



Neutral Citation Number: [2019] EWHC 2287 (Comm)

Case No: CL-2013-000683

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

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Wednesday, 21<sup>st</sup> August 2019

Before:

**MRS. JUSTICE MOULDER**

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

**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.

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**Approved Judgment**

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,  
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**MRS. JUSTICE MOULDER :**

1. This is the claimants' application that the court should make a suspended committal order pursuant to CPR 71.8(2).

Absence of Mr Arip

2. The respondent, Mr. Arip, the second defendant in the proceedings, has not attended this hearing. He was notified by service on his Cypriot lawyers, by e-mail, directly to his e-mail address, and by notification to Gresham Legal, the solicitors acting for his wife. There has been no response to service of the application, either by contact with the court or to the claimants' solicitors. Nevertheless, given the various ways in which service has been effected I am satisfied that Mr. Arip is aware of today's hearing and it is appropriate, notwithstanding the serious nature of the application before me, that the matter should proceed in his absence. The application before me is a suspended committal order and therefore Mr Arip will have the opportunity to challenge the order before it is enforced and thus his Article 6 rights are not infringed (*Broomleigh Housing Association Ltd v Okonkwo* [2010] EWCA Civ 1113 at [22]).

Jurisdiction

3. I was addressed by counsel on the issue of whether or not the court has jurisdiction over Mr. Arip, given that he is outside the jurisdiction. I was referred to the authority of *Masri v Consolidated Contractors Int (UK) Ltd (No 4)* [2009] UKHL 43; [2010] 1 AC 90 (HL(E)) and the statement of Lord Mance at [17] of his judgment which indicates that this court does have jurisdiction over a personal judgment debtor, notwithstanding that the judgment debtor is out of the jurisdiction.
4. I was also referred to the judgment of Gross LJ in *Deutsche Bank v Sebastian Holdings Inc (Nos 1 and 2)* [2018] EWCA Civ 2011; [2019] 1 WLR 173, where the Court of Appeal held that a committal application such as this is incidental to an order under CPR 71 and therefore permission to serve the committal application out of the jurisdiction is not required.

Standard of Proof

5. In approaching this application, the court bears in mind throughout that the standard of proof on an application for committal is to the criminal standard.

Background

6. The background to this matter is very lengthy and complicated, but it is not necessary for me to go into any details of the matters which led to Mr. Arip being a judgment debtor, other than to note that there was a four month trial before Picken J in 2017 in the commercial court, following which judgment was awarded against Mr. Arip and others in a sum of approximately US\$300 million, and that no such amount has been paid, although I understand that steps have been taken to enforce the judgment in the form of interim charging orders over properties said to be owned by Mr. Arip and I also understand that a tracing claim is in progress.

The matter which concerns this court is that, pursuant to CPR 71.2, Mr. Arip as a judgment debtor was ordered to attend the court for oral examination. The date originally fixed by an order of Registrar Kay QC dated 3 April 2019 was 1st May 2109 but this was varied by order dated 29 April 2019 to the 22nd May 2019.

On 9th May 2019 Mr. Arip's then solicitors, Charles Fussell & Co LLP, wrote to the claimants' solicitors that Mr. Arip was due to have spinal surgery in Russia on 20th May 2019.

7. The day before the hearing, on 21st May 2019, Mr. Arip's solicitors served a witness statement of Mr. Charles Fussell which said that Mr. Arip had been admitted to a clinic in Moscow, and that surgery was expected to take place that week.

The hearing of 22nd May was therefore adjourned by order of 22 May to 22nd July 2019, with a requirement in the order for Mr. Arip to file a witness statement giving details of his medical condition and the medical treatment received, and if he said that he was not fit to attend the adjourned hearing, he was required to give a full explanation about when he would be fit to attend. If there was to be a prolonged period of recuperation he was required to provide proper medical evidence to substantiate this, with regular updates.

8. Mr. Arip did, in response to that order, produce a witness statement dated 5th June 2019. In that witness statement Mr. Arip stated that he would not be able to travel to England for the hearing on 17th July and was not permitted to undertake the stress associated with the adjourned hearing.
9. On 17th July 2019 Mr. Arip did not attend the hearing and Registrar Kay QC ordered that the failure be referred to a High Court judge, pursuant to CPR 71.8(1)(a). By order of 5th August 2019 Butcher J ordered that this hearing take place.

#### Evidence

10. Before this court I have various witness statements from the past proceedings, but in particular I have the witness statement of Ms Vaswani, dated 16th July 2019, and an expert report of Dr. Gross, a consultant neurologist. I understand that that expert report was before Registrar Kay. To the extent that this court needs to give permission for the evidence to be adduced, I give that permission. I understand from counsel that the expert report was served on Mr. Arip.

#### Relevant law

11. CPR 71.8 provides in subsection (1):
  - "(1) If a person against whom an order has been made under rule 71.2 –
    - (a) fails to attend court;
    - (b) refuses at the hearing to take the oath or to answer any question; or
    - (c) otherwise fails to comply with the order the court will refer the matter to a High Court judge or Circuit Judge.

(2) That judge may, subject to paragraphs (3) and (4), make a committal order against the person.

(3) A committal order for failing to attend court may not be made unless the judgment creditor has complied with rules 71.4 and 71.5.

(4) If a committal order is made, the judge will direct that –

(a) the order shall be suspended provided that the person –

(i) attends court at a time and place specified in the order; and

(ii) complies with all the terms of that order and the original order.

(b), if the person fails to comply with any term on which the committal order is suspended, he shall be brought before a judge to consider whether the committal order should be discharged."

12. The cross references to rules 71.4 and 71.5 are that CPR 71.4 provides that the judgment debtor may seek his travelling expenses and CPR 71.5 provides that the judgment creditor must file an affidavit stating that the person ordered to attend court has not requested payment of his travelling expenses or that such a sum has been made. The claimants have filed affidavits stating that Mr. Arip has not requested payment of his travelling expenses. The condition therefore in CPR 71.8 in this regard has been met.

13. Turning to the authorities, I was referred to the authority of *Islamic Investment Company v Symphony Gems* [2008] EWCA Civ 389 at [24], that in the case of such an application the court must be satisfied that not only that the judgment debtor is in contempt, but (as the term used at that time) that it must be contumaciously. In *Broomleigh Housing Association v Okonkwo* [2010] EWCA Civ 1113 at [22], the Court of Appeal moved away from the use of the term "contumacy" but nevertheless stated that in having regard to the circumstances the court must be satisfied not only that the judgment debtor's failure to attend was intentional, but also that there is what was described as some extra obstinate or obstructive dimension to the debtor's intentional breach.

#### Issues for the court

14. The questions therefore that this court has to address are whether or not it is satisfied on the following three issues: first, was Mr. Arip served with the order to attend; secondly is the court satisfied that Mr. Arip's failure to attend was intentional; thirdly in the circumstances has the test been met that it is appropriate to make a suspended committal order and in this respect does the evidence establish that there has been some extra obstinate or obstructive dimension to the intentional breach of the order?

#### Service

15. On the first issue, whether Mr. Arip was served with the order to attend for oral examination, the relevant order was that of 22nd May 2019. It is clear that the order

was served and that Mr. Arip was aware of the hearing on 17th July. A letter of 11th July 2019 from his solicitors at that time refers to the hearing and states:

"We understand that our client will be unable to attend the hearing before Deputy Master Kay QC on 17th July 2019 owing to health reasons."

Whether failure to attend intentional

16. The second issue is whether the failure to attend on 17th July 2019 was intentional. In my view there can be no doubt that Mr. Arip took the deliberate decision not to attend on 17th July. That is clear from the evidence of his witness statement. I accept that, were he here, Mr. Arip might well say that he acted on the basis of medical advice, but that is a matter which I will deal with in relation to the third issue, of whether or not in all the circumstances it is appropriate to make a suspended committal order.
17. This was not a case where the failure to attend was caused by circumstances outside his control, such as a flight delay or an illness in the family which might have exculpated him or made the failure other than intentional.

In all the circumstances should the court make the order

18. The real issue in this application is to look at the circumstances surrounding Mr. Arip's failure to attend on 17th July. The starting point is the explanation which is provided in Mr. Arip's witness statement. On page 5 of his witness statement at subparagraph (4) he says that he has been advised not to work, not to travel, to restrict movement and avoid all stress. At page 7 he states that he cannot work for the foreseeable future due to hypertensive disease and elevated blood pressure. He refers to the discharge report which is exhibited to his witness statement and to the clinic report.
19. The weight to be given to Mr. Arip's witness statement has however to be assessed in the light of the observations of Picken J in his lengthy judgment on liability in the proceedings, handed down in December 2017. At paragraph 65 of that judgment Picken J states:

"My overwhelming impression is that Mr. Arip was not an honest witness, indeed that he was a thoroughly dishonest witness. During his cross-examination Mr. Arip often came across as evasive; he sought to avoid answering difficult questions about documents which contradicted his evidence."

Picken J concluded:

"I am quite satisfied that Mr. Arip was intent when giving evidence to present a thoroughly misleading picture to the court in order to try to cover up his role in the alleged frauds."

20. Against that assessment of his credibility Mr. Arip's explanation for his non-attendance cannot be accepted at face value but needs to be scrutinised with some care. The court does have certain medical evidence which Mr. Arip has produced and which he seeks to rely on. In particular he refers to a medical discharge report dated

31st May 2019, which states that Mr. Arip should avoid stress for six weeks and avoid stressful situations with atmospheric pressure such as flights.

21. Mr. Arip also relies on a note of a consultation with a cardiologist, dated 4th June 2019, where Mr. Arip is noted to have complained of spots in his vision, nausea and headache, and that the consultant has advised that he should limit his physical exercise, undertake bedrest, and it contains the statement that air flights are not recommended.
22. I note that these medical reports relied on by Mr. Arip in his witness statement do not go as far as Mr. Arip asserts in his witness statement, when he says that he will not be able to travel and the doctors will not permit him to undertake the stress associated with an adjourned hearing.
23. Further, the recommendations in these medical reports have to be considered in the light of the expert report of Dr. Gross. Dr. Gross has not had an opportunity to examine Mr. Arip, nevertheless it seems to me that he is able to assist the court by providing his opinion as to what he understands the medical position of a person to be who suffers from the medical conditions which Mr. Arip asserts he suffers from, notably hypertension and high blood pressure. Dr. Gross expresses the opinion that there is no reason why Mr. Arip should avoid flying once his blood pressure is controlled. In relation to a person with normal blood pressure, Dr. Gross states that stress is irrelevant and is not something that would lead to an individual being regarded as not fit to give evidence in a legal matter in the UK.
24. Mr. Arip, I understand, has received a copy of Dr. Gross' report. If Mr. Arip wished to answer the points raised by Dr. Gross in his report it would have been open to Mr. Arip to file a further witness statement in these proceedings, even if he could not physically attend the hearing (he was able to make the earlier witness statement in June 2019). He has however not provided the court or the claimants with any evidence subsequent to his witness statement at the beginning of June, notwithstanding the fact that there was an express provision in the order of Master Kay that Mr. Arip should provide updates on his condition.
25. I further take into account the fact that the claimants suggested that Mr. Arip should undergo an independent medical examination in Moscow. This was proposed by a letter of 26th June 2019 to Mr. Arip's then solicitors. However, it appears from the correspondence before the court that Mr. Arip's solicitors did not respond to this suggestion. The only correspondence from them at this time was a letter of 11th July 2019, where the solicitors merely state that Mr. Arip will be unable to attend the hearing in July owing to health reasons.
26. While there is no obligation on Mr. Arip to have submitted to such an examination it seems to me that it is a factor which the court is entitled to take into account, in the same way that the court is entitled in my view to take into account the absence of any engagement by Mr. Arip since his witness statement of 5th June and his failure to provide any update on his condition to the court.
27. The court also has to weigh in this regard the background circumstances and his previous conduct surrounding the original hearing scheduled for 22 May 2019. I note the timing of his hospitalisation in the week of the scheduled hearing. I note that it is

only when he had been notified of the cross-examination hearing, that he stated that he needed urgent hospitalisation for spinal surgery.

28. While I take the view on the evidence that Mr. Arip probably was hospitalised on or around 20th May 2019, given the documents that are before the court, nevertheless the fact remains that the surgery has not taken place and, having regard to the evidence of Dr. Gross, it can be inferred that the surgery was not in fact as urgent as Mr. Arip has asserted. Dr. Gross' evidence, was that if hypertension was found, as Mr. Arip asserts, and urgent surgery had been necessary, the hypertension could have been controlled in as little as 24 hours, which would have allowed surgery to take place if in fact it was urgent.
29. As part of the background circumstances the court also considers why Mr. Arip has sought surgery in Russia. There is evidence before the court (witness statement of Mr McGregor dated 20 May 2019) which suggests that the clinic chosen and the specialist chosen were not an obvious choice for somebody such as Mr Arip who could afford to choose the clinic. Further, I note that in his witness statement Mr Arip gives an address in Cyprus. He is a national, I understand, of Cyprus and Saint Kitts and Nevis, and his wife apparently lives in Rome. The observations of Mr McGregor are challenged by Mr Arip through his solicitors in the form of the witness statement from Mr Fussell referred to above. However, it is difficult to understand, on the evidence, why Mr. Arip should have elected for surgery at a clinic in Russia and why such surgery was said to be necessary at the end of May thereby preventing him from attending the hearings in London.

### Conclusion

30. While individually these factors might not be conclusive that Mr. Arip was seeking to avoid the jurisdiction of this court and the requirement to attend for cross-examination, taking all these factors together I am satisfied to the criminal standard that Mr. Arip has intentionally failed to attend the court on 17th July and that there can be said to be an obstructive dimension to his failure. Accordingly, I order that he should be committed to prison for 14 days for his failure to attend court on 17th July 2019. Such committal to be suspended, provided that he attends court for cross-examination on a date which will now be fixed in consultation with counsel for the claimants.

### **JUDGMENT ON COSTS**

31. It falls to me to summarily assess these costs. It is the costs of an application for a suspended committal order which has succeeded. It seems to me that it is appropriate that costs be awarded on the indemnity basis and on that basis (applying CPR 44.3) I am satisfied that the sum of £27,507.55 is properly payable and that amount I award.

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