

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

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

CLAIM NO. BVIHC (COM) 2023/0051

BETWEEN:

By way of Claim

HOSS HOLDING LIMITED

Claimant / Respondent

-and-

ENERGY CONCEPTS INTERNATIONAL LIMITED

Defendant / Applicant

And by way of Counterclaim

ENERGY CONCEPTS INTERNATIONAL LIMITED

Claimant by way of Counterclaim / Applicant

-and-

[1] HOSS HOLDINGS LIMITED

[2] JACOB AGAM

[3] RUTH AGAM

[4] PIO VALLENTA

[5] VERTICAL GROUP HOLDING LIMITED

Defendants by way of Counterclaim / Respondents

[1] PAUL FAVAHHELMUT GOERLING (ALSO KNOWN AS HELMUT GÖRLING)

Defendants by way of Counterclaim

Appearances: Andrew McLeod for the Defendant/Applicant
No appearance by the Respondents

2024: 10 July
19 September

JUDGMENT – SENTENCING

- [1] **WEBSTER J [Ag.]** On 1 May 2024, the Court heard an application by Energy Concepts International Ltd., the claimant by way of counterclaim (“**ECI**”), charging the 1st to 5th respondents (together “**the Respondents**”) with 32 counts of contempt of court for breaches of orders made by the Court on 6 October 2023, 14 December 2023 and 11 January 2024 (“**the Contempt Application**”). The Court delivered a written judgment on 7 June 2024 which found each Respondent guilty of multiple counts of contempt of court. The Court adjourned the Contempt Application for sentencing to a later date. The sentencing hearing was held on 10 July 2024. This is the Court’s decision on sentence.

Background

- [2] The background to the Contempt Application is set out in paragraphs 2 to 22 of the judgment delivered on 7 June 2024 (“**the Liability Judgment**”). I will repeat only those parts of the background that are essential for a clear understanding of the sentencing procedure.
- [3] The underlying claim in these proceedings arises out of divorce proceedings between Alexandra Linda Dorrenstein (“**ALD**”), a director of ECI, and Jacob Agam (“**Mr. Agam**”), her estranged husband. ALD was at all material times either the legal or beneficial owner of the shares in ECI. ECI is the parent company of ADA Property Enterprises Pty Limited (“**ADA Property**”). ADA Property owns a penthouse apartment in Johannesburg, South Africa that is occupied by ALD and her two daughters.
- [4] Mr. Agam is the sole director and representative of Hoss Holding Limited (“**Hoss**”), a Maltese Company. Hoss commenced the proceedings in the BVI claiming that ECI holds the shares in ADA on trust for Hoss based on disputed documents (“**the Documents**”), and for an order that ECI transfer the ADA shares to Hoss. ECI counterclaimed for a declaration that it is the sole legal and

beneficial owner of the ADA shares (and by extension the apartment), and sought an order to inspect the Documents. Following Hoss' failure to allow inspection of the Documents ECI obtained an inspection order from the BVI court on 21 June 2023. This did not produce the desired result and Hoss continued to withhold inspection of the Documents.

- [5] On 19 September 2023, Hoss filed a notice of discontinuance of the BVI claim and the following day commenced fresh proceedings against ECI in Malta seeking substantially the same relief as in the BVI claim ("**the Malta Action**"). This prompted ECI to apply for an anti-suit injunction restraining Hoss from pursuing the Maltese Action ("**the ASI**"). The ASI was granted on 5 October 2023 and continued at the inter partes hearing on 6 October 2023 ("**the 6 October Order**").
- [6] On 12 December 2023, the Court continued the ASI that it had previously granted and extended it to the 2nd to 5th Respondents (Jacob Agam, Ruth Agam (Jacob's sister), Dr. Pio Valletta and Vertical Group Holding Limited) who had all become involved in the Maltese Action ("**the December Order**"). ECI also applied in the Maltese Action for a stay of the Action. Hoss opposed the stay application.
- [7] The return date for the December order was 11 January 2024. The Respondents did not appear at the hearing and the Court continued the December Order ("**the January Order**") which, together with the 6 October Order and the December Order are referred to together in this judgment as "**the Orders**"). The Respondents did not appeal against any of the Orders.
- [8] The Court found in the Liability Judgment that wherever service of orders or other documents was required such service was complied with by the BVI lawyers for ECI or by the Court itself. This includes service on all the Respondents of the Contempt Application and notice of the hearing of the Application. The Respondents did not appear at the hearing on 1 May 2024. The Court proceeded to hear the Application and make findings of contempt in the absence of the Respondents.
- [9] The Respondents in their various roles were found guilty of the following breaches of the Orders:
- (a) commencing and continuing to pursue the claim in the Malta Action in breach of the 6 October Order and the December Order;

- (b) opposing ECI's application for a stay of the Malta Action in breach of the December Order; and
- (c) failing to make the Documents available for inspection by representatives of ECI in breach of the 6 October Order.

Full details of the charges against the Respondents, the roles that they played in breaching the Orders, and the findings of contempt are set out in the Liability Judgment.

Sentencing proceedings in the absence of the Respondents

[10] The Liability Judgment, the order made on the Judgment, and notice of the date and time of the sentencing hearing were served on the Respondents and the Court is satisfied by the evidence that there was proper service of these documents. The Respondents did not appear at the hearing. Learned counsel for ECI, Andrew McLeod, urged the Court to proceed with the sentencing notwithstanding the absence of the Respondents. He reminded the Court that apart from the inter partes hearing on 6 October when Hoss was represented by counsel, there has been no appearance of or representation by the Respondents in these proceedings, and they have shown a complete disregard for the orders made by this Court. He took the Court to **Sang Cheol Woo v Charles C Spackman aka Yoo Choi**,¹ the leading case in the BVI on the issue of whether a court hearing a contempt application should proceed in the absence of the respondents. He relied on paragraph 114 of the judgment of Wallbank J which sets out the matters that a court should consider before deciding to proceed with the contempt application in the absence of the respondent. Paragraph 114 reads:

"In considering whether to grant a committal order against the respondent who did not appear at the hearing, Roth J created the following checklist of factors to which the court should have regard:

- (1) Whether the respondent has been served with the relevant documents including the notice of hearing;
- (2) Whether the respondent has had sufficient notice to enable him to prepare for the hearing;
- (3) Whether any reason has been advanced for the respondent's non-appearance;

¹ BVIHCM 58/2019

- (4) Whether by reference to the nature of the circumstances of his behaviour he has waived his right to be present;
- (5) Whether an adjournment would be likely to secure the respondent's attendance;
- (6) The extent of the disadvantage to him of not being able to present his account of events;
- (7) Whether undue prejudice would be caused to the applicant by any delay;
- (8) Whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of the respondent; and
- (9) Whether the Overriding Objective to deal with cases justly, expeditiously and fairly would be fulfilled if the application was heard in the absence of the defendant.

[11] Mr. McLeod submitted that all the conditions in **Spackman** were satisfied having regard to the Orders and the Respondents' conduct. The court accepted Mr. McLeod's submissions and decided to proceed with the sentencing hearing, finding that the Respondents were served with a notice of the hearing and chose not to attend (as they have done in other hearings) and that there was nothing to be gained by an adjournment. Further, ECI was being prejudiced by the failure of the Respondents to comply with the Orders and the Court should proceed with the sentencing.

Principles of sentencing for contempt

[12] Paragraph 8 of Mr. McLeod's skeleton argument helpfully sets out the three main objects of sentencing for contempt for breaches of court orders:

- (i) Punishment – breach of the court's order amounts to an attack on the administration of justice that should attract punitive consequences.
- (ii) Deterrence - the sanction imposed following a finding of contempt should seek to deter the respondents and others considering a similar course of conduct.
- (iii) Coercion - where the breach of the court's order is continuing the sanction imposed should be such as to encourage the contemnor to comply with the order where compliance remains possible.

- [13] The options that are available to the Court to sanction breaches of its orders are a fine, committal, and sequestration.
- [14] The conduct of Hoss in not allowing inspection of the Documents on which they were relying in the BVI claim and the Malta Action is a sort of conduct one sometimes sees in heavily contested civil litigation causing the requesting party to apply to the Court for a disclosure or inspection order. Once the order is made the position of the withholding party changes dramatically. If there is no appeal the withholding party is bound to comply with the order or face the possibility of being in contempt of court. Non-compliance with or breach of a court order is treated as a very serious matter by the Courts.
- [15] The seriousness of a breach of a court order can be seen in the dictum of the Court of Appeal (per Hamblen and Holroyde LLJ) in the **Financial Conduct Authority v McKendrick**²:
- "Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the Solodchenko case (see para 31 above) as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of the sentence which may often be appropriate. Mr Underwood [counsel for the contemnor] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."
- [16] The seriousness of the breaches by the Respondents is highlighted by the facts that:
- (a) Self-evidently, they are breaches of court orders;
 - (b) they were committed knowingly by the Respondents;
 - (c) they are continuing breaches committed over several months and continuing;
 - (d) the Respondents are unapologetic and have not shown any remorse;

² [2019] 4 WLR 65 at paragraph 40

- (e) two of the Respondents, Mr. Agam and Dr. Valletta, have stated in correspondence that the BVI proceedings were discontinued, the documents relating to the Application were not properly served, and the Orders are unenforceable outside the BVI.
- (f) Mr. Agam has stated in correspondence that the BVI Court does not have the power to injunct the Respondents from pursuing legal proceedings in Europe and it is acting beyond its jurisdiction.

[17] I summed up the Court's view of the Respondents' conduct in paragraph 49 of the Liability Judgment as follows –

“My general finding is that the Respondents (as stated above) were properly served with the orders and, with a full appreciation of the purpose of the Orders, choose to disregard and disobey the terms of the Orders. They have shown no regard for the Orders and by their individual and collective conduct have made it clear that they do not intend to comply with the Orders.”

I maintain this view and state that the Respondents' conduct should be met with the strongest condemnation up to and including committal to reinforce the three principles of sentencing set out in paragraph 12 above.

[18] A breach of an anti-suit injunction, like a breach of a freezing order, is treated as a serious breach justifying a custodial sentence. In **Dell Emerging Markets (Emea) Limited and others v Systems Equipment Communication Services Sal and others**³ Henshaw J compared breaches of a freezing order and breaches of an anti-suit injunction and continued on page 4 –

“Contemptuous breaches of anti-suit injunctions are to be treated for sentencing purposes as analogous to breaches of freezing injunctions. In both cases a breach of the court's order is a serious attack on the administration.”

And later on the same page –

“As the Court of Appeal emphasised in **McKendrick** the inherent seriousness of a breach of a freezing order is such that it is likely that nothing short of a prison sentence will be sufficient to punish it.”

³ [2020] EWHC 1384

- [19] Another factor that strongly favours a custodial sentence is that all the breaches of the Orders committed by the Respondents are continuing breaches and the Respondents have refused to take any steps to purge their content by withdrawing the Malta Action and making the Documents available for inspection by ECI. In **Hu Lan v Sundale International Limited**⁴ Jack J had to deal with a similar situation in this Court where the contemnor started proceedings in China in breach of an anti-suit injunction issued by the BVI court. Following her conviction for contempt the defendant continued to refuse to withdraw the proceedings in China. Jack J found that the Court had a common law power to imprison the contemnor indefinitely for her continuing breach of the ASI. The learned judge ordered the contemnor to be imprisoned indefinitely with the right to apply to the Court to purge her contempt at which time the Court would review whether any further incarceration was necessary or justified. The fact that the contemnor was overseas and could not be brought to the BVI to serve the custodial sentence did not deter the learned judge from making the order that he did. This is in keeping with the sentencing principle that deterrence is an important consideration in dealing with breaches of the Court's orders.
- [20] In **Spackman**⁵ Wallbank J noted that the fact that the contemnors were overseas did not preclude the court from making a committal order, nor would such an order be in vain because of the strong public policy of ensuring respect for the administration of justice.⁶
- [21] I am satisfied that this is an appropriate case for the imposition of custodial sentences on the Respondents and I will deal with their cases individually to see which form of punishment, fine or imprisonment, should be imposed.

The sentences

- [22] Mr. Agam is the sole director and driving force behind Hoss. It is apparent from the totality of the evidence that the other respondents follow his lead. He is also the person who in correspondence has been heavily critical of the BVI court system and its orders. He has not taken any steps to disclose the Documents or withdraw the Malta Action. In fact, he has opposed ECI's attempt to stay

⁴ BVIHC(COM) 2017/0172

⁵ Supra note 1

⁶ Para 110 Ibid at paragraph 110

the Action. He has deliberately and without apology flouted the Orders and it is clear that he does not intend to comply with any of them. In the circumstances, the Court has no option but to impose a custodial sentence on him.

[23] I note that in England there is a statutory time limit of two years on custodial sentences for contempt of court.⁷ There is no time limit on the length of a custodial sentence for contempt in the BVI. The two-year limit in England is not binding on this Court but I will take it into consideration and order a sentence on Mr. Agam of two years in custody at HM Prisons in Tortola. Mr. Agam can purge his contempt by disclosing the Documents and withdrawing the Malta Action. If he does these things the Court may consider setting aside the custodial sentence. But that is a matter for another day and another court. My order is simply that Jacob Agam be imprisoned for two years.

[24] I appreciate that Mr. Agam does not reside in the Territory and the sentence will not take effect unless he submits himself to the jurisdiction. However, as stated above, the sentence preserves the dignity of the administration of justice in the Territory and it sends a message to Mr. Agam and other persons that court orders must be obeyed.

[25] Dr. Valletta has also played a leading role in the acts of contempt. He has custody of the Documents through his law firm in Malta and continues to withhold them from inspection. He has also prepared documents that were used by Ms. Agam and Vertical Malta in the Malta Action, and he appears to be the legal representative for the claimants in those proceedings. He also engaged in correspondence disputing the validity of the Orders.

[26] Dr. Valleta is sentenced to one year in custody at HM Prisons in Tortola. Like Mr. Agam, he has the power to purge his contempt and possibly avoid the custodial sentence.

[27] Ms. Agam played a lesser role in the breaches of the Orders and appears to have been acting on her brother's instructions and in accordance with his wishes. This is a mitigating factor. In considering a fine I note that I do not have any direct evidence of Ms. Agam's means. However, I infer that she must have some means by her continued participation in the proceedings in Malta, whether from her

⁷ Contempt of Court Act 1981 section 14(1)

own means or otherwise. Ms. Agam is sentenced to pay a fine of \$50,000.00 in three months from the date of this judgment. Failure to pay within the stipulated time will result in a custodial sentence of 3 months at HM Prisons in Tortola.

[28] Hoss is a corporate entity and cannot be imprisoned. It played a leading role in the breaches of the Orders. It has retained lawyers here and in Malta. It obviously has means. Hoss is sentenced to pay a fine of \$100,000.00 in three months from the date of this judgment.

[29] Vertical Malta replaced Hoss as the claimant in the Malta Action and has continued to breach the anti-suit injunction by pursuing the Action. I infer that it has means. Vertical Malta is sentenced to pay a fine of \$50,000.00 in three months from the date of this judgment.

[30] I have considered suspending the sentences but I will not do so because the Respondents have shown a total disregard for this Court and its orders and a suspension of the sentences will not serve any useful purpose.

Disposal

[31] The Court, by the Liability Judgment, found each of the Respondents in contempt of the Court's Orders in the circumstances outlined in the Liability Judgment and this judgment. I make the following orders as punishment:

- (1) The 2nd Respondent, Jacob Agam, stands committed to His Majesty's Prison at Balsam Ghut, Tortola, for a period of two years for his contempt of court.
- (2) The 4th Respondent, Dr. Pio Valletta, stands committed to His Majesty's Prison at Balsam Ghut, Tortola, for a period of one year for his contempt of court.
- (3) The 3rd Respondent, Ruth Agam, is sentenced to pay a fine of \$50,000.00 in three months from the date of this judgment, in default the 3rd Respondent shall be committed to His Majesty's Prison at Balsam Ghut, Tortola, for a period of 3 months.

- (4) The 1st Respondent, Hoss Holding Limited, is sentenced to pay a fine of \$100,000.00 in three months from the date of this judgment. In default, the Defendant/Applicant, Energy Concepts International Limited, is at liberty to commence sequestration proceedings against the 1st Respondent.
- (5) The 5th Respondent, Vertical Group Holding Limited, is sentenced to pay a fine of \$50,000.00 in three months from the date of this judgment. In default, the Defendant/Applicant, Energy Concepts International Limited, is at liberty to commence sequestration proceedings against the 5th Respondent.
- (6) The Respondents shall not be heard in these proceedings until they purge their contempt to the satisfaction of the Court.
- (7) Costs of the sentencing proceedings to the Defendant/Applicant to be assessed if not agreed within 21 days and paid by the Respondents jointly and severally.

Paul Webster
High Court Judge [Ag.]

By the Court

Registrar