Neutral Citation Number: [2024] EWHC 3379 (KB)

Case No: KB-2023-004010

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/12/2024

Before :

MR JUSTICE FREEDMAN

- -

Between :

MEX GROUP WORLDWIDE LIMITED	**Claimant**
- and -	
(1) STEWART OWEN FORD	
(2) BRIAN ROBERT CORMACK	
(3) COLM DENIS SMITH	
(4) MICHAEL GOLLITS	
(5) MELVILLE CONSULTING PARTNERS LIMITED	
(6) MELVILLE CONSULTANCY LIMITED	
(7) REGAL CONSULTANCY INTERNATIONAL LIMITED	
(8) CSM SECURITIES SARL	
(9) VON DER HEYDT & CO AG	
(10) VON DER HEYDT INVEST SA	
~~**(11) MEX SECURITIES SARL**~~	
(12) VIACHESLAV VOLOTOVSKIY	**Defendants**

- -
- -

Thomas Grant KC and Caley Wright (instructed by **Quillon Law LLP**) for the **Claimant**
Dr Julian Roberts (instructed by **William Sturges**) for the **Third Defendant and the Eighth Defendant**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE FREEDMAN

MR JUSTICE FREEDMAN :

INTRODUCTION

1. The Third Defendant and the Eighth Defendant ("the Defendants") have stated that they are content for the Court to determine on paper the question of permission to appeal against the order dated 13 December 2024 if the court has jurisdiction so to do. There are draft grounds of appeal they rely upon and a draft skeleton argument dated 18 December 2024 and supplanted by a revised skeleton dated 20 December 2024 (14 pages) in support prepared by Dr Julian Roberts of Counsel who appeared at the hearing on 18 November 2024.

BACKGROUND

2. The draft Judgment was distributed on 29 November 2024. It was another two weeks before the final Judgment was handed down. On 2 December 2024, the Defendants sought a longer time to consider the Judgment, that is until 6 December 2024. The parties were unable to agree a draft order and competing versions were provided. The Defendants did not make an application for permission to appeal, although they indicated that they were considering an appeal.

3. The Court said that that unless there was a specific direction in this regard, this has not been included in the draft order. No application was made for permission to appeal. The order of 13 December 2024 made no express reference to permission to appeal or to a postponement of time to make the application. The order of 13 December 2024 provided among other things that the hearing of 18 November 2024 should consider among other things "consequential matters including costs".

4. In the Judgment as handed down, there was a section XI of Consequential Matters. That was at paras. 74 - 79 and referred to again at para 81. Among other things, that section stated that the court would require assistance as to whether it should proceed to penalty or direct that the hearing of the application to set aside the WFO should first be dealt with. It also stated at para 79 that the considerations referred to in the Judgment were not comprehensive and that there may be other matters to consider.

5. On 16 December 2024, the Defendants wrote to the court for the first time asking for the court to deal with permission to appeal. In a responsive e-mail of the same date the court set out "subject to any representation by any party to the contrary" that the court believed that it did not have jurisdiction to consider an application for permission to appeal after the date of the Judgment. The Defendants responded to the effect that an appeal had been contemplated, that very little time had passed since the order and that the court still had jurisdiction and not to deal with it would be contrary to the overriding objective.

6. On 17 December 2024, the Court responded referring to the above history, and stated also that it may be arguable that the effect of the adjournment of consequential matters to 20 December 2024 in the order of 13 December 2024 was to amount to an adjournment of the hearing of 13 December 2024.

7. That was the view of HH Judge Paul Matthews sitting as a Deputy Judge of the High Court in the case of *Terna Energy Trading doo v Revolut Ltd* [2024] EWHC 1524

(Comm) at [9-11]. In that case, the Judge set a timetable for written submissions on consequential matters. He did not say that the hand down hearing was "formally adjourned". He said at para. [11]:

"I accept that I did not use any express words such as I hereby adjourn this hearing. Nevertheless, that is what I meant by setting a timetable for written submissions on consequential matters which were not restricted in any way. In my Judgment, I did adjourn the hand down hearing, although to a written procedure instead of to an oral one. Accordingly, I hold that I have jurisdiction to deal with an application by the applicant, contained in the written submissions for which I provided, for permission to appeal."

8. This case is now referred to in the commentary in the 2024 White Book as updated as follows:

"It is not necessary for a judge to use the express words "I hereby adjourn the hearing" for the hearing at which the Judgment to be appealed to be adjourned".

9. The Claimant has suggested that this was not an adjournment because there was no expression of a formal adjournment and it was already stated in the order of 18 November 2024 that consequential matters would be adjourned.

10. Each case must turn on its own facts. None of these problems would have arisen if application for permission to appeal had been made during the two weeks between 29 November 2024 and 13 December 2024. Likewise, if an order had been sought for a formal adjournment with an expression of an intention to make an application for permission to appeal, the court would have had the opportunity to consider whether such an adjournment should be granted and the terms of the adjournment.

11. Nevertheless, in the circumstances of peculiar facts of this case, I consider that the authority of *Terno Energy Trading doo v Revolut Ltd* can be applied because of an objective interpretation of the order of 13 December 2024 which deferred consequential matters to the later hearing. The term "consequential matters" was not restricted in any way. Looking at the matter on an objective interpretation, it includes the question of permission to appeal.

PERMISSION TO APPEAL

12. This Judgment is to be read alongside the Judgment of 13 December 2024.

13. The three draft grounds of appeal are as follows:

(1) the case concerns the jurisdiction to make an order in the first place and not the obligation to obey an order once made;
(2) the court could not find special circumstances if service was to circumvent the 1965 Hague Service Convention;
(3) the court misdirected itself about burden in that it is for the claimant to show that service is "not contrary to" the law of the country where the document is to be served.

(1) First ground of appeal: jurisdiction

14. It is not apparent that this argument was deployed in this way in the application, but it matters not. The Court will consider it in case it was put. The argument of the Defendants is that the High Court was not a court of competent jurisdiction in respect of the WFO and that the jurisdiction is limited to the territory of the court. It is submitted that the jurisdiction of any court outside its own territory is contingent on the consent of the authorities whose jurisdiction runs in the other territory. Without consent, a command to a person in another territory is an invasion of sovereignty. The proper vehicle for consent is the 1965 Hague Convention.

15. These submissions are rejected. The position is as stated in Gee on Commercial Injunctions 7th Ed. at para. 20-080:

> *"No one can justify contempt on the grounds that the order should never have been made, or was irregular. If an order has been made, it must be obeyed until it is set aside.: see Yuzu Hair and Beauty Ltd v Selvathiraviam [2020] EWHC 1209 (Ch) at [62]; Isaacs v Robertson [2014] AC 97. Whether the original order should have been made may be irrelevant to an appeal challenging a committal order made on breach of the order."*

16. The fact that there is an application to set aside the WFO was held by Soole J on 21 October 2024 not to be a good reason to stay the contempt application, and there was no application to set aside that order within the seven days therein provided or at all.

17. The sense in which the term *"competent court of jurisdiction"* is used as to the general jurisdiction of the High Court to make an order, and not the facts specific to the case. The High Court of England and Wales is a superior court of record and has jurisdiction to grant injunctions: see sections 19(1) and 37(1) of the Senior Courts Act 1981.

18. This is apparent from the case of *Isaacs v Robertson* above cited, referred to at para. 42 of the Judgment in this case, where it was said that the Court did not have jurisdiction to make the order such that it was a nullity. Before the passage quoted in para. 42 of the Judgment, the Privy Council (Lord Diplock) rejected a contention that disobedience to a court order could not constitute a contempt of court because the order was a nullity. This rejection was *"upon the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, must be obeyed unless and until it has been set aside by the court."*

19. In respect of a Defendant to a court order, it is not the case that there could be no breach of a court order if there is a jurisdictional challenge. The answer is contained in the passage from Gee on Commercial Injunctions above cited.

20. The references in the skeleton argument to the English court not being able to act by an alternative service order without the consent of the other country is not well based. By way of example, but at the heart of this case, this occurs in cases where the Court makes orders for alternative service despite the Hague Convention. As Marcus Smith J stated in *Nokia v Oneplus* [2022] EWHC 293 (Pat) at [31] *"Put shortly, it is due administration of justice versus comity and it is where the interests of the former outweigh those of the latter that special circumstances or exceptional circumstances exist."* Another example is in a contempt case, albeit that the instant case is about service of the WFO. In a contempt case, the public interest that court orders should be obeyed is engaged: see *Dar Al Arkan Real Estate Development Co v Al-Refai* [2015] 1

W.L.R. 135 at [42]. One of the factors in the case cited by the Defendants of *Olympic Council of Asia v Novans Jets LLP* [2022] EWHC 2910 (Comm) in deciding that there were exceptional circumstances to have service other than through the Hague Convention at para. [19(1)] per Butcher J was the public good about compliance with court orders: *"What is at issue here is a Contempt application. Such applications should if possible be dealt with expeditiously in order to ensure compliance with and uphold the authority of court orders."*

21. It follows that the first ground of appeal is rejected.

(2) Second ground of appeal: Hague Convention

22**.** The Defendants' submission is that there is nothing in the instant case which qualifies as special circumstances within the existing authorities. If it is suggested that there must be evidence of evasion of service or attempting unsuccessfully to serve through Hague Convention means (paras. 35-36 of the skeleton of the Defendants), this is not borne out by the decided cases, particularly *M v N* [2021] EWHC 360 (Comm) at paras. 8 – 9, where Foxton J reviewed the case law.

23. The Judgment found that there were special circumstances to depart from the Hague Convention at para. [54]. The delay of months for service through the State Authority in Luxembourg would undermine the purpose of the WFO. This was not a mere desire for speed. Contrary to the skeleton of the Defendants, there have been a number of prior cases where this reasoning has been adopted. Those cases include by way of example only:

(i) Cases where the proceedings have been begun with a without notice injunction application, which is to be served immediately or in short order on the respondent. As Calver J noted in *Griffin Underwriting Limited v Varouxakis* [2021] EWHC 226 (Comm), [57] : *"In my Judgment, in a case such as this where a party seeks a freezing injunction, because the court is making a number of coercive orders with the risk of committal for contempt, as well as the claimant giving an undertaking in damages, it is important that the proceedings be constituted formally as soon as possible which, in my Judgment, fully justifies an order for alternative service, despite this being a Hague Convention case."*

(ii) In *Abu Dhabi Commercial Bank PJSC v Shetty* [2020] EWHC 3423 [115], Bryan J said as follows:

"It is particularly important in the context of without notice freezing orders, and the need for urgency that matters are drawn to the attention of the Defendants at the earliest possible juncture."

(iii) The above was noted as part of a line of authorities to this effect as amounting to special or exceptional circumstances in *M v N* above.

24. It is not enough to seek to circumvent the Hague Convention for the purpose of speed alone (Marcus Smith J in *Nokia v Oneplus* supra,(cited at para. 53 of the Judgment): in that case the administration of justice prevailed over comity in order not to delay a trial. This provided special or exceptional circumstances going beyond the delay inherent in service under the Hague Convention. The instant circumstances do provide a basis for

alternative service in cases involving freezing orders: see para. 21 above. Accordingly, it was found at para. 64 of the Judgment that special or exceptional circumstances were made out in the instant case.

25. It follows that the second ground of appeal is rejected.

(3) Third ground of appeal: proof of "not contrary to" the law where the document is to be served

26. The Defendants submit that the Judgment has incorrectly at para. 58 imposed a burden on the Defendants to raise a case that service outside the Hague Convention would give rise to an illegality in Luxembourg. It is not necessary to consider para. 58 (which is about the inter partes stage) because at para 59 of the Judgment (not referred to in the skeleton argument of the Defendants), it was stated that if illegality has to be disproved by the serving party, it has been done in this case. This was fully explained in the Judgment by reference to the letter of advice from Elvinger Hoss Prussen SA ("EHP") that (a) Luxembourg law does not expressly prohibit the service of documents by electronic means because there is no Luxembourg law provision that would render service by electronic means unlawful; and (b) where service takes place as a result of the act of a foreign court internal Luxembourg law provisions will not apply to the service of documents.

27. As noted in the Judgment, there was no application before the Court to set aside the order for alternative service. The court found that service of the WFO was not illegal or ineffective: see the Judgment at paras. 56-65. Whatever the standard of proof required of the Claimant as regards proving that service was "not contrary to" to the law of Luxembourg, this was satisfied in this case.

28. The argument, first mooted in oral argument without evidence of Luxembourg law, is still repeated that the Article 227 of the Luxembourg Penal Code provides an argument about illegality. This was rejected for the reasons set out in paras. 69-70 of the Judgment which it is not necessary to repeat. This too, for the reasons set out, does not provide a basis for permission to appeal.

29. The arguments at paras. 40-41 of the Defendants' skeleton argument of 20 December 2024 are about whether the proceedings in Scotland and in this court were appropriate at all and whether proceedings ought to have been brought in Luxembourg go, if anything, to the broader issues on the application to set aside the WFO. They are not mentioned in the skeleton argument of 14 October 2024 or in the update argument of 12 November 2024. There was no evidence about this deployed in the application on 18 November 2024, including whether a worldwide freezing order could be sought in Luxembourg.

30. That was consistent with the approach of the Defendants to leave evidence and arguments for the second stage, sanctions, after the first stage of determination of whether contempts were proven: see the updating skeleton argument of 12 November 2024 in the last part of para. 8 and the opening part of para. 7 that the wider background should be considered before deciding if sanctions were appropriate. This was reflected in the definition of issues at the first stage as reflected in the Judgment at paras. 20, 22 and 23-26.

31. In a new paragraph [52] of the Defendants' skeleton of 20 December 2024 (not contained in the earlier draft), it is stated that the Claimant informed the Court that service by email was likely to be ineffective in Luxembourg and sought also service by process agents. In the event, service was by email only. If this is the case, it does not alter matters in that the order for alternative service at para. 27 of the WFO provides for service by email and/or process servers. On this wording, service was effective by email alone.

32. There was no unlawfulness for the reasons set out above. It does not follow that the unavailability of email under Luxembourg law rendered service by email unlawful. On the contrary, the Supreme Court in *Abela v Baadarani* [2013] UKSC 44 at paras. 31 – 32 stated that there would be no need for alternative service if it was a method which was permitted by the country where the document was to be served: see CPR 6.40(3). Alternative service was permitted by method which was not permitted in the foreign country unless delivery was contrary to the law of the foreign country: see *Abela* at paras. 24 and 45. Although *Abela* was not a Hague Convention case but these principles apply to this point. For the reasons in the Judgment and herein, the service in this case was not contrary to the law of Luxembourg.

33. It follows that the third ground of appeal is rejected.

(4) Conclusion on permission to appeal

34. It follows that this appeal has no real prospect of success. Further, there is no other compelling reason for the appeal to take place. On the basis that there is jurisdiction, the application for permission to appeal is rejected on all three grounds. It is now academic whether or not the jurisdiction issue was concluded in the way in which it has been, in that the Defendants are still able to issue an Appellant's Notice and to do it in time before the expiry of 21 days from the order of 13 December 2024.

STAY PENDING DETERMINATION OF PERMISSION TO APPEAL BY COURT OF APPEAL

35. In an exchange of emails on Friday 20 December 2024, the Defendants asked for the committal to be stayed until determination of the appeal. The Claimant replied that it would wish to be heard orally on this and that the proper time to consider would be the hearing of the timing of the penalty and the consequential matters which will now take place in January 2025. Any stay until determination of the appeal will be heard at the adjourned hearing, if in the meantime the Defendants have not sought a stay from the Court of Appeal (which it is free to do).

36. If an appeal is still to be pursued, there has been no application for an extension of time for lodging an appeal. If there is any reason why that should be done which is not inconsistent with the adjourned hearing taking place, this will be considered. It is envisaged at the moment that if an appeal is to be brought, the appeal notice was to be issued before the expiry of 21 days from the order of 13 December 2024.

37. The parties are asked to prepare a composite order giving effect to the above with the order for the adjournment of the consequentials and other matters to the hearing to be fixed for a date in January 2025.