

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIH (COM) 2024/0111

BETWEEN:

**[1] ELETSON CORPORATION
[2] ELETSON GAS LLC**

Claimants/Respondents

and

**[1] LEVONA HOLDINGS LTD
[2] TROPICAL ISLAND INTERNATIONAL LTD**

Defendants/Applicants

Appearances: David Allen KC with Ms. Marcia McFarlane and Mrs. Kimberly Crabbe-Adams for the Claimants/Respondents

Stephen Cogley KC with Mark Forte for the Defendants/Applicants

**2024: June 26
October 11**

Application to commit for contempt – civil contempt – Contempt of Court Act – interpretation of undertaking regarding use of information disclosed under a worldwide freezing order – whether the Respondents breached the undertaking – dispensing with service of the undertaking endorsed with a penal notice – CPR part 53

JUDGMENT

[1] **WEBSTER J [Ag.]** This is an application by the defendants/applicants, Levona Holdings Ltd and Tropical Island International Limited (“**the Applicants**”), for declarations that the claimants/respondents, Eletson Corporation and Eletson Gas LLC (“**the Respondents**”), are in

contempt of court for breaches of an undertaking that they gave to the court on 14 March 2024, and orders that they be committed to pay a fine or their assets be sequestered or such other punishment as the Court sees fit for their contempt (**“the Contempt Application”**).

Procedural background

- [2] The parties have been involved in heavily contested disputes in New York and elsewhere, including arbitration between Eletson Holdings Inc (**“Holdings Inc”**), the parent company of the Respondents, and Eletson Corporation (**“EC”**), as claimants, and the first applicant, Levona Holdings Ltd. (**“Levona”**) as defendant. The arbitration was conducted in New York by the Judicial Arbitration and Mediation Services Inc. On 29 September 2023, the arbitrator awarded over US\$36 million to the Respondents payable jointly and severally by Levona and two of its affiliates (**“the JAMS Award”**). The JAMS Award was substantially confirmed by the District Court for the Southern District of New York (**“SDNY Court”**) by an opinion dated 9 February 2024. The Honourable Judge Lewis J. Liman presides over the proceedings in the SDNY Court.
- [3] In September 2023 three creditors of Holdings Inc filed involuntary bankruptcy proceedings against Holdings Inc and two of its affiliates in the Bankruptcy Court for the Southern District of New York (**“the Bankruptcy Proceedings”**). The Honourable Judge John P. Mastando III presides over the Bankruptcy Proceedings. Judge Mastando made an order staying the enforcement of the JAMS Award and restrained the parties in the JAMS arbitration proceedings from dealing with the JAMS Award or any other property relating to the Award without the Bankruptcy Court’s permission (**“the Lift-Stay Order”**).
- [4] The Bankruptcy Court also appointed a creditors committee in the Bankruptcy Proceedings (**“the Creditors Committee”**). The Creditors Committee is a statutory body usually appointed by the Bankruptcy Court to represent the interests of the unsecured creditors. The Bankruptcy Proceedings are ongoing. The firm Dechert LLP represents the Creditors Committee.
- [5] The JAMS Award was not paid and on 11 March 2024, the Respondents applied ex parte to this Court for interim relief against the Applicants. On 14 March 2024 the Court granted a worldwide

freezing order and other interim relief against the Applicants (**“the WFO”**). The WFO contained undertakings by the Respondents including undertaking No. 8 that –

“The [Respondents] will not without the permission of the Court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in the BVI or in any other jurisdiction, other than this claim.” (**“the Undertaking”**).

- [6] The WFO was served on the Respondents by uploading it to the Electronic Litigation Portal. The WFO (with the Undertaking) was not endorsed with a penal notice as required by parts 53.3 and 53.6 of the Civil Procedure Rules (Revised Edition) 2023. I will deal with this issue below.¹ The Respondents have not challenged the service of the Contempt Application and the WFO and have appeared and contested the Contempt Application on other grounds.
- [7] The WFO was continued at an inter partes hearing on 10 April 2024 when all the parties were represented by counsel.
- [8] On 22 April 2024, following a contested hearing, the Court granted an injunction restraining the Respondents from publicising the WFO except in the SDNY Proceedings, LCIA and the Bankruptcy Proceedings. I will deal with this order below.²
- [9] There was another contested hearing on 29 May, 3 and 4 June 2024. It resulted in a variation of the WFO allowing the Applicants to borrow an additional \$5 million to meet their ongoing legal expenses. The variation reads-
- “Paragraph 17A be added to the WFO so as to read: “The [Applicants] are permitted to increase the amount borrowed under the loan facility agreement between Levona (as a borrower) and Nomis Bay Ltd and BPY Limited (as lenders), secured over the shares held by Levona in Tropical, from USD 5 million to USD 10 million for the purpose of spending on legal advice and representation in relation to the BVI proceedings and any other proceedings” (**“the Validation Order”**).

¹ See paragraphs 17-21 below

² See paragraphs 42-46 below

The Contempt Application

- [10] The Contempt Application alleges that the Respondents breached the Undertaking by disclosing to Holdings Inc information obtained as a result of the WFO. Reed Smith LLP (“**Reed Smith**”), the Respondents’ attorneys in New York, then disclosed the information in the New York proceedings. There is no allegation in the Application about how and by whom the information was provided to Holdings Inc. Adam Spears asserted in his evidence in support of the Contempt Application that the same person, Vassilis Kertsikoff, controls the Respondents and Holdings Inc, and “[T]here is no other explanation how the information came into the hands of Eletson Holdings Inc.”³ The Court was not addressed on the adequacy or otherwise of the pleading and evidence of the manner of disclosure, and the disclosure to Holdings Inc was not denied. The substance of the Respondents’ defence is that the information that was disclosed was not confidential information involuntarily disclosed by the Applicants; the disclosure did not breach the Undertaking; and even if it did, the Court impliedly permitted the disclosure to the New York Courts by its order on 22 April 2024.
- [11] Reed Smith is an international firm of lawyers with offices in New York, London, and elsewhere. They represent Holdings Inc in the SDNY and Bankruptcy proceedings in New York. Immediately following the Validation Order they sent letters to the Creditors Committee, Judge Liman and Judge Mastando concerning matters in the BVI proceedings on 4, 5 and 6 June 2024 respectively. Dechert LLP sent a similar letter to Judge Mastando on 6 June 2024 (together “**the Letters**”). The Applicants say the Letters are an attempt by the Respondents to use the information in the BVI proceedings to their advantage in the New York proceedings and that this breached the Undertaking. This formed the basis of the Contempt Application. The material parts of the Letters are:

(a) Email from Reed Smith to the Creditors Committee dated 4 June 2024:

“We ask that the Committee immediately determine of Pach Shemen and Levona as to whether Levona is taking steps in the BVI proceeding to permit it to encumber the Symi and/or Telendos by \$5mm, directly or indirectly, in addition to a prior \$5mm encumbrance that Levona effectuated since the Lift Stay Order was imposed.”

³ Spears 9 at paragraph 19

(b) Letter from Reed Smith to Judge Liman dated 5 June 2024:

“While Levona remains subject to the worldwide freezing injunction in the BVI, Levona fails to disclose that Levona is challenging that injunction, seeking to modify its terms, and in fact is actually and materially encumbering those assets”

(c) Letter from Reed Smith to Judge Mastando dated 6 June 2024:

“Our information concerning Levona’s knowing and ongoing violations of this Court’s Lift Stay Order derives in part from the proceeding in the BVI. We intend to honor the confidentiality of those proceedings. Nonetheless, Levona knows the answer to the straightforward question whether it obtained and is using a loan facility that directly or indirectly is encumbering any asset related to the Symi and/or Telendos.”⁴

(d) Letter from Dechert LLP to Judge Mastando dated 6 June 2024, exhibiting the following email addressed to the Creditors’ Committee:

“We ask that the Committee immediately determine of Pach Shemen and Levona as to whether Levona is taking steps in the BVI proceeding to permit it to encumber the Symi and/or Telendos by \$5mm, directly or indirectly, in addition to a prior \$5mm encumbrance that Levona effectuated since the Lift Stay Order was imposed.”

It was further stated in the letter from Dechert LLP that “...counsel for the Debtors called counsel for the Committee and stated that allowing the Committee access to the BVI proceedings was not relevant and instead asked that the Committee make inquiries of Levona concerning any efforts to encumber vessels generally.”

[12] There is no allegation in the Contempt Application or evidence that the Respondents issued the Letters or caused Holdings Inc, Reed Smith, or Dechert LLP to issue the Letters.

[13] The substance of the information that was disclosed to Holdings Inc can be gleaned from the Letters. It is also summarised by the Applicants in paragraph 7 of the Contempt Application –

“The information concerns the intended increase of the loan facility between Levona (as a borrower) and third party lenders against security over the shares that Levona holds in Tropical. The said information was disclosed by the Applicants in the BVI proceedings as part of the application filed on 27 May 2024 (the “**Validation Application**”) seeking variation of the WFO to allow the said increase of the facility (the “**Information**”). On 4 June 2024 the BVI Court granted the Validation Application in part, allowing Levona to increase the facility by USD 5 million.

⁴ “Symi” and “Telendos” are vessels chartered by entities in the Eletson group

- [14] The method of disclosure to Holdings Inc is in paragraph 10 of the Contempt Application where it is pleaded that the Respondents and Holdings Inc are controlled by the same person, Vassilis Kertsikoff. The Applicants did not plead the details of how and to whom the information was disclosed. I dealt with this issue in paragraph 10 above.
- [15] The Contempt Application seeks the following relief:
- (a) declarations that each of the Respondents is guilty of contempt of court;
 - (b) orders that the Respondents pay a fine for their contempt of court or that a sequestration order be made against them;
 - (c) an order that the Respondents disclose to whom and how the information obtained as a result of the WFO was disclosed; and
 - (d) an order under CPR 53.6 dispensing with service of a copy of the WFO endorsed with a penal notice.
- [16] The Respondents filed a notice of opposition opposing the Application on two basic grounds, namely, (1) they are not in contempt of court, and (2) they are not in breach of the WFO.

Dispensing with service of the Undertaking with a penal notice

- [17] There is no dispute that the WFO containing the Undertaking was served on the Respondents. However, the WFO was not endorsed with a penal notice as required by CPR rule 53.3. Rule 53.3 provides that a court may not make a committal or sequestration order unless the order is served personally on the person alleged to be in breach with a penal notice warning him of the consequences of the breach. Further, rule 53.6 provides that an undertaking must, if practicable, be in writing and must, if practicable, be served on the person giving the undertaking.
- [18] The requirement in rule 53.3 must be read with rule 55.5(3) which gives the court the power to dispense with service of a judgment or order under rules 53.3 or 53.4 “[I]f it thinks it just to do so.” Rule 53.5(2) lists the matters that the court should consider when dealing with a request to dispense

with service of an order. Rule 53.5(3) does not specifically mention dispensing with service of an undertaking, but for the reasons set out below the power to dispense with service of an order applies a fortiori to service of an undertaking, whether under rule 53.5 or the court's inherent jurisdiction.

[19] The court's primary concern in considering a request under rule 53.5 is whether the person against whom the order is to be enforced has notice of the terms of the order by:

- (a) being notified of the terms of the order by post, telephone, electronic communication, or otherwise; or
- (b) being present when the order was made.

[20] In considering the application under Rule 53.5 I make the following points which are uncontroversial:

- (i) the Undertaking was given by the Respondents, presumably on instructions from their legal practitioners;
- (ii) the Respondents were present in court, by counsel, when the Undertaking was given;
- (iii) the Respondents' legal practitioners would have drafted the WFO with the Undertaking and filed the WFO. They were responsible for endorsing the WFO with the penal notice;
- (iv) the WFO was the subject of three separate court proceedings after it was granted; and
- (v) the Respondents did not oppose the application made under Rule 53.5.

[21] Having considered these matters, I have no hesitation in dispensing with personal service of the Undertaking with a penal notice on the Respondents.

General principles relating to contempt applications

[22] The legal principles relating to applications to commit for contempt of court were not seriously disputed between the parties. The starting point is the **Contempt of Court Act ("the Act")** which deals mainly with contempts committed in the face of the court, which does not apply in this case. However, section 10 of the Act provides that-

"Nothing hereinbefore contained shall be deemed to interfere with or affect the power now possessed by the court to punish, by attachment or otherwise any person who shall disobey any order or direction of such court."

The Courts of the Eastern Caribbean have consistently held that section 10 of the Act, or its equivalent in other Eastern Caribbean countries, preserves the common law power of the court to deal with civil contempt.⁵ The allegation in this case is that the Respondents breached the Undertaking in the WFO which is a civil contempt. As such it is governed by the common law principles relating to civil contempt.

[23] Mr Stephen Cogley KC who appeared for the Applicants made the following general submissions about contempt applications (with my comments added):

- (1) The law treats the breach of an undertaking the same way it treats the breach of an order: **Biba Ltd v Stratford Investments Ltd** [1973] Ch. 281.

Comment - This is uncontroversial and the point has been applied by the courts of the Eastern Caribbean.

- (2) Contempt proceedings are quasi-criminal and the burden of proof is on the applicant to prove the allegations of contempt beyond reasonable doubt. There is no burden on the respondent who has the right to remain silent. However, the judge hearing the application can draw adverse inferences from the respondent's silence.

Comment- There is no room for adverse inferences in this case because the Respondents were not silent. They gave evidence opposing the Application through their witnesses Charles Weller, a partner in Reed Smith, and Kimberly Crabbe-Adams, BVI counsel for the Respondents in these proceedings. The Applicants did not apply to cross-examine any of the witnesses. The evidence from both sides was given by affidavit without cross-examination.

- (3) The motive of the contemnor in breaching an undertaking is irrelevant to the issue of liability and can only go to mitigation in sentencing. That is why mens rea is irrelevant.

⁵ **Pagarani & Ors v Choithram & Ors**, BVI Claim No 184 of 1997 (Georges J); **Sang Cheoi Woo v Spackman** BVIHMC 58/2021 (Wallwank J); **Cowelby Blake v Victor Williams** [1996] ECSC J1028-1 (Byron CJ); **Hoss Holding Limited v Energy Concepts International Limited** BVIHCM 2023/0051 (Webster J)

Comment - I would qualify this by saying that mens rea is required for civil contempt but it is simply knowledge of the undertaking or order. The applicant does not have to prove that the respondent intended to breach the undertaking, or that he knew that his actions would put him in breach.

[24] Mr Cogley KC relied on these general principles to illustrate his case that there is no doubt that the information from the WFO proceedings was disclosed by the Respondents to Holdings Inc and Reed Smith and thereafter to the New York Courts and the Creditors Committee. The Respondents used the information acquired from the WFO in the proceedings in New York in breach of the Undertaking. The information could only be used by the Respondents in this way if they had first obtained permission from the BVI court. They had no such permission and they are in contempt of court.

[25] Mr David Allen KC who appeared for the Respondents did not seriously dispute any of the legal points made by Mr Cogley KC. He challenged the application of the principles to the facts of the case and made the following additional points:

- (i) Due to the quasi-criminal nature of contempt proceedings the courts construe orders and undertakings strictly and to the criminal standard. He relied on the dictum of Jenkins J in **Redwing Limited v Redwing Forest Products Limited**⁶:

“I cannot say I think that the undertakings contained in the order were clearly drawn and I cannot say I regard the questions of construction involved in them as entirely easy questions, but, in my judgment, a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.”⁷

Similarly, in **Federal Bank of the Middle East Ltd v Hadkinson & Ors**⁸ Mummery LJ, giving the unanimous judgment of the Court of Appeal, said:

“Even if Mr. Hadkinson had committed breaches of the freezing order, was it correct in all the circumstances to treat him as in contempt of court? This is a question of mixed law and fact. The basic principle in the civil law of contempt is that, although there is an obligation to comply strictly with the terms of an order, the court will only

⁶ (1947) 177 LT 387

⁷ Ibid at page 390

⁸ [2000] 1 WLR 1695

punish a person for contempt of court upon adequate proof that the terms of the order are clear and unambiguous and that he has broken those terms ...”⁹

- (ii) Mr Allen KC also made the related point that if an order or undertaking is open to two interpretations and the contemnor acts in accordance with one of those interpretations he should not be held to be in contempt of court. He relied for this point on the judgment of the Court of Appeal in **Michael Wilson & Partners Ltd v John Forster Emmott**¹⁰ where Lewison LJ said:

“It has been frequently said that such an order must be "strictly construed" and that if there are two possible interpretations of it a defendant who acts in accordance with one possible interpretation should not be held to be in contempt: *Redwing Ltd v Redwing Forest Products Ltd*”.

- (iii) The Court must interpret the Undertaking in the context of the WFO to determine its meaning. It must be clear and unambiguous, and the acts of the alleged contemnor must breach its terms. Any ambiguity in the undertaking or doubt about whether the contemnor’s conduct breached it must be resolved in favour of the contemnor.

Interpretation of the Undertaking

- [26] The starting point is to determine the meaning of the Undertaking in the context of a freezing injunction. The Undertaking is the same as the standard undertaking in freezing injunctions in **Practice Direction 17 No. 4 of 2023**. An undertaking in the same terms was considered in **Gee on Commercial Injunctions**.¹¹ The commentary in **Gee** is that such an undertaking.

“[E]nables the court to retain control over information obtained under the disclosure order by not permitting the use of the information in civil or criminal proceedings other than the proceedings in which the disclosure order has been made. The purpose of this undertaking is to avoid the use of the information for an improper or collateral purpose. This undertaking applies to information disclosed under the disclosure order including the contents of any affidavits made pursuant to the order.”

- [27] Mr Allen KC drew two conclusions from the commentary: (1) the Undertaking must relate to a disclosure provision in the order, and (2) the breach applies to information disclosed under the

⁹ Ibid at 1705

¹⁰ [2015] EWCA Civ 1028

¹¹ 7th ed. 23-0236

disclosure order. It does not restrict the disclosure of information otherwise obtained in the WFO proceedings. For example, it does not apply to disclosure of the WFO and its contents to third parties such as banks or other persons holding assets for the person restrained by the WFO. The claimant is expected to make such disclosure and the usual practice is to send copies of the WFO to the relevant third parties.

[28] I would add that this type of disclosure is usually granted ex parte before or contemporaneously with the filing of the claim. It is different from disclosure under CPR part 28 which is voluntary disclosure by the parties during the course of the proceedings. The party receiving the disclosure is not required to give an undertaking regarding the use of the information.

[29] Leading counsel for the parties relied on the case of **Chedington Events Limited & others v Nihal Brake & others**¹² in support of their respective positions. The application before the judge in **Chedington** was concerned with the use of a document disclosed by the respondents under the disclosure provision in a worldwide freezing order. The freezing order contained an undertaking by the claimants in the same form as the Undertaking in this case. The claimant sought to rely on the document in the same and related proceedings because the document was relevant in all the proceedings. HHJ Paul Matthews (sitting as a judge of the High Court) reviewed the authorities relating to information obtained under a disclosure order in a freezing injunction and concluded that-
“Overall, on the facts of this case, I am in no doubt that the Guy Parties [the claimants] have failed to show that the strong public interest in preserving the confidentiality and privacy of documents disclosed by compulsion has been overcome.”

[30] Mr Cogley KC relied on **Chedington** and submitted that the case is against the Respondents because it shows that an undertaking should be widely construed. Mr Allen KC submitted to the contrary. He said that the case confirms that the undertaking not to use the information in other proceedings is deliberately framed so that information that is involuntarily disclosed (at a preliminary stage) is kept confidential and is not used for collateral purposes. He relied on the dicta of HHJ Matthews in paragraphs 40 and 41 of **Chedington** to support his position. The learned judge said at paragraph 40-

¹² [2022] EWHC 2880

“Where a party is compelled by law to supply information to another party as part of the legal process, this information may only be used by the recipient for the purposes for which it was compelled to be supplied, and not for any wider purpose”

And at paragraph 41-

“In the case of an undertaking contained in a freezing order, however, the scope and extent of the prohibition are obviously subject to the express terms of that order. Here those terms are clear. They are based on the standard form of freezing injunction to be found in Annex A to CPR Part 25. The undertaking is not without permission to use the information obtained for the purposes of any proceedings *except the proceedings in which the order was obtained*. Where the disclosure obligation is imposed on the respondent by the order simply for the purpose of “policing” the order, those words of exception are strictly speaking too wide. It may be that, in future, judges granting such relief should consider whether to make the exception narrower.”

[31] In my opinion, the dicta of HHJ Matthew supports Mr Allen’s position that the Undertaking in this case is narrow because the disclosure that it restricts is information that is involuntarily disclosed in compliance with the disclosure provisions in the WFO. This information is highly confidential and must not be used for any collateral purpose outside of the proceedings in which it was disclosed. It is no wonder that HHJ Matthews came to the conclusion that he did (see paragraph 26 above) and refused the application to use the information compulsorily disclosed by the defendants in other proceedings. The case does not suggest that the standard undertaking should be widely construed as suggested by Mr Cogley KC. If anything, the learned judge suggested obiter that where the information is disclosed to police a freezing order the undertaking should be narrowed to reflect that factual position.¹³ That is different from saying that an undertaking should be widely construed.

[32] Applying the principles to this case, if the information that was disclosed to Holdings Inc was a part of the information disclosed by the Applicants in compliance with the disclosure provisions in the WFO it would be caught by the Undertaking and could not have been disclosed without the Court’s permission (as in **Chedington**). On the other hand, if the information was not a part of the disclosure obligation in the WFO it is not caught by the Undertaking and the Respondents could disclose it without breaching the Undertaking. To determine this issue I must review the information that was disclosed by the Applicants in the context of the provisions of the WFO and the proceedings in the case.

¹³ Ibid note 12 at paragraph 41 – see paragraph 30 above

The disclosure provisions in the WFO

- [33] The general disclosure provisions in the WFO are at paragraphs 12 - 15 of the WFO. The material paragraphs for this case are paragraphs 12 and 14, which deal with what was to be disclosed.

Paragraph 12 – “Unless paragraph 13 applies, Levona and Tropical Island must within 7 days of service of this Order, and to the best of their ability, inform the [Respondents’] legal representatives of all assets worldwide exceeding US\$10,000 whether in their own names or not and whether solely or jointly owned, providing the value, location and details of all such assets”

Paragraph 14 – “For the avoidance of doubt such obligation entails informing the [Respondents’] legal representatives of all its assets held whether directly or indirectly, and the location, of such assets including bank accounts and receivables.

- [34] Paragraph 16 under the heading “Exceptions to this Order” is also relevant. The paragraph reads
“This Order does not prohibit the [Applicants] from spending a reasonable sum on legal advice and representation. Before spending any money the [Applicants] must tell the [Respondents’] legal representatives how much and where the money is to come from.”

- [35] In a nutshell, the Applicants were required to disclose full details of their worldwide assets exceeding \$10,000.00 in value, and amounts spent on legal advice and representation. Before spending any amount on the latter they had to inform the Respondents’ legal representatives of the amounts to be spent and the source of the money to make the payments.

- [36] The substance of the information that the Respondents disclosed to Holdings Inc is set out in the extracts from the Letters to the US Courts and the Creditors Committee detailed in paragraph 11 above. The Respondents’ first submission on the substance of what was disclosed to the US Courts is that the letters were sent to update the Courts on the developments in the BVI, and by so doing to promote the administration of justice. I will not elaborate on this point because it does not have merit. Court orders and undertakings are meant to be obeyed. If they are not obeyed the motive, intention, or purpose of the person in breach, no matter how noble or conscientious, does not excuse the breach. Such conduct only goes to mitigation.¹⁴

¹⁴**Attorney General v Crosland** [2012] 4 WLR 103

- [37] The disclosed information, as gleaned from the Letters, concerns the intended increase of the loan facility between Levona (as a borrower) and third party lenders against security over the shares that Levona holds in Tropical. The said information was disclosed by the Applicants in the BVI proceedings as part of the Validation Application which was filed on 27 May 2024 seeking a variation of the WFO to allow the increase of the loan facility. On 4 June 2024, the BVI Court granted the Validation Application in part by inserting a new paragraph as paragraph 17A¹⁵ which allows Levona to increase the facility by US\$5 million. This is not information that the Applicants were required to disclose under the disclosure provisions in the WFO. It relates to the Applicants' separate application to get the court's permission to borrow additional funds to finance their legal expenses.
- [38] The Applicants submit that the disclosed information came to the Respondents' notice "as a result of the WFO", and as such it is caught by the restriction imposed by the Undertaking. That is not sufficient. The information must have been disclosed as a result of the mandatory disclosure obligations in the WFO, not just the terms of the WFO.

Ambiguity in the Undertaking

- [39] An alternative way of looking at the case is that the Undertaking prohibits either all disclosures as a result of the WFO, as argued by the Applicants, or only involuntary disclosures pursuant to the disclosure provisions (as I have found). This, in my opinion, creates an ambiguity. It is common ground that this is a quasi-criminal proceeding and the Applicants must prove their case beyond reasonable doubt. If there are two possible interpretations of the Undertaking and the Respondents acted in accordance with one of those interpretations, they should not be found to be in contempt. Any doubt or ambiguity in the meaning of the Undertaking, and whether the Respondents breached it, must be resolved in favour of the Respondents.¹⁶
- [40] Applying this principle, the Undertaking restricts only information that is involuntarily disclosed by the Applicants in compliance with the disclosure obligations in the WFO (as I have found), or it restricts all information that was disclosed by the Applicants as a result of the WFO (as contended by the

¹⁵ Paragraph 17A is set out in paragraph 9 above

¹⁶ See paragraph 24 above

Applicants). On this hypothesis, there would be ambiguity in the meaning of the Undertaking and the ambiguity must be resolved in favour of the Respondents. I have found that there is no ambiguity in the meaning of the Undertaking. It only applies to information disclosed by the Applicants to comply with the disclosure obligations in the WFO. If there is ambiguity in the meaning of the Undertaking, I would resolve it in favour of the Respondents and come to the same conclusion.

- [41] I am also satisfied so as to feel sure that the information the Respondents shared with Holdings Inc was not disclosed by Levona to comply with its disclosure obligations in the WFO. The information was disclosed as a part of Levona's application for the Validation Order. Therefore, the information that was disclosed to Holdings Inc did not breach the Undertaking and the Respondents are not in contempt of court.

The 22 April 2024 Order

- [42] On 22 April 2024, the Court heard a heavily contested application by the Applicants for interim relief pending the hearing of their application to set aside the WFO. The Court's order included a finding that –

“The Respondents [the Eletson parties] and their agents and associates shall not publicize the continuance of the WFO as made, as varied and/or as continued or its terms or content in any way without the express prior written consent of the Applicants save for in the Bankruptcy, SDNY, LCIA proceedings or as otherwise required to comply with any order of any competent authority, Court or tribunal ...” (Emphasis added)

- [43] There are three elements to this finding:
- (i) It restrains the Respondents, their agents, and associates, from publicising the continuation of the WFO, its terms or contents, without the Applicants' consent.
 - (ii) The WFO, its terms or conditions can be disclosed without the Applicants' consent in the Bankruptcy Proceedings, the SDNY Proceedings and the LCIA arbitration (in London).
 - (iii) The WFO, its terms or conditions, can be disclosed without the Applicants' consent if it is otherwise required to comply with an order of a competent authority, Court, or tribunal.
- [44] The Applicants submitted in their written submissions that the Respondents cannot rely on the exceptions in the Order because (a) they are not the persons who disclosed information in the New

York cases, and (b) they were not required to comply with an order of any competent court or authority to disclose the information.

[45] Taking the first point, the Applicants' case is that the Respondents cannot take advantage of the exception in the Order because it only applies to the person or persons who disclosed the information in the New York proceedings, in this case, Reed Smith and Dechert LLP. I agree with this submission. The case against the Respondents is that they disclosed the information to their parent company, Holdings Inc. There is no evidence or suggestion that the Respondents disclosed information in the US proceedings. The first part of the exception in the 22 April 2024 Order does not apply to the Respondents.

[46] The second part of the exception in the Order also does not apply to the Respondents. The disclosure to Holdings Inc was not made because of or in response to an order of a competent court or authority.

Conclusion

[47] The Applicants have failed to discharge the burden of proving that the Respondents are in contempt of court by disclosing information from the WFO to Holdings Inc in breach of the Undertaking. The Undertaking restricts information disclosed involuntarily pursuant to the disclosure orders in the WFO. The information that the Respondents disclosed was not information that the Applicants disclosed pursuant to the disclosure orders in the WFO. The Applicants' disclosure was to support their application for a variation of the WFO to allow them to obtain additional loan financing to continue funding their legal expenses. The Undertaking does not restrain the disclosure of this type of information. Therefore, the Applicants have not proved to the required standard that the Respondents breached the Undertaking and are in contempt of court

Order

- [48] The application to declare the Respondents in contempt of court is dismissed with costs to the Respondents to be assessed if not agreed within 21 days.
- [49] The Court is grateful to leading counsel and those assisting them for their helpful written and oral submissions.

Paul Webster
High Court Judge [Ag.]

By the Court

Registrar