent to a trial and arising out of the evidence he had given in it. It was thus somewhat removed from the context of dealing with contempt arising from the alleged breach of a freezing order. None the less and with respect, these observations from Moore-Bick LJ (and David Richards J [in *Daltel*]) helpfully highlight the dangers of satellite litigation and of carving out issues ahead of the trial of the action … Such concerns plainly require careful consideration generally; the present context is no exception."

13. In his submissions, Mr Scorey QC further stressed that there had been no allegations of any breach of undertakings in relation to the shareholding in WEH which, on the Claimants' case, was worth some US $1-$ 2billion.

14. Following the hearing, the 1st Defendant (with my permission) produced a note in response to a supplemental note which had been prepared by the Claimants and shared with the Court shortly before the CMC but copies of which had not been seen by the relevant Defendants' legal representatives ahead of (or during) the CMC. The 1st Defendant's note reiterated that both the leading Court of Appeal authorities of Ablyazov (No 7) and JSC BTA Bank v Ereshchenko [2013] EWCA Civ 829 confirmed that context-specific case management factors were to guide the exercise of the Court's discretion in relation to alleged breaches of freezing or similar orders as much as in other circumstances, and repeated that pressing ahead with an expedited hearing of Contempts 1 and 2 as sought by the Claimants would result in a very considerable overlap with trial issues, would cause serious disruption to the timetable to the main trial, and that the Worldwide Freezing Order application was sufficient to protect any legitimate interests of the Claimants prior to trial.

15. While I recognise and endorse the general desirability of dealing with allegations of breach of freezing orders or equivalent undertakings promptly and with decision, the question of when there should be a determination of allegations of contempt is an issue to which considerations of proper case management, of proportionality and of the fair allocation of court resources are vital, as they are in other areas. The appropriate course will depend on the facts of the case. On the basis of the material and arguments presented to me on this hearing, I do not consider that, in this particular case, it is necessary or appropriate for directions to be given for the determination of the alleged contempts prior to the trial.

16. In coming to this decision, I regard the following 5 matters as of importance.

(1) I accept that a determination of the contempt application in advance of the trial will be significantly disruptive of and may well be prejudicial to the relevant Defendants' preparation for the trial. The pre-trial timetable is full, and already tight, as was very apparent during the first part of the hearing on Friday.

(2) While it is difficult to estimate precisely how long a hearing of the contempt application would take, and it would depend in part on whether one was considering the full application or the reduced version adumbrated by Mr Peto in oral argument, it appears clear that it would probably take more than a week, and possibly two. If that is right, then to order it to come on before trial would amount to expediting it in advance of the date on which a trial of such a length would come on in the ordinary course. Such expedition comes at the cost of other court users. I do not consider that that is justified and proportionate, especially given the amount of time and judicial resources that this case has been taking and will continue to take up independently of the contempt application.

(3) The course adumbrated by Mr Peto of a reduced version of the application would give rise to there being two different hearings in relation to contempt allegations, which itself is not desirable.

(4) I do not consider that there is a particular urgency for the hearing of the contempt application. Specifically, insofar as the Claimants need and are entitled to further protection to ensure that assets are not dissipated in advance of judgment, they will obtain it by means of their application for a Worldwide Freezing Order.

(5) There are dangers inherent in ordering the prior determination, to a different (criminal) standard of proof, and in respect only of some of the Defendants, of some of the issues which will arise at the trial. These include the possibility of inconsistent findings, as well as duplication of judicial resources. Moreover, it does not appear to me that this is one of those cases in which the resolution of the issues raised in the contempt application would be likely to dispose of or lead to the settlement of the whole action, given that the action involves other issues and other Defendants, and given also that the Defendants who are not party to the contempt application would not be bound by any determination made on it.

17. I recognise that there is the possibility that the judge hearing the application for a Worldwide Freezing Order, who will be better placed than I am at present to make an assessment of the merits of the Claimants' complaints of breach, may consider that an early hearing of the contempt application is essential, notwithstanding the above considerations. As Mr Scorey himself recognised, the Claimants should have liberty to apply to that judge for an early hearing if facts emerge at that hearing which warrant such a course of action.

18. In the circumstances I will direct that the contempt application will be heard by the trial judge, that trial witness statements and evidence taken at trial stand as evidence in the contempt application, and that the trial judge is to give further directions in relation to the way in which the contempt application should be dealt with; but that these orders are subject to further or other order by the judge hearing the Worldwide Freezing Order application.