

Neutral Citation Number: [2023] EWHC 3271 (Comm)

Case No: CL-2022-000048

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 November 2023

Before :

THE HON MR JUSTICE BUTCHER

Between :

- (1) **COMMERCIAL BANK OF DUBAI PSC**
(2) **HORTIN HOLDINGS LIMITED**
(3) **WESTDENE INVESTMENT LIMITED**
(4) **LODGE HILL LIMITED**
(5) **VS 1897 (CAYMAN) LIMITED**

Claimants

- and -

- (1) **MR. ABDALLA JUMA MAJID AL SARI**
(2) **MR. MAJID ABDALLA JUMA AL SARI**
(3) **MR. MOHAMED ABDALLA JUMA AL SARI**
(4) **FAL OIL CO LLC**
(5) **INVESTMENT GROUP PRIVATE LIMITED**
(6) **IGPL GENERAL TRADING LLC**

Defendants

Tony Peto KC (instructed by **Jones Day LLP**) for the **Claimants**
Sean Yates (instructed by **Janes Solicitors**) for the **1st and 2nd Defendants**
The **3rd to 6th Defendants** did not appear and were not represented

APPROVED JUDGMENT

This judgment was handed down by the court in person and was then released to The National Archives on the 19 December 2023 once the transcript was produced.

1. This hearing was fixed as the adjourned hearing to consider sanctions for contempt of court on the part of the First to Sixth Defendants.
2. By my judgment given on 4 October 2023, [2023] EWHC 2624 (Comm), after a hearing held in public, but at which the First to Sixth Defendants did not appear and were not represented, I found those Defendants to be in contempt of court, in the respects and for the reasons there set out.
3. I adjourned the question of sanction, not least to give the First to Sixth Defendants the opportunity of addressing the court in relation to sanction, and to put forward any mitigating or extenuating circumstances which they said existed.
4. The sanctions hearing was fixed for 27 October 2023. On that occasion, solicitors and counsel appeared on behalf of the First and Second Defendants to seek the adjournment of the hearing. A part of the basis for this was that they had only recently been instructed and needed time to investigate matters; and at the hearing it was indicated that the First and Second Defendants had not been aware of the hearing on 4 October 2023.
5. Faced with that, I adjourned the sentencing hearing until today.
6. I made an order which included the following:

‘If the First and Second Defendants wish to rely on the assertion that they were unaware of the hearing on 4 October 2023, they shall file and serve any affidavit

evidence to that effect on which they wish to rely by no later than 4 pm on 10 November 2023, including any statement they wish to make (a) that they were unaware of the 4 October 2023 hearing prior to that date; and (b) as to the time at which and the manner in which they became aware that that hearing had occurred.’

7. On 10 November 2023, the Second Defendant, Majid Al Sari, swore a Third Affidavit (which has also been called ‘Majid 3’). That Affidavit included the following:

‘[8] I apologise to the Court (on behalf of myself and my father) for our lack of engagement in these contempt proceedings so far. The truth is, the last contact I had with the solicitors acting for me in the underlying proceedings was in December 2022. From that point onwards, I have been completely in the dark about what has been happening.

[9] I now understand my previous solicitors, Charles Russell Speechly (CRS), came off the Court record in February 2023. As I said above, as far as I can remember, my last contact with them came two months previously, on 15 December 2022. At that stage, whilst I was aware that Contempt Proceedings had been intimated, I was unaware that Contempt Proceedings had been issued against my father and me.

[10] Since then, neither my father nor I have been aware of any developments in these proceedings. I did not see, nor was I aware of, any correspondence, Court Orders, Applications, or hearings. This includes, for example, the hearing to deal with my application challenging the Court's jurisdiction, which I now understand was dealt with in a hearing by Mr Justice Bright on 13 and 14 June 2023, with a Judgment on 14 July 2023. Had I known that the hearing was taking place, I would have wished to

have attended/ arranged for representation, as I had understood we had a good case concerning our jurisdictional challenge.

[11] It is against that background that I was most surprised to receive notification on or around 10 October, after documents were delivered to my house by courier, that on 4 October 2023, the Court held my father and me in Contempt of Court, when we had received no notification that the hearing would take place. Had I been aware of that hearing, I would have ensured that I obtained legal representation so that my position could be protected.

[12] Upon becoming aware of the findings against us, my father and I took urgent steps to instruct English solicitors and counsel, which led to Janes Solicitors and Sean Yates attending the hearing on 27 October 2023.

[13] Again, I want to reiterate that had I known about this earlier, I would have instructed solicitors earlier. I understand that Contempt Proceedings are serious, and although we do not live in the UK, my and my father's liberty is at stake. Given that I wish to continue doing business in the UK and would want to travel to the UK for that purpose, it would always have been in my interests to defend myself in these proceedings to avoid any warrant of committal being issued against me.'

8. The Claimants served reply evidence on 15 November 2023, in the form of the Thirteenth Witness Statement of Sion Richards.
9. At this hearing, the First and Second Defendants, but not the Third to Sixth Defendants, have been represented by Mr Yates.

10. Mr Yates has in his skeleton argument and today applied for the following orders: (1) that my order of 4 October 2023 be set aside pursuant to the court's powers under CPR 39.3 and that the current proceedings be relisted with appropriate directions; alternatively (2) that the contempt proceedings be stayed and permission to appeal be granted to the First and Second Defendants in respect of the contempt order; alternatively (3) that the court should find that the First and Second Defendants have discharged their obligations under the WFO to the extent that they are able and should therefore face no sanction in respect of the contempt order.

11. I will deal with those applications in turn.

12. As to the first, the application to set aside, Mr Yates referred to the Court's powers under CPR r. 39.3(2) to (5), which provide as follows:

39.3(2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.

39.3(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

39.3(4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –

- (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
- (b) had a good reason for not attending the trial; and
- (c) has a reasonable prospect of success at the trial.

13. Mr Yates submitted that the First and Second Defendants had a good reason for not attending the hearing on 4 October in that they had not known about it. It is also said by Mr Yates that the First and Second Defendants have a reasonable prospect of success at the trial. Accordingly, the order of 4 October 2023 should be set aside.
14. The Claimants argue that nothing has changed. There has been no attempt to purge the contempt, no promise to do so, and there is now the aggravating factor that the First and Second Defendants have relied on, as the Claimants put it, ‘yet further false affidavit evidence in an attempt to avoid or delay sanction for their contempt.’ The Claimants say that Majid Al Sari’s Third Affidavit is demonstrably false in various respects.
15. Specifically, as to the requirements of CPR r. 39.3, the Claimants say: that the First and Second Defendants did not act promptly; that there is no good reason for their not having attended on 4 October; and that they have no reasonable prospect of success.
16. I consider that the First and Second Defendants did not act promptly. Their own position is that they became aware of the contempt order on 10 October 2023. Janes Solicitors first contacted the Claimants 10 days later indicating that they had been approached by a Dubai law firm instructed by the First and Second Defendants. It

was not until 24 October 2023 that Janes Solicitors said that their provisional instructions would be to seek an adjournment; and after the 27 October hearing there appears to have been no substantive contact from them until Majid 3 was served. The first intimation of an application to set aside was made in the First and Second Defendants' skeleton argument, served on the afternoon of the working day before this hearing. Given this chronology I find that the First and Second Defendants failed to act promptly.

17. Even more importantly, however, there is the issue of whether I am persuaded that there is a good reason why the First and Second Defendants did not attend and were not represented at the hearing on 4 October 2023. This in turn raises the question of whether I can rely on Majid Al Sari's Third Affidavit.
18. That Affidavit has to be scrutinised with more than usual attention, in that there is good evidence that the First and Second Defendants have in the past evaded or denied service of proceedings upon them. Thus:
 - (1) As set out in paragraphs 65-67 of Mr Richards's First Affidavit, dated 8 February 2022, there was evasion of service by Majid and Mohamed Al Sari in 2017 in the BVI enforcement proceedings;
 - (2) In relation to the present proceedings, Mr Justice Calver found, at [2022] EWHC 705 (Comm), at [23], that 'it is clear to me that Mr Abdalla Al Sari and Mr Majid Al Sari have taken steps to avoid being served with these proceedings'. The evidence given in Mr Richards' Second Affidavit is that even after they became

aware of the WFO they, or persons acting on their behalf, hung up or ceased answering telephones, refused deliveries, refused to authorise 'read receipts' and denied that they worked for Al Sari companies. A representative of Jones Day spoke to Abdalla Al Sari on the phone, who said that he knew what she would say, that he did not want to hear it, and that she should speak to his legal representative, while refusing to say who those representatives were.

(3) Furthermore, and most troublingly, after the Service Bundle was left with Mr Al Aidarous's firm as envisaged by the Service Order, a lawyer there phoned 'the client', who must have been one of the Al Saris, and the Claimants' representative, who was a junior member of Jones Day in Dubai, then received various threats by WhatsApp and voice messages from two separate numbers threatening to call the police and to make an allegation that the files contained drugs.

19. Examining Majid 3, I am in no doubt that it contains deliberate falsehoods, seeks to give a wholly misleading impression, and cannot be relied upon.

20. Thus, as I have already set out, Majid 3 contains the statement that, as at 15 December 2022, while he was aware that Contempt Proceedings had been intimated he was unaware that Contempt Proceedings had been issued against him and his father.

21. That, in my judgment, is patently untrue. The contempt application had been issued on 12 May 2022, the day before Majid 2 was served. It was while CRS were representing the First and Second Defendants; indeed, CRS continued on the record for them for more than 8 months thereafter. CRS's correspondence with the Claimants' representatives indicates quite clearly, and unsurprisingly, that CRS had

sought instructions in relation to various matters, and must have made their clients aware of the contempt application, the need to file evidence in response to it and the fees which would be charged in respect of their work on the application. The details are set out in paragraph 10 of Mr Richards's Thirteenth Witness Statement. Equally, the evidence referred to in paragraph 11 of that Witness Statement itself indicates that CRS had brought the contempt application to the attention of their clients.

22. Majid 3 also says that, since 15 December 2022 he had been 'completely in the dark about what has been happening' in these proceedings. This is based on the supposed fact that 'the last contact' he had with CRS was in December 2022; and that he 'now understands' that they came off the record in February 2023; but that he was aware of no developments since December, including the hearing of the Defendants' own jurisdiction challenge which was heard by Mr Justice Bright in June 2023.

23. In my view it is inconceivable that CRS did not communicate with the First and Second Defendants in the period between 15 December 2022 and when they came off the record. When they came off the record, as material available to the Claimants demonstrates, this was on the basis of various breaches of the terms of CRS's engagement by the Al Saris, including non-payment of CRS's fees.

24. I have no doubt at all that, during that period, CRS will have communicated with their clients by means which they had reason to believe would be effective in bringing matters to the clients' attention. If, which I think is unlikely, the First and Second Defendants were unaware of what was being communicated, it must have been because they were taking good care not to see what was in front of them.

25. The statement in Majid 3 that ‘the last contact I had with [CRS]’ was on 15 December 2022 is thus, I am sure, very misleading. It may be that 15 December 2022 was the last time that he contacted CRS. As I have said, I am sure that it will not have been the last time that they contacted him. As to his statement that he was thereafter completely in the dark, I am sure that if he was, which I very much doubt, it was self-imposed darkness.

26. The same applies in relation to the period after CRS came off the record. Numerous communications were sent by Jones Day to an email address which had been ordered as effective alternative service. There was no indication that emails to that address were not received. There was a series of notifications produced by Jones Day’s server stating that delivery to the recipients or groups was complete. There were no ‘unable to send’ or other bounce back messages in respect of that email address. Furthermore, Majid 3 does not say that the emails were not received at that address; nor does it say that that the address was inoperative. Indeed, it is very thin on detail generally.

27. Moreover, the jurisdiction challenge, which was to be the Defendants’ own application, had been listed by consent for June 2023 in August 2022, while CRS were acting for the First and Second Defendants. The First and Second Defendants must have been aware of that.

28. Communications were not only made to the email address I have referred to above, but each of the communications set out in paragraphs 13.4.6-10, 13.4.12 and 13.4.14-20 of Mr Richards’s Thirteenth Witness Statement were also sent to Abdalla Al Sari

on a telephone number via iMessage. There is a 'read receipt' from 10 October which shows that communications to this number were received. Majid 3 does not say that these messages were not received.

29. It is also quite clear that there is good communication between Abdalla and Majid Al Sari. Majid 1, 2 and 3 have all been made on behalf of Abdalla Al Sari, as well as on behalf of Majid Al Sari himself. The two Defendants have instructed the same solicitors. They live at the same address. And CRS stated, in the certificate of service in relation to the order for them to come off the record, that majid@faloil.co.ae was the last known email address for both Abdalla and Majid Al Sari.

30. Furthermore, on 5 September 2023 Abdalla Al Sari instructed Acuity Law to arrange supervised access to the Bridge Properties in order to recover certain items and documents which were said to be sensitive. This indicates that Abdalla Al Sari was aware of the eviction, despite CRS having ceased to act in the Possession Proceedings at the same time as they had ceased to act in these proceedings. In the reply to Acuity Law's letter, the Claimants' solicitors stated that an application for committal had been issued on 12 May 2022, and that a hearing had been listed for 4 October 2023. Acuity Law's reply of 13 September 2023 was to say that they were not instructed in relation to the WFO. The natural inference is that Acuity Law will have made enquiries of Abdalla Al Sari in relation to these matters. Certainly Majid 3 does not say that they did not do so.

31. Five other email addresses were used to send all the emails which appear at pages 146, 170, 172, 177, 180 and 181 in the second supplemental bundle, from May and

September 2023. The First and Second Defendants' skeleton argument suggests, in relation to an email of 2 March 2023 that the fact that that email was sent to those other email addresses may account for why Majid Al Sari may have been aware of its contents. But even if that is right, there is no good reason to think that he will not have gained a similar awareness of their contents from the sending of the other emails to those different email addresses.

32. The suggestion made by Mr Yates today that there was a deliberate decision by the Claimants to try to engineer that the First and Second Defendants did not have any knowledge of the hearing on 4 October is in my judgment wholly untenable. It was based apparently on the fact that one email notifying of the hearing date was sent only to the majid@faloil.co.ae email address. However, there was a series of communications about the hearing which were sent to all the five other email addresses. There was in particular an email of 20 September 2023, at 14.10, which was sent to all the five other email addresses, which specifically stated that the hearing would be taking place on the 4 October, correcting a previous mistake that it would be on the 3 October.

33. Majid Al Sari's evidence has to be considered in the light of the following more general point. As at the date when he says he had no further contact with CRS and was entirely in the dark, there were outstanding: the jurisdiction challenges; the summary judgment application on the substantial enforcement claim; and the 2014 and 2022 costs applications. He cannot have thought that, after December 2022, there would be no developments in any of them. There quite clearly would be, not least

because the jurisdiction challenges were the Defendants' own challenges and would clearly be being dealt with one way or the other. Even if, which I think highly unlikely, he heard and saw none of the communications sent to him about them, he must have realised that matters would be progressing. He would have known that documents in the case would be being sent to him, and by the methods which had already been ordered as alternative service. He failed to provide any other address. Further, he could have contacted Jones Day, or instructed solicitors other than CRS, had he wanted not to be 'completely in the dark' about what was happening, but did not. I am in no doubt that if he was completely in the dark, it was because he had deliberately contrived to be so.

34. It is not a convincing answer to say that the First and Second Defendants must have been ignorant as to the 4 October 2023 hearing, because they have now instructed solicitors and counsel and say that they wish to be able to continue doing business in this country. Abdalla and Majid Al Sari have previously shown themselves willing to change their position about whether they see any benefit in avoiding sanctions of the English court. In 2012, in opposing a WFO against certain Al Sari companies, Majid Al Sari gave evidence that he and other directors of those defendants would simply not return to England, which would render the freezing order redundant and, implicitly, that those defendants would not honour the terms of any freezing order granted.

35. For all those reasons, I am not persuaded that there was a good reason for the First and Second Defendants not to attend the 4 October 2023 hearing.

36. Those two points, in particular that second point, are themselves an answer to the application under CPR 39.3. It is not, for that reason, essential to consider the third point which is whether the First and Second Defendants have a reasonable prospect of success at trial. I am, nevertheless, quite satisfied that the First and Second Defendants do not have a reasonable prospect of success on any further hearing that there might be as to whether they were in contempt.
37. Many of the points which were apparently made in Majid 2 appear not to be pursued in Majid 3 and indeed Mr Yates has indicated today that they were not being relied on. The very limited evidence given in Majid 3 does not, in my judgment, begin to deal adequately with the breaches of the orders which are alleged and which I have found to have been made out in my judgment of 4 October 2023.
38. One argument made today is that it was impossible to comply with the disclosure order within the time limit. I do not accept that it was impossible to comply with the time limits. Further, if there had been any difficulties in relation to compliance with the orders within the times set then there could, and should, have been an application or request for an extension. The order provides that there can be an application for a variation or discharge of the order at any time.
39. In any event, the complaint that some of the deadlines could not be complied with in the time specified rings hollow in light of the fact that there was no compliance within any reasonable period thereafter.

40. I reject the new argument put at this hearing that, if there was no failure to comply with the order within the time limits specified, because, as the First and Second Defendants say, it was impossible within that time period, there was then no breach at all in non-compliance thereafter. That is in my judgment a wrong interpretation of the order; and it flies in the face of what an order such as this is, and is obviously, attempting to achieve.
41. That new argument apart, there has been no attempt to deal with the detailed findings of breach, including in paragraph 39 of my judgment of 4 October 2023.
42. As to the argument that the First and Second Defendants may not have been in contempt because they had been advised that there was no obligation to make disclosures because of UAE law, it is important to realise that this point relates only to disclosure on behalf of the companies. It provides no excuse as to the other non-compliance by the First and Second Defendants, including in particular of their own assets. That itself throws doubt on the suggestion that this was really a relevant consideration.
43. In any event, I am sure that it is not an adequate explanation for the non-compliance that there was. At most it would have been a reason to seek some variation or amendment of the order. Without doing that, the order stood. The First and Second Defendants knew that fact; and that there was non-compliance. I do not consider that there is any ground on which the First and Second Defendants should be able to put in further evidence in relation to this, as Majid 1, 2 and 3 have provided an opportunity for any evidence which would be relevant.

44. For those reasons I do not consider that the First and Second Defendants have a reasonable prospect of success.
45. As to the application that there should be a stay and permission to appeal, the Claimants accept that permission to appeal would be required at this stage but will not be if I proceed to make a committal order, in which case there can be an appeal to the Court of Appeal as of right. I see no reason, however, why there should be permission to appeal and equally and in any event why there should be a stay.
46. Two particular arguments were marshalled under this head by Mr Yates.
47. The first was the impossibility ground, which I have already considered.
48. The second related to the supposed lack of independence of Mr Al Zarouni. The complaint is that Mr Al Zarouni lacked independence because he had previously been instructed on various other matters by the Al Saris. In my judgment the complaint goes nowhere. My decision of 4 October 2023 did not depend on findings as to UAE law. The primary basis of my finding in para. 37 was that, even if there were an argument that Abdalla and Majid Al Sari could have been exposed to penalties under the UAE Penal Code, that would not have been a justification for non-compliance, as opposed to seeking some variation or amendment of the order. I also found that there was no real risk of prosecution even if there were some possible penalty under UAE law.

49. Any lack of independence on the part of Mr Al Zarouni did not affect my assessment of the credibility of the Defendants' evidence. There was much other evidence on which to gauge that.

50. Accordingly, I reject the application for a stay.

51. As to the third application made by Mr Yates, namely that it should be determined that the First and Second Defendants have complied with the WFO to the extent that they are able, that application cannot succeed unless the first application is successful, as such a determination would be contrary to the findings made in my judgment of 4 October 2023. As the first application has not been successful, the third application cannot be, and I reject it as well.

52. I will therefor turn to consider the question of sanctions which I will do after the short adjournment.

[The short adjournment and further submissions]

Sanction remarks:

1. I intend to proceed to deal with the sanctions to be imposed for the contempts which I have found to have been committed by the First to Sixth Defendants.
2. In relation to sentence, I have been addressed by Mr Yates on behalf of the First and Second Defendants. No submissions were made on behalf of the Third to Sixth Defendants.

3. In assessing the appropriate sanction, I consider both the degree of each Defendant's culpability and the harm caused, intended or likely to be caused. If only a custodial sentence is justified, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
4. Guidance in relation to breaches of asset disclosure orders was provided in McKendrick v The Financial Conduct Authority [2019] 4 WLR 65. I have taken that into account.
5. The contempts in this case were of a very serious nature for the reasons I set out in my judgment of 4 October.
6. There are a number of aggravating factors. In particular, the Bank has a substantial judgment against the Defendants, and its enforcement is being frustrated by the non-compliance of the Defendants with the asset disclosure orders. Secondly, the Al Saris have a history of contemptuous reaction to freezing orders of the English court: as emerges from RBS v FAL Oil [2012] EWHC 3628 (Comm). Thirdly, their conduct in the litigation more generally has indicated a failure to engage properly with court processes or to have proper regard to court orders. Two matters in particular, of which I am sure, should be referred to. The first is that the First and Second Defendants sought to evade service of these proceedings, as was found by Mr Justice Calver. The second is that the Defendants also made a jurisdiction challenge, at the hearing of which they simply failed to appear. By this course of conduct they delayed the summary judgment and contempt applications.

7. Furthermore, I consider that there is a significant further aggravating factor in relation to the First and Second Defendants consisting of the service of Majid 3 and their conduct after 4 October. As I have set out today, I am satisfied that Majid 3 contains deliberate falsehoods.
8. I do not consider that there are any mitigating factors of significance.
9. In my judgment only a custodial sentence is appropriate to mark the seriousness of the offending of the First, Second and Third Defendants. This will be of the shortest period which properly reflects the gravity and extent of the contempts. In the case of each of the First and Second Defendants, where there is the additional aggravation of the behaviour since 4 October the sentence which I impose will be one of twenty-four months imprisonment. In the case of the Third Defendant where there is not that additional aggravating factor, the sentence will be one of 21 months imprisonment.
10. I give an indication, albeit one which will not be binding on any judge who subsequently has to consider this, that of the period of twenty-four months in the case of the First and Second Defendants, 18 months are the punitive element, and 6 months are intended to encourage belated compliance with the orders. In the case of the Third Defendant the respective periods are 15 and 6 months.
11. In relation to those sentences of imprisonment, each of the First to Third Defendants will be released no later than halfway through the sentence imposed, namely after twelve months in the case of the First and Second Defendants and after 10 1/2 months in the case of the Third Defendant.

12. In relation to the corporate Defendants, namely the Fourth to Sixth Defendants, I consider that the appropriate sanction is an order for the confiscation of any property they may have in the jurisdiction.

13. The Defendants may appeal against these sanctions to the Court of Appeal. There is no requirement for permission in relation to the First to Third Defendants. If and to the extent that there is any possible argument that the Fourth to Sixth Defendants cannot appeal without permission, I give permission to appeal, insofar as necessary, to all the First to Sixth Defendants. I will give all those Defendants 28 days in which to serve appellant's notices.