Neutral Citation Number: [2024] EWHC 141 (KB)

Case No: KA-2024-000003

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2024

Before Mr Justice Lavender:

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Between:

Wintermute Trading Limited

Appellant

- and -

Terraform Labs Pte Limited

Respondent

- -
- -

Robert Anderson KC and **Peter Head** (instructed by **Mishcon de Reya**) for the **Appellant**
Henry Byam-Cook KC (instructed by **Rahman Ravelli**) for the **Respondent**

Hearing date: 22 January 2024

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. I will refer to Terraform Labs Pte Ltd as the applicant and to Wintermute Trading Limited as the respondent. These are my reasons for the decision which I announced on 22 January 2024 on the hearing of the respondent's appeal against the order of Senior Master Cook made on 11 January 2024 ("the second order"), pursuant to leave to appeal granted by Jay J on 12 January 2024. I decided:

   (1) to treat the hearing as the hearing of an application by the respondent for the second order to be set aside;

   (2) to set aside the second order;

   (3) to give directions for the resolution of the dispute between the parties whether the respondent has complied with the Senior Master's order of 7 December 2023 ("the first order"); and

   (4) to adjourn the hearing for a week to allow the parties to consider and, if possible, agree appropriate directions.

(2) Background

2. The applicant is a defendant to proceedings brought by the Securities and Exchange Commission ("the SEC") in the United States District Court for the Southern District of New York ("the US action"), in which the SEC alleges that between April 2018 and May 2022 the applicant made fraudulent misrepresentations in relation to the sale of crypto-asset securities known as LUNA and UST. In order to prove its case the SEC relies on events in May 2022, known as the May 2022 Depeg, when UST de-pegged from the US dollar and UST and LUNA suffered a significant decline in value.

3. The applicant's case at trial will be that the May 2022 Depeg was not a result of any flaw or instability in an algorithm, but was instead the result of a concerted and pre-meditated "shorting" strategy in respect of UST and Luna orchestrated and led by a number of third party trading firms. The applicant alleges, and the respondent denies, that the respondent participated in this shorting strategy.

4. On 15 August 2023 the judge in the US action issued a letter of request, requesting that the High Court order the respondent to produce certain documents and order the respondent's CEO, Evgeny Gaevoy, and COO, Marina Gurevich, to be examined. Pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act") the Senior Master made the orders requested on 7 December 2023, including the first order.

5. Paragraph 1 of the first order is in the following terms:

   > "The First Respondent shall produce copies of the documents listed in Appendix A hereto to the Applicant's UK Representatives (defined in Appendix B) in electronic form by 15th December 2023, save only for

> items 1(a), 4(a) and 4(c) on Appendix A, which shall be produced by 5th January 2024. To the extent that production by photocopies or in electronic form is impractical, the First Respondent shall make such documents available for inspection by the Applicant's UK Representatives."

6. I need not set out the terms of Appendix A to the first order, but it is relevant to note that paragraph 2 of Appendix A refers to certain code, i.e. computer code.

7. Paragraph 3 of the first order is in the following terms:

> "The First Respondent's production of documents shall be accompanied by a sworn statement from the First Respondent, which attests to the fact that the production comprises the entirety of the documents described herein, or otherwise specifies what documents have been omitted and the reasons for their omission, and which authenticates the documents as true and accurate copies of the documents described herein."

8. In response to paragraph 3 of the first order, the respondent has served affidavits made by Mr Gaevoy.

9. The first order did not contain a penal notice. It appears that the applicant did not ask for one. I have not been told why. I am told that there was no mention of penal notices at the contested hearing on 7 December 2023.

10. There has been a great deal of correspondence between the parties' solicitors. I need not summarise it all. By 5 January 2024 the respondent had produced what it contends are all of the documents which it was required by the first order to produce. The applicant contends that the respondent has not fully complied with the first order. I need not summarise, and certainly could not resolve, the issues which have arisen. They primarily concern the question whether the respondent should have produced another document or documents, although it may also be necessary to consider whether, if production is impractical, the respondent is obliged to make a document or documents available for inspection. It appears to be common ground that the resolution of the dispute between the parties will require expert evidence, not least because it includes questions as to how the respondent could and should produce the code referred to in paragraph 2 of Appendix A to the first order.

11. On 4 January 2024 Rahman Ravelli, the applicant's solicitors, wrote to Mishcon de Reya, the respondent's solicitors, inter alia, asserting that the respondent's alleged breach of the first order was calculated, not accidental, and threatening both to commence contempt proceedings against the respondent and to seek the committal to prison of Mr Gaevoy and Ms Gurevich. On 5 January 2024 Mishcon de Reya replied, asserting that there had been no breach of the first order and saying, inter alia, that there was no penal notice in the first order and asserting that there was no reason why the court should dispense with the requirement for such a notice.

12. This is what prompted Rahman Ravelli to send an email to the court at 19.17 on Tuesday 9 January 2024 attaching a letter inviting the Senior Master to make an order in the terms of a draft attached to the email. The email stated:

> "The Respondents solicitors are copied into this email and given the urgency have been asked to serve any response by 4pm 10th January 2024."

13. The urgency was because the examination of Mr Gaevoy and Ms Gurevich was fixed to commence on the following Monday, 15 January 2024, and the trial of the US action was fixed to commence on 29 January 2024.

14. Referring to what became the second order as the "Penal Notice Order", Rahman Ravelli said, inter alia, as follows in their letter of 9 January 2024:

> "If the First Respondent is correct that it has complied fully with the existing order, the Penal Notice Order imposes no new obligations. If however there are documents that have not been disclosed but which should have been pursuant to the Order, the Penal Notice Order requires them to be disclosed by this Friday 12 January 2024."

15. At 10.32 on Wednesday 10 January 2024 Mishcon de Reya sent an email to the court asking that the court not make any decision on the applicant's application before 16.00, by when Mishcon de Reya intended to send correspondence to the court. At 16.00 Mishcon de Reya sent an email to the Court, attaching a letter in which Mishcon de Reya argued against the making of the order sought and contended that Rahman Ravelli should have issued an application notice supported by evidence and then sought to have the application listed, affording sufficient time for responsive evidence to be served. Mishcon de Reya also submitted that there were no proper grounds for the court to dispense with an application notice and a hearing.

16. By email sent at 14.36 on 11 January 2024, the court sent a copy of the sealed second order to the parties. The second order was in the terms of the draft provided by Rahman Ravelli. The recitals to the second order included the following:

> "AND UPON there being a dispute between the parties as to whether or not the First Respondent has complied with the 7 December Order"

17. The only operative paragraph of the second order provided as follows:

> "If and to the extent that the First Respondent has not already complied with the 7 December Order, it shall do so by 4pm on Friday 12 January 2024."

18. Although the second order was made without a hearing, it did not contain any reasons. Moreover, the second order was made by the Senior Master without sight of Mishcon de Reya's letter of 10 January 2024. That appears from the fact that a court officer sent an email to Mishcon de Reya at 15.12 on 11 January 2024 saying that the letter had been referred to the Senior Master for directions.

19. Then at 15.30 on 11 January 2024 the court sent an email to the parties which referred to the following "directions" by the Senior Master:

> "They are entitled to a penal notice the order remains the same. Refer them to para 16.30 to 16.35 of the Chancery Guide the same applies in KB."

20. The appellant's notice was issued on 12 January 2024 and there was a hearing on that day at which both parties were represented. Jay J granted permission to appeal and stayed the second order pending the determination of the appeal.

21. There are two grounds of appeal. Ground 1 has three limbs. It is alleged that the Senior Master was wrong to make the second order: (a) without requiring service of an application notice; and/or (b) by making the order on the documents without a hearing; and/or (c) by acceding to an application which was abusive or oppressive in the circumstances. The third limb of ground 1 overlaps with ground 2, which is that the second order ought to have specified precisely what, if any, further documents were required to be produced, particularly in circumstances where the 11 January Order contains a penal notice.

22. The examination of Mr Gaevoy and Ms Gurevich went ahead on 15 January 2024.

23. On 16 January 2024 the judge in the US action adjourned the trial, which had been fixed for 29 January 2024, to 25 March 2024. The time estimate for the trial is 2 weeks.

24. On 21 January 2024 the applicant, which is a Singaporean company, issued a petition for Chapter 11 bankruptcy in Delaware. It was not suggested that that affected the present proceedings, although at the hearing on 22 January 2024 the respondent was still considering the implications of that development.

(3) A Preliminary Procedural Issue

25. CPR 23.8(1) provides as follows:

> "The court may deal with an application without a hearing if—
>
> (a) the parties agree the terms of the order sought;
>
> (b) the parties agree to dispense with a hearing; or
>
> (c) the court does not consider that a hearing would be appropriate."

26. Thus, the Senior Master had power under CPR 23.8(1)(c) to deal with the application without a hearing. He has not given any reasons for his decision to exercise that power, but they appear to have been based on a combination of the urgency of the matter and his view, reflected in his directions, that the second order was merely giving the applicant something to which it was entitled.

27. Since 1 October 2023, CPR 23.8(3) & (4) have provided as follows:

> "(3) If the court decides the application without a hearing under paragraph (1)(c) and does so without giving the parties an opportunity to make representations—
>
> (a) a party affected by the court's order may within such period as the court may specify apply to have the order set aside, varied or stayed;
>
> (b) if no period is specified, the application must be made within 7 days after the date the order was served on the party applying; and
>
> (c) the order must contain a statement of the right to make such an application.
>
> (4) An application under paragraph (3) shall be considered at an oral hearing unless the court decides and states in an order that the application is totally without merit."

28. It is relevant also to note paragraphs 2.3 and 2.4 of Practice Direction 23A, which provide as follows:

> "2.3 On receipt of an application notice containing a request that the application be dealt with without a hearing, a Master, District Judge or other judge will decide whether the application is suitable for consideration without a hearing.
>
> 2.4 Where the Master, District Judge or other judge so decides, the court will inform the applicant and the respondent and may give directions for the filing of evidence."

29. The Senior Master did not give the respondent an opportunity to make representations. He did not inform the parties, as required by paragraph 2.4 of Practice Direction 23A, that he had decided that the application was suitable for consideration without a hearing and he gave no indication as to when any representations were to be made. He did not consider, presumably because he did not receive, the representations made in Mishcon de Reya's letter of 10 January 2024 before he made the second order.

30. It is unfortunate that CPR 23.8(3) was overlooked in the present case. Although introduced in October 2023, it replaced what was, in effect, an equivalent provision in paragraph 11.2 of Practice Direction 23A. The second order did not include the statement required by CPR 23.8(3)(c) and the respondent did not make an application under CPR 23.8(3)(a) for the second order to be set aside, but instead applied for permission to appeal against the second order. Jay J was not alerted to these provisions and therefore granted permission to appeal against the second order instead of simply hearing an application to set aside the second order.

31. At the beginning of the hearing I asked the parties whether the appropriate course in these circumstances might be for me to exercise my power under CPR 3.10 to remedy the procedural errors by treating the hearing as the hearing of an application to set aside the second order rather than an appeal against the second

order. Mr Anderson submitted that that was the safer course. Mr Byam-Cook said that his client was neutral on the issue and that his client wanted me to focus on the substantive dispute as to whether the second order should have been made.

32. I decided that it was appropriate for me to treat the hearing as the hearing of an application for the second order to be set aside. It is generally inappropriate for a party to seek to appeal against an order when the party has an opportunity to apply instead for it to be set aside. The fact that the second order did not include the statement required by CPR 23.8(3)(c) may have contributed to the respondent's adoption of an inappropriate procedure, since the inclusion of the statement in the order would presumably have prompted the respondent to apply for the second order to be set aside.

33. Treating the hearing as the hearing of an application for the second order to be set aside also had the advantage that it enabled to court to focus on the question of what order should have been made, rather than on the respondent's complaints about the procedure adopted. It follows that I need not decide whether the Senior Master was wrong to dispense with an application notice and a hearing, but I did take account, when deciding whether to set aside the second order, of the history which I have set out as to how the order came to be made and of Mr Anderson's robust criticisms of both the applicant and the Senior Master in respect of the procedure followed.

34. I was not referred during the hearing to paragraph 3.3.2 of *Civil Procedure 2023*, nor to the cases referred to therein, so I merely record that that paragraph states, inter alia, as follows:

> "An application under r.3.3(5)(a) to set aside, vary or stay an order made under r.3.3(4) should involve a rehearing of the issue, not a review of the decision made (*Al-Zahra (Pvt) Hospital v DDM [2019] EWCA Civ 1103*; but see also *R. (Kuznetsov) v Camden LBC* [2019] EWHC 3910 (Admin))."

35. I see no reason why a different approach should be followed on an application under CPR 23.8(3)(a) to have an order set aside, varied or stayed.

(4) The Parties' Submissions on the Substantive Issue

36. For the respondent, Mr Anderson submitted that:

(1) The appropriate course would have been for the applicant, instead of applying for the second order, to apply for the determination of the question whether the respondent was in breach of the first order and, if so, in what respects, since:

(a) if it was found that the respondent was not in breach of the first order, then the respondent was not in contempt of court; and

(b) if it was found that the respondent was in breach of the first order, then an order could be made requiring the respondent to remedy that breach and a penal notice could be attached to that order.

(2) The application made on 9 January 2024 was abusive, being akin to the issue of a winding-up petition by an applicant who knows that the debt is disputed.

(3) The application made on 9 January 2024 was not an application for the variation of the first order and could not have been such an application, because the first order was a final order.

(4) The Senior Master, who referred in his directions to an out-of-date version of the Chancery Guide, was wrong to think that the applicant was entitled as of right to have a penal notice included in the second order, because it is for the court to decide whether to include a penal notice in an order: see *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch), in which it was held (at paragraph 21) that:

> "A party to litigation is not at liberty to add a penal notice to an order of the court of its own motion; rather, that party must apply to the court to vary the order if it wishes a penal notice to be added."

(5) The following principles, as stated in paragraph 4.001 of *Gee on Commercial Injunctions* (7th Edn) (to which I had referred the parties), were relevant:

(a) "There is a general principle that an order must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order. Contempt proceedings will not succeed when the order is unclear or ambiguous".

(b) "An injunction should not be granted in terms which leave it to be argued out in contempt proceedings what it does and does not require."

37. For the applicant, Mr Byam-Cook submitted that:

(1) The second order was, in effect, merely a variation of the first order so as to add a penal notice and to extend time for compliance with the first order.

(2) A penal notice is merely a warning of the potential consequences of breach of an order: see the definition in CPR 81.2 and *Benhurst Finance Ltd v. Colliac* [2018] EWHC 2188 (QB), at paragraph 19.

(3) There could have been no objection to the inclusion of a penal notice in the first order, nor to its amendment shortly after it was made to include a penal notice.

(4) The first order was akin to a witness summons under CPR 34.2(2)(b), which routinely includes a penal notice, as appears from Form N(20).

(5) There was a prospect that the second order might encourage the respondent to change its position as to compliance with the first order and might produce more documents in advance of the depositions on 15 January 2024.

(6) Disclosure is not permitted under the 1975 Act (see section 2(4)(a)) and so it would not have been appropriate for the applicant to apply for what was, in effect, specific disclosure.

(7) Nor could the English court re-word, amend or vary the formulation in the letter of request of the documents sought to be produced, which had been adopted in the Appendix to the first order: see section 2(4)(b) of the 1975 Act.

38. Mr Byam-Cook confirmed that, although the depositions of Mr Gaevoy and Ms Gurevich have taken place, the applicant still wants to obtain the documents which it contends should have been, but have not been, produced pursuant to the first order in order to be able to use them at the trial of the US action commencing on 25 March 2024. He also accepted that there will have to be a hearing to resolve the dispute between the parties as to what the first order required and that that dispute could be heard either as part of a committal application or on an application by the applicant for an order resolving that dispute.

(5) Decision

39. It is helpful to dispose of some issues at the outset:

(1) Each party was critical of the other. Mr Anderson accused the applicant of being oppressive in threatening committal applications and in the manner in which it did so. As I have already noted, the applicant accused the respondent of deliberately failing to comply with the first order. I attach no weight to these points:

(a) Both parties are commercial enterprises represented by City solicitors who, as can be seen from the correspondence, are able to give as good as they get.

(b) It is a fact that, although the sanctions for contempt can be draconian, contempt proceedings are the only means available to a litigant of encouraging compliance with a court order or seeking to penalise non-compliance.

(c) I cannot assume that the respondent has failed to comply with the first order, let alone that it has done so deliberately. Those are matters to be resolved hereafter.

(2) While I accept that the first order was a final order, I do not accept that that fact meant that the first order could not be amended by adding a penal notice. Such an amendment would merely have given a warning to the respondent. It would not have interfered with the decisions made on any disputed issues when the first order was made. In addition, Mr Anderson accepted that the first order could be amended by extending the time for compliance with the first order.

(3) I do not accept the argument that, because the 1975 Act does not permit orders for disclosure, it would be impermissible or inappropriate for the applicant to apply for an order that the respondent produces documents which the applicant contends, but the respondent denies, were required to be produced by the first order. On the contrary, Mr Byam-Cook accepted that it would be necessary for the court to resolve the dispute between the parties as to what the first order required the respondent to produce.

(4) Nor do I find it helpful to have regard to the fact that, in proceedings under the 1975 Act, the court could not re-word, amend or vary the formulation in the letter of request of the documents sought to be produced. There is no suggestion that the court should re-word, amend or vary Appendix A to the first order, whose provisions, as I have said, mirror the terms of the letter of request. However, it is a necessary part of the enforcement of the first order for the court to decide what the first order meant. That is common ground between the parties.

40. In my judgment, the striking feature of this case is that there is a dispute between the parties as to whether the respondent has complied with the first order and no progress can be made in this case until that dispute has been resolved. Seen against that background, the second order achieves little, if anything. The prospect that it would prompt the respondent to change its position and produce more documents was slight and has not materialised.

41. There was a disagreement between the parties as to whether it is common or rare to include a penal notice in an order made under the 1975 Act, but I do not have any evidence with which to decide that issue. I do not agree with the Senior Master that the applicant was entitled to a penal notice, since the court has a discretion whether or not to include a penal notice in an order. The passage from the out-of-date version of the Chancery Guide to which the Senior Master referred included, in paragraph 16.32, the following statement:

> "it is not necessary to obtain the consent of the court before a penal notice is endorsed on an order before service"

42. This statement, which is inconsistent with the decision in *Re Taray Brokering Ltd*, has been removed from the Chancery Guide, no doubt because of that decision. In any event, it concerned the situation where a litigant endorses an order with a penal notice without the approval of the court, rather than the question of how the court should exercise its discretion to include, or not include, a penal notice in an order.

43. Nevertheless, I see no reason in principle why the first order could not have included a penal notice, if the applicant had sought one on 7 December 2023, or could not have been varied so as to include a penal notice, if the applicant had applied for such a variation shortly after the first order was made. By 9 January 2024, however, there had been what in my judgment were three significant developments:

    (1) The time for complying with the first order had passed.

    (2) The respondent had produced documents in response to the first order and contended that it had complied fully with the first order.

    (3) A dispute had arisen between the parties as to whether the respondent had complied fully with the first order.

44. It is the combination of these three factors which makes it appropriate to question whether the second order was the appropriate order to make in this case. In particular, the mere fact that the time for complying with the first order had passed would not, by itself, have made it inappropriate to vary the first order by extending the time for compliance and inserting a penal notice if, for instance, there had been no compliance with the first order.

45. It may also be the combination of these three factors which prompted Jay J to say as follows in the hearing on 12 January 2024:

> "But here where there is an obvious dispute in a very complex area, whether or not there has been compliance, then to use the penal notice as a device for compelling compliance even though the order itself does not specify whether or not there has been compliance just does not seem to me to be very fair."

46. The applicant says that it was the respondent, through Mishcon de Reya, who first took a point about the absence of a penal notice in the first order and that it was appropriate for the applicant to take action to address that point. There is room for debate whether *Re Taray Brokering Ltd* was correctly decided: see Steven Gee KC's article, *Penal notices and contempt of court: Re Taray Brokering Ltd [2022] EWHC 2958 (Ch)* C.J.Q. 2023, 4292), 111-119. However, the applicant was entitled to proceed on the basis that it was correctly decided and that the applicant could not add a penal notice to the first order of its own motion.

47. Having said that:

    (1) The purpose of a penal notice is to show that a party who is ordered to do, or not to do, something knew the potential consequences of disobeying the court's order before he disobeyed it.

    (2) It follows that, on a committal application, the court can dispense with the requirement for a penal notice if the contemnor already knew those consequences: see *Serious Organised Crime Agency v Hymans* [2011]

EWHC 3599 (QB); and *Business Mortgage Finance 4 Plc v Hussain* [2022] EWHC 449 (Ch); [2022] 4 All E.R. 170.

(3) Consequently, it will be open to the applicant to contend on any future committal application that the respondent already knew the potential consequences of disobeying the first order when the first order was made. I say nothing about the merits of such a contention in respect of the period before 9 January 2024.

(4) Moreover, it was open to the applicant to achieve the substantive effect of a penal notice without a court order. As was said in *Re Taray Brokering Ltd* (at paragraph 22):

> "… even where the order does not contain a penal notice, it is open to the party seeking to enforce it to point out to the party who is disobeying it that their breach of the order may have penal consequences."

(5) Further, if, as the applicant contends, there has been a deliberate breach of the first order, then it would be open to the applicant to bring a committal application against Mr Gaevoy and to allege that he had made false statements in the affidavits sworn in response to paragraph 3 of the first order. A penal notice is not required in respect of such an application.

(6) Finally, as I said during the hearing, as a result of events since 9 January 2024, it is difficult to envisage that the respondent could say that it is now unaware of the potential consequences of disobeying a court order.

48. The real difficulty with the second order is that, given the three factors to which I have referred, the second order required the respondent, on pain of being found to be in contempt of court, to do something by the end of the following day, but did not tell the respondent what that something was, and did so in circumstances where: (a) that something may be nothing; and (b) what, if anything, that something was remained to be decided. This much was effectively acknowledged by Rahman Ravelli in the paragraph which I have quoted from their letter of 9 January 2024. For these reasons, the second order offends against the principles stated on *Gee on Commercial Injunctions* which I have quoted. That is not necessarily determinative, but it is a significant factor on the facts of this case.

49. Indeed, as I put to Mr Byam-Cook, it is a striking feature of this case that, if the respondent had asked the Senior Master on 11 January 2024, "What have you just ordered me to do by 4 pm tomorrow?" the Senior Master would have had to reply, "I don't know. Possibly nothing. Possibly to produce a document or documents, but I don't know which document or documents, because that remains to be determined." Moreover, that would in substance have been the case whether the second order was in the form which it actually took or whether it had taken the form of a variation of the first order so as to extend time for compliance and insert a penal notice.

50. In all the circumstances, I concluded that it was inappropriate to make the second order and that the appropriate order to make instead, and which I will make, is an order giving directions for the determination of the dispute between the parties as to what the first order required, whether the respondent has complied fully with the first order and, if not, what document or documents remain to be produced, or made available for inspection, in order to comply with the first order. The parties were not in a position to address me at the hearing on 22 January 2024 on the subject of what would be the appropriate directions to make and so I adjourned the hearing to 29 January 2024.