

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

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

CLAIM NO. BVIHCM 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 FAVAHMUT GOERLING (ALSO KNOWN AS
HELMUT GÖRLING)**

Defendants by way of Counterclaim

Appearances:

Andrew McLeod with Murray Laing of Walkers for the
Defendant/Applicant
No appearance by the Respondents

2024: May 1;
June 7.

Contempt of court - civil contempt - aiding and abetting - burden and standard of proof -
section 10 Contempt of Court Act - CPR 2023 part 53.

JUDGMENT

[1] **WEBSTER J [Ag.]** On 26 April 2024 the Defendant/Applicant, Energy Concepts International Limited ("**ECI**"), applied to this court for declaratory and other relief that the 1st to 5th Respondents be found to be in contempt of court by breaching in various ways orders of this Court made on 6 October 2023 ("**the 6 October order**"), 14 December 2023 ("**the 14 December 2023 Order**") and the 11 January 2024 r ("**the 11 January 2024 order**"). The application was made under section 10 of the Contempt of Court Act, CAP 14, rules 53.3, 53.4, 53.5, 53.7 and 53.9 of the Eastern Caribbean Supreme Court Civil Procedure Rules ("**CPR**"), and/or the common law, and/or the inherent jurisdiction of the Court ("**the Application**"). An outline of the factual and procedural background is essential to understand the Application.

Background

[2] The claim in these proceedings arises out of divorce proceedings between Alexandra Linda Dorrenstein ("**Alexandra**")¹, a director of ECI, and Jacob Agam ("**Jacob**"), the estranged husband of Alexandra and the sole director

¹ References to the parties by their first names in this judgment is for convenience and clarity only and no disrespect is meant.

and representative of the Claimant, Hoss Holding Limited ("**Hoss**"), a Maltese Company. During the marriage Jacob purchased an apartment in Johannesburg as a gift for Alexandra ("**the Property**"). The Property was acquired in the name of ADA Property Enterprises Pty Limited ("**ADA**"), a subsidiary of ECI. The shares in ADA were held by Vertical Financial Holdings (formerly Clean Air Limited), an entity formed under the laws of Lichtenstein, in trust for ECI. Alexandra was at all material times either the legal or beneficial owner of the shares in ECI.

[3] In October 2022 Jacob's sister, Ruth Agam ("**Ruth**"), acting with Mr. Paul Fava, a business associate of Jacob ("**Mr Fava**"), and Vertical Group Holdings Limited, a Maltese Company ("**Vertical Malta**"), attempted to seize control of ADA and ECI by calling a meeting of the shareholders of ADA with the intention of removing Alexandra as a director and otherwise taking control of the company. As a result Alexandra caused ADA and ECI to apply to the High Court in South Africa on an urgent basis for an injunction to prevent Jacob, Ruth, Mr. Fava and Vertical Malta from calling and/or holding the threatened meeting of the shareholders ADA. The defendants to the claim relied on two documents in the South African proceedings:

- (1) a beneficiary agreement dated 3 May 2011 which purported to cancel the share in Alexandra's name or held on her behalf in ECIL if Jacob and Alexandra ceased to be married to each other, or cohabit, or either one filed divorce proceedings ("**the Beneficiary Rights Agreement**"); and
- (2) an agreement dated 18 May 2011 signed by Jacob by which ECI purported to give Ruth and Vertical Malta an irrevocable power of attorney to take steps in relation to the assets of ECI ("**the IPOA Agreement**"). On 15 October 2022 Ruth and Vertical Malta purported to assign the benefit of the agreements to Hoss. The Beneficiary Rights Agreement, the IPOA Agreement and the assignment are referred to together in this judgment as "**the Documents**".

- [4] On the 4 November 2022 the High Court in South Africa granted an injunction restraining the defendants from proceeding with the meeting of the directors or shareholders of ADA and/or from holding themselves out as authorised representatives of ADA.
- [5] Having failed to gain control of ADA and the Property in South Africa Jacob turned his attention to the Virgin Islands where ECI is incorporated and domiciled. On 16 March 2023 Hoss initiated these proceedings by filing a claim seeking, among other things, a declaration that Alexandra holds the shares in ADA and the Property in trust for Hoss, and for orders that Alexandra transfer the shares in ADA to Hoss.
- [6] ECI filed a defence and counterclaim. The counterclaim joined Jacob, Dr Pio Valetta, a Maltese lawyer for Jacob ("**Dr Valletta**"), Vertical Malta, Mr Fava and Helmut Goerling as defendants by way of counterclaim. The counterclaim sought declarations that ECI is the sole legal and beneficial owner of the shares in ADA and that the Documents are void and of no effect. The counterclaim also sought an injunction prohibiting the defendants to the counterclaim from commencing, pursuing, prosecuting, continuing, taking any steps otherwise participating in any proceedings in any jurisdiction in respect of or connected with the ADA shares and/or the Property.
- [7] Alexandra had serious concerns about the authenticity of the Documents and on 9 May 2023 ECI served a notice to inspect under CPR 28.16 requiring Hoss to make the original forms of the Documents available for inspection within seven days. Hoss did not make the Documents available and on 21 June 2023 this Court made an inspection order requiring Hoss to make the Documents in their original form available for inspection at the offices of Hoss' Maltese lawyers, Messrs. Farruga, Gatt & Falzon ("**FGF**"). Dr Valletta is a partner in FGF.
- [8] On 25 August 2023 Hoss agreed that the inspection could occur on 9 - 10 October 2023. However, Hoss did not comply with the inspection order on

9 – 10 October 2023, or at all. Instead, it took the following steps in relation to the BVI proceedings:

- (1) on 18 September 2023 it terminated its relationship with its BVI legal practitioners, Sterlington;
- (2) on 19th September 2023 it filed a notice of discontinuance of the BVI claim; and
- (3) on 20th September 2023 it filed fresh proceedings against ECI in Malta for substantially the same relief as in the BVI claim, also relying on the Documents (“the Maltese Action”).

[9] In light of the developments summarised in the preceding paragraph, ECI applied *ex parte* and on an urgent basis in these proceedings for a temporary anti-suit injunction restraining Hoss from pursuing, prosecuting, continuing or taking any steps in or otherwise participating in the Maltese Action, or from commencing or taking any steps in any other proceeding concerning the shares in ADA (“**the ASI**”). The application was granted initially on the papers on 5 October 2023 with a return date on 6 October 2023. The ASI was served on Hoss. Late in the day on 5 October 2023 Hoss’ new legal practitioners, Ogier BVI (“**Ogier**”), filed and served a notice of acting on behalf of Hoss and a second notice of discontinuance of the proceedings. Learned counsel from Ogier appeared for Hoss at the return date hearing on 6 October and opposed the continuation of the ASI. Mangatal J heard both sides and made orders that:

- (1) the two notices of discontinuance filed by Hoss be set aside and confirmed that the BVI proceedings had not been brought to an end;
- (2) continued the ASI;
- (3) required Hoss to make the Documents in their original form available for inspection by ECI’s representatives at the offices of FGF in Malta between 8:30 am and 4:00 pm on the 8 and 9 October 2023, and to permit ECI’s representatives to take photographs, images or other copies of the original forms of the Documents and make a room with natural light and a colour

photocopier available to ECI's representatives for the duration of the inspection. This is the 6 October Order.

- [10] A penal notice in the usual form was endorsed on the 6 October Order expressly warning Hoss that any failure to comply with the terms of the Order could result in a finding of contempt of court ("**the Penal Notice**") and warning Jacob, Dr. Goerling and Dr. Valletta (by name) that they could be fined or imprisoned if they knowingly did anything that helps, causes or permits Hoss to breach the terms of the Order.
- [11] There was no appeal against the 6 October Order.
- [12] Hoss' legal representative at the inter partes hearing on 6 October 2023, Ogier, received a copy of the 6 October Order directly from the Court on the same date. In addition, ECI's legal representative, Walkers BVI ("**Walkers**"), arranged for a copy of the 6 October Order to be served by hand on Ogier on Monday 9 October 2023. Upon receiving sealed copies of the 5 October Order and 6 October Order from the Court on 12 October 2023, Walkers served copies of both Orders on Hoss by hand the same date.
- [13] On 6 October 2023 at 16:24 Walkers sent the 6 October Order to Jacob, Dr Valletta and Dr Goerling by email. Jacob acknowledged receipt of the 6 October Order and by email on 8 October 2023 to Walkers said that he could not open the attachments. Further, that he disputed service of the Order and the BVI court's jurisdiction and referred to the transfer of rights under the Documents with the result that possession of the Documents had reverted to Ruth and Vertical Malta as of 7 October 2023. He also said that ECI was no longer entitled to inspect the Documents.
- [14] Walkers also arranged for a copy of the 6 October Order to be delivered by hand to Dr Valletta at FGF's offices in Malta on 6 October 2023. ECI had not been able to identify Jacob's ordinary place of residence and was unable to effect personal service of the 6 October Order on him.

- [15] Walkers also sent copies of the 6 October Order to Jacob, Dr Valletta, Mr. Fava, and lawyers who have acted for and/or continue to act for Jacob, Hoss or Ruth in Switzerland, Israel, Luxembourg and South Africa. Sealed copies of the 5 October Order and 6 October Order were sent by email to Jacob, Ruth, Dr. Valletta, Dr Goerling and Mr Fava on 12 October 2023.
- [16] Unknown to ECI at the time, a “Note” had been filed by Hoss on 27 October 2023 in the Maltese Action purporting to substitute Vertical Malta and Ruth as plaintiffs in place of itself (“**the Note**”). The Note was prepared by FGF and signed by Dr Valletta. A resolution signed by Jacob on behalf of Vertical Malta and a power of attorney signed by Ruth authorising Dr Valletta to act on her behalf in the Maltese Action were annexed to the Note. Alexandra deposed in her third affidavit filed on 21 October 2023 that the use of the Note to substitute Hoss with Ruth and Vertical Malta as the claimants in the Maltese Action was a tactic by the Agam parties to avoid the consequences of the 6 October Order.
- [17] On 12 December 2023, ECI applied *ex parte* to the BVI Court for further anti-suit relief as against Hoss, Jacob, Ruth, Dr Valletta and Vertical Malta. Hoss, Jacob, Ruth, Dr Valletta and Vertical Malta are referred to together in the remainder of this judgment as “**the Respondents**”. At an *ex parte* hearing on 14 December 2023, Mangatal J made an order (“**the December Order**”), to which a Penal Notice was attached, that continued the ASI and granted permission to ECI to serve the Respondents (except Hoss which was already subject to the jurisdiction) with the ancillary claim form and any other documents required to be served in the proceedings outside the jurisdiction by email at the email addresses in paragraph 8 of the Order.
- [18] Walkers served the December Order on each of the Respondents on 15 December 2023. Having received no response from any of them, Walkers sent follow-up emails on 22 December 2023 with additional copies of the December Order. The Respondents did not respond to the December Order.

- [19] On 19 December 2023 ECI applied in the Maltese Action for a stay of the proceedings (“**the Stay Application**”). On 3 January 2024 Hoss filed a response to the Stay Application opposing the grant of a stay.
- [20] The return date for the December Order was 11 January 2024. Despite being served with the December Order in accordance with the terms for service in the Order, and also being notified by Walkers of the hearing date and time, none of the Respondents appeared at the hearing. The Court made orders extending the ASI relief in paragraphs 1 to 4 of the December order (“**the January Order**”). The January Order was served on the Respondents by e-mail on 17 January 2024.
- [21] The December Order and the January Order were endorsed with penal notices similar to the notice endorsed on the 6 October Order, and a further notice to Jacob that if Hoss and Vertical Group fail to comply with the Orders, proceedings may be commenced against them, and he (Jacob) may be liable to be imprisoned or to have a sequestration order made in respect of his property.
- [22] The 6 October Order, the December Order and the January Order are referred to together in this judgment “**the Orders**”.

The Contempt Application

- [23] ECI alleged that each of the Respondents breached the Orders in several ways as detailed below. On 26 March 2024 ECI filed an application (“**the Application**”) seeking declaratory relief and orders that:
- (1) Hoss is in contempt of court for breaches of paragraphs 4 and 6 of the 6 October Order, paragraphs 2(a), 2(b) and 4(a) of the December Order, and paragraphs 2(a) and 4(a) of the January Order;
 - (2) Jacob is in contempt of court:
 - (a) as Hoss’ sole director for wilfully failing to ensure that Hoss obeyed the Orders;

(b) for breaches of paragraphs 1(c) and 4(b) of the December Order and paragraphs 1(c) and 4(b) of the January Order;

(3) Ruth is in contempt of court:

(a) for assisting Hoss' breaches of the 6 October Order;
(b) for breaches of paragraphs 1(a), 2(a), 2(b) and 4(a) of the December Order and paragraphs 1(a), 2(a), 2(b) and 4(a) of the January Order;

(4) Dr Valletta is in contempt of court:

(a) by assisting Hoss' breaches of the 6 October Order;
(b) by breaching paragraphs 1(c), 2(b) and 4(b) of the December Order and paragraphs 1(c) and 4(b) of the January Order;

(5) Vertical Malta is in contempt of court:

(a) for assisting Hoss' breaches of the 6 October Order;
(b) for breach of paragraphs 1(a), 2(a), 2(b) and 4(a) of the December Order and paragraphs 1(a), 2(a), 2(b) and 4(a) of the January Order;

[24] The Contempt Application lists 32 counts detailing the ways in which the Respondents are alleged to have committed the various breaches of the Orders. I will deal with these counts when I come to deal with my analysis of the orders to be made. The Application is supported by the Third Affidavit of Alexandra filed on 21 October 2023 which outlines the factual background to the Application, and the affidavit of Samantha Hollingworth, an attorney at Walkers, filed on 26 April 2024 which sets out in detail the various documents were served on the Respondents

[25] ECI's skeleton argument sets out three forms of contempt that are alleged in the Application:

- (1) Breaches of the Court's order by parties against whom the orders were made. This is civil contempt in its simplest form;
- (2) The liability of a person who is not directly bound by the Court's order but with knowledge of its terms assists a party who is bound by the order to breach the order. ECI contends that Ruth, Dr Valletta, and Vertical Malta committed this form of contempt in relation to the 6 October Order by aiding and abetting or wilfully assisting Hoss to breach the 6 Oct Order; and

- (3) The liability of a director or officer of a company for the breach of the Court's order made against the company. This allegation is directed against Jacob, as director of Hoss, that he should be held liable for the contempts alleged against Hoss for breaching the Orders.

[26] Walkers served the Application and related documents on the Respondents and/or notified them of the Application as follows:

- (1) The Application itself and supporting documents by email on 21 March 2024 on each of the Respondents in accordance with paragraph 5 of the December Order;
- (2) The Application itself and supporting documents by hand at its address for service in the BVI on Hoss on 22 March 2024;
- (3) On 27 March 2024 Walkers received the notice of hearing issued by the Court for the hearing of the Application on 1 May 2024 and served it by email on the Respondents on 28 March 2024;
- (4) On 19 April 2024 Walkers sent a further email to the Respondents with a copy of the Court's list for the 1 May 2024 showing that the Contempt Application would be heard at 10:00 am;
- (5) Also on 19 April 2024, Walkers hand delivered a letter with the various notices to the address for service in the BVI of Hoss and at the offices of FGF in Malta;
- (6) On 22 April 2024 Walkers sent an email to Dr Valletta notifying him of the hearing and repeated the warnings about non-attendance; and
- (7) On 19 April 2024, having not received a response from the Respondents, Walkers sent emails to lawyers who have or continue to represent the Respondents in Luxembourg (Anthony Van Hagen), Malta (Jason Azzopardi and FGF), Switzerland (Richard Alleman), Israel (Professor Niv and Bezalel Hochman), and South Africa (Schindlers).

[27] The Respondents did not respond to the Application that was served on them nor to the various notices that were sent to them or their representatives. I pause here to note that the Respondents were not required to respond because this is a quasi-criminal proceeding and, as respondents, they do not have to prove anything. I will deal with this point in more detail below. Suffice it to say for now that it is apparent from the correspondence that their position is that the BVI proceedings are not valid and/or not binding on them because they were not properly served and in any event the proceedings were discontinued by Hoss.

Contempt of Court – Jurisdiction and Procedure

[28] When a court makes an order it expects that it will be obeyed. When there is disobedience or otherwise of any breach of an order, the court has, and has always had, a common law or inherent power to punish the alleged contemnor. This case is concerned with allegations that the Respondents, by acts of omission and commission, breached the Orders and should be punished for these breaches. This is an allegation of civil contempt.

[29] The starting point in the Virgin Islands is the **Contempt of Court Act** ("the Act"). Section 4(1) provides that –

"All contempts of Court other than those committed in the presence and hearing of the Court when sitting shall be dealt with and determined only by means of a rule of the Court which may be applied for by any person whomsoever calling upon the defendant to show cause why he should not be attached for contempt of Court."

Civil contempts are not usually committed in the presence or hearing of the court. As stated in the preceding paragraph they are committed after the court makes an order and the contemnor disobeys or breaches the order. The common law right to deal with civil contempts was preserved by section 10 of the Act which 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 a process of such Court directed to him, or who shall disobey any order or direction of such Court."

[30] The retention of the right to deal with civil contents was confirmed by Georges J in **Pagarani & Ors v Choithram & Ors**², by Wallwank J in **Sang Cheoi Woo v Spackman**³ and by Sir Dennis Byron in **Cowelby Blake v Victor Williams**⁴ where the learned Chief Justice stated

“Civil contempts are dealt with by Section 10 which specifically enacts that the Act shall not be deemed to interfere with or affect the power of the Court to punish disobedience of Court process, orders and directions of the Court”.⁵

Byron CJ was interpreting section 10 of the 1898 Contempt of Court of St Christopher & Nevis which is identical to section 10 of the BVI Act.

[31] The procedure governing contempt applications is contained in part 53 of **The Civil Procedure Rules 2023 (the CPR)**. The procedure for making the application is set out in rules 53.7 and 53.8 which I reproduce below:

“Application for committal order or sequestration order

53.7 (1) The application must specify the –

- (a) exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor; and
 - (b) precise term or terms of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken.
- (2) The application must be verified by affidavit.
- (3) The applicant must prove –
- (a) service of the order endorsed with the appropriate notice under rule 53.3(b) or rule 53.4(b); and
 - (b) that the person against whom it is sought to enforce the order had notice of the terms of the order under rule 53.5 if the order required the judgment debtor not to do an act; or
 - (c) that it would be just for the court to dispense with service.

Service of notice of hearing

53.8 (1) The judgment creditor must serve on the judgment debtor or, in the case of a body corporate, the officer against whom it is sought to make a committal order or sequestration order, notice of the application for the order at least 7 days before the date fixed for hearing.

(2) If the notice of application is served on the judgment debtor less than 7 days before the hearing, the court may direct that in all the

² BVI Civil Suit No 184 of 1997.

³ BVIHCM 58/2021.

⁴ [1996] ECSC J1028-1.

⁵ Ibid at paragraph 6.

circumstances of the case sufficient notice has been given and may accordingly deal with the application.

(3) The notice of application must be served in accordance with Part 5.

(4) A copy of the application and of the evidence in support must be served with the notice.”

[32] In this case I am satisfied so as to feel sure that the Orders that have allegedly been breached and the nature of the breaches have been sufficiently particularised in the Application and the supporting affidavit of Alexandra. Further, that the Orders were endorsed with the appropriate penal notices as required by CPR 53.3 and 53.4, and that the Application was served on Hoss as required by CPR 53.8(3). I am also satisfied that the Application, the notice of hearing and other documents in the proceedings⁶, were served on the Respondents in accordance with the alternative service order in paragraph 5 of the December Order, and that the requirement in CPR rule 53.8(3) of service of the Application and the evidence in support has been satisfied.

Contempt of Court - Legal Principles

[33] The basic principles relating to all forms of civil contempt are uncontroversial and were summed up by Rose J in **JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev**⁷

Rose J (as she then was) as follows:

"i) The burden of proving the contempt that it alleges lies on the Applicant. Insofar as the Respondent raises a positive defence, he carries an evidential burden which he must discharge before the burden is returned to the Applicant.

ii) The criminal standard of proof applies, so that the Applicant's case must be proved beyond reasonable doubt – or so that the court is sure. In case the meaning of this formulation were unclear, Phipson on Evidence (17th edn, 2009 at para 6.51) cites the Privy Council in *Walters v R* [1969] 2 AC 26 as indicating that '[a] reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another'.

iii) The court needs to exercise care when it is asked to draw inferences in order to prove contempt. Circumstantial evidence can be relied on to

⁶ See paragraph 6 above

⁷ [2016] EWHC 192 (Ch) at [41].

establish guilt. It is however important to examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Applicant's case.

If, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the claimants fail.

iv) Where a contempt application is brought on the basis of almost entirely secondary evidence, the court should be particularly careful to ensure that any conclusion that a respondent is guilty is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn."

These principles are well-known, have been followed by the courts of the Eastern Caribbean, and will be followed in this case.

[34] The actus reus for civil contempt is the act or omission that breaches the order made by a court. Once the conduct complained of falls within the wording and spirit of the order the actus reus is complete. The mens rea of civil contempt is that the contemnor knows about the terms of the order and knows that the facts that made his conduct a breach. In **Masri v Consoildated Contractors International Company SAL** Christopher Clarke J put the matter this way –

"In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach:

Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors [2009] EWHC 1445 (QB)."⁸

[35] It is not necessary to prove that the alleged contemnor knew that his action or omission would put him in breach of the order. In **Varma v Atkinson**⁹ the unanimous judgment of the Court of Appeal was delivered by Rose LJ who reviewed the authorities on the mens rea of contempt and concluded –

"[T]hat once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor

⁸ [2011] EWHC 1024(Comm)

⁹ [2021] Ch 180.

to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach. "¹⁰

- [36] Applied to this case, it is sufficient to prove, for example, that Hoss, through its sole director Jacob, knew that the 6 October restrained it from further prosecuting the Malta Action, and that the filing of the Note was prohibited by the 6 October Order. But ECI does not have to prove that Hoss, through Jacob, knew that by filing the Note it was breaching the Order

Persons not bound by the orders of the court / Aiding and abetting or knowingly assisting a breach

- [37] The principles that I have outlined so far apply to persons who are bound by the court's order. These are persons in the first category of contemnors in paragraph 25 above. The next issue is whether the same or different principles apply to persons who are not bound by an order but who are alleged to have either assisted the party bound to disobey or breach the order, and persons who are not bound by the order but who disobey or breach the order themselves. The first category of persons are said to be aiding and abetting or knowingly assisting the breach. This is a form of accessory liability. The second category of persons are third party contemnors. Their act of breaching the court's order is independent of any breach by the party bound. Only the first type of contempt, aiding and abetting or knowingly assisting the party directly bound by the order, applies in this case to commit a breach. That said, I will for completeness deal briefly below with third party contempt.

- [38] The elements of aiding and abetting is knowledge of the order and assisting the person bound in that person's breach of the order. As Georges J said in **Pagarani** , a case of accessory liability,

"Aiding and abetting Counsel pointed out was a civil contempt and the only mens rea required is knowing of the order or of the undertaking in question. That is a correct statement of the law and

¹⁰ Ibid at [54].

is summarised in Borrie & Lowe's Contempt of Court at pages 573-578."

Put simply, the mens rea for aiding and abetting is knowledge of the order. Once the accomplice knows about the order and assists the respondent (the actus reus), he can be found guilty of contempt. There is no requirement to prove that the aider and abettor knew that his conduct breached the order.

[39] The elements of third-party contempt, where the alleged contemnor acts on his own, is knowledge of the order and acting with the intention of frustrating or thwarting the purpose of the order. A good example of this type of contempt is **Attorney General v Punch Ltd and another**.¹¹ The Attorney General obtained an injunction restraining "S" from disclosing certain confidential information. The respondent, a newspaper, disclosed some of the confidential information in breach of the injunction. The trial judge found that the *mens rea* of contempt was established because the editor of the newspaper knew about the injunction and intended to act in breach of it, and that such intention equated with an intention to interfere with the administration of justice. The House of Lords upheld this finding. The ratio of the case on this point is that it is not sufficient to prove that the third party knew about the injunction and acted in breach of it. It must be proved that the contemnor acted with the intention of thwarting or interfering with the purpose of the injunction. This is a higher burden for the applicant to discharge than the burden for aiding and abetting.

[40] To sum up, civil contempt is proved when the person bound by the order of the court knows about the terms of the order and acts in breach of the order. When the contemnor is not bound by the order but nonetheless assists the party bound, he can be found to be in contempt if he knows of the terms of the order and participated in the breach. If the contemnor is a third party who knows about the order and himself breaches it, he can be found to be

¹¹ [2003] 1 AC 1046.

in contempt if he committed the breach with the intention of thwarting or interfering with the purpose of the order.

Liability of a director or officer of a company for breach of an order made against the company of which he is a director or officer

[41] The third form of contempt alleged in the Application is that Jacob, as a director of Hoss, wilfully assisted Hoss to breach the 6 October Order. The test for this form of liability is set out in **Attorney General of Tuvalu v Philatelic Distribution Corp Ltd** as –

“In our view where a company is ordered not to do certain acts and a director of that company is aware of the order, he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and if he wilfully fails to take those steps and the order or undertaking is breached, then he can be punished for contempt.”¹²

[42] This is explained by learned counsel for ECI, Mr Andrew McLeod, in paragraph 44 of his skeleton argument:

“A director of a company subject to an order or undertaking will be personally liable in contempt if, knowing of the order or undertaking, “he either aids or abets the company’s breach of the order or undertaking, or wilfully fails to take reasonable steps to ensure that the order or undertaking is obeyed, whether the order or undertaking is case in prohibitory or mandatory terms”: Grant and Mumford, Civil Fraud (Sweet & Maxwell 2018) at [35-039].”

[43] The Application charges Jacob, as the sole director of Hoss, for wilfully causing the company to breach paragraph 6 of the 6 October Order by not making the Documents available for inspection by the representatives of the Applicant on 9 and 10 October, or at all, and prosecuting and taking steps in the Malta Action in breach of paragraph 4 of the said order. Details of these charges are set out below.

[44] Before dealing with the counts in the Application I must deal with two issues that were raised by the Applicant.

Proceeding in the absence of the Respondents

¹² [1990] 1 WLR 926 at 936

[45] At the commencement of the hearing on 1 May 2024, the Respondents were not present personally or by counsel. The Court heard an application by Mr. McLeod that the Court should proceed with the application notwithstanding the absence of the Respondents. The court granted the application largely because it was satisfied beyond reasonable doubt that each of the Respondents was served with the Contempt Application and the other documents associated with the application, and were aware that the application would be heard on 1 May 2024. They chose not to attend or participate in any way in the BVI proceedings. Both Jacob and Dr Valletta stated in correspondence that they thought that the BVI proceedings were not properly served and that the proceedings had been discontinued by Hoss. The Court referred to the criteria for proceeding in the absence of the respondents to a committal application in **Spackman**¹³ and found that this was an appropriate case to proceed in the absence of the Respondents.

Dispensing with personal service of the Orders

[46] Mr. McLeod also referred to CPR 53.3 and 53.4 and the requirement to serve the Orders on the Respondents personally, and to rule 53.5(3) which gives the Court the power to dispense with service of the judgment or order as required by rule 53.3 and 53.4 if it thinks it just to do so. I have already expressed the view that I am satisfied beyond reasonable doubt that the Contempt Application and other documents were served on the Respondents. These documents include the three Orders that are the subject of this application. I am satisfied that the Respondents were served with the Orders by e-mail in accordance with paragraph 4 of the December Order and that they were aware of the contents of the Orders. I have also taken note of the evidence that Walkers invited the Respondents to make themselves available for personal service of documents and that they have not responded to this request. In the circumstances I have no hesitation in dispensing with personal service of the Orders on the Respondents and

¹³ Supra note 3

accept that they were served by email and were aware of the contents of the Orders.

The counts of contempt alleged in the Application

[47] The remainder of this judgment deals with the 32 counts of contempt alleged in the Application. As this is a quasi-criminal matter I am required to deal with each count separately. Before doing so I make the following general findings in relation to the conduct of the Respondents.

[48] Hoss, acting on the direction of its sole director Jacob, commenced the South African claim in late 2022 seeking to wrest control of ADA and the Property from Alexandra. When the pursuit of the claim was restrained by a court in South Africa, Hoss filed a similar claim in the BVI. Alexandra defended the claim and filed a counter claim. Hoss then sought to discontinue the BVI claim and immediately filed a claim in Malta on substantially the same grounds. The BVI Court made the three Orders on the application of ECI. The collective effect of the Orders was to order Hoss, and later the other Respondents, to make the Documents available for inspection by ECI, to discontinue the Malta action, and to support and not oppose ECI's application for a stay of the Malta Action. The Orders, applications and all other relevant documents were served on each of the Respondents. There is no appeal against any of the Orders. Two of the Respondents, Jacob 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.

[49] My general finding is that the Respondents (as stated above) were properly served with 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.

[50] I will now examine the 32 counts to determine if the Respondents' disobedience of the Orders amounts to contempt of court. Following the helpful guidance provided by Mr McLeod and his team I will deal with the counts in the following categories (using the numbering of the counts in the Application for example, A1, A2 etc.):

Category 1 - breaches of paragraph 6 of the 6 October Order

Category 2 - breaches of paragraph 4 of the 6 October Order

Category 3 - breaches of paragraphs 1(a), (2)(a) and (2)(b) of the December Order

Category 4 - breaches of paragraph 4(a) and 4(b) of the December Order

Category 5 - breaches of paragraph 1(a), 2(a) and 2(b) of the January Order

Category 6 - breaches of paragraph 1(c) of the January Order

Category 7 - breaches of paragraph 4(a) and 4(b) of the January Order

Category 8 - general breaches of the December Order and the January Order

[51] The counts are dealt with in the following sequence: A.2, B.2, C.2, E.2, A.1, B.1, C.1, D.1, E.1, F.1, F.2, I.2, J.2, K.1, H.1, I.1, F.3, H.1, I.3, J.2, K.2, F.4, J.3, K.3, H.3, I.4, F.1, H.4, I.5, J.4, K.4 and G.1.

Category 1 - breaches of paragraph 6 of the 6 October Order - inspection of the Documents.

[52] (1) **Count A.2 – Breach by Hoss** - Paragraph 6 of the 6 October Order ordered Hoss to make the Documents available for inspection by ECI's representatives (see paragraph 9 above). I find that Hoss breached this order by not making the Documents available for inspection:

Particulars

- (i) Hoss objected to the inspection on grounds that the Orders were invalid because the BVI proceedings had been discontinued, that there was no proper service of the documents in the proceedings on the overseas

respondents, and that the Orders were unenforceable in other jurisdictions because the BVI was a black-listed territory;

- (ii) Hoss agreed on 25 October 2023 that the inspection could take place at the offices of FGF in Malta on 9 and 10 October 2023. When representatives of ECI attended the offices of FGF to conduct the inspection they were not allowed to do so; and
- (iii) On 7 October 2023 Hoss purportedly assigned its rights under the Documents and possession thereof to Ruth and Vertical Malta. The following day it advised ECI, by an email sent by Jacob, that ECI no longer had the power or right to instruct the inspection.

- (2) **Count B.2 - Breach by Jacob** – I find that as the sole director of Hoss, Jacob, with knowledge of the 6 October Order, wilfully caused Hoss to breach paragraph 6 of the 6 October Order as set out in paragraph 52(1)) above. Further or alternatively, Jacob wilfully failed to take reasonable steps to ensure that Hoss obeyed the inspection contemplated by paragraph 6 of the 6 October Order. This count is proved but the 6 October Order was not endorsed with a warning that the contemnor, as a director or officer, may be imprisoned or his property sequestrated as required by CPR 53.4. I will bear this in mind sentencing.

- (3) **Count C.2 – Breach by Dr Valletta.** I find that Dr Valletta knowingly, intentionally and therefore wilfully helped, caused and/or permitted Hoss to breach paragraph 6 of the 6 October Order by failing to make the Documents available for inspection when the representatives of ECI visited the offices of FGF on 9 October 2023 for the previously agreed purpose of inspecting the Documents.

- (4) **Count E.2** charges **Vertical Malta**, acting through Jacob as its director, with knowingly, intentionally and therefore wilfully helped, caused and/or permitted Hoss to breach paragraph 6 of the 6 October Order. I am not satisfied that there is sufficient evidence to make me feel sure that Vertical Malta wilfully helped, caused and/or permitted Hoss to breach the paragraph 6 of the 6 October Order. This count is dismissed.

Category 2 - breaches of paragraph 4 of the 6 October Order - the ASI and the Malta Action.

[53] Paragraph 4 of the 6 October Order orders Hoss, whether by itself, its directors, officers, servants, agents or otherwise, not to:

- (a) pursue, prosecute, continue or take any steps in or otherwise participate in the Malta Action; and/or
- (b) commence any further or other proceedings insofar as they may seek relief or involve applications arising out of and/or concerning claims in respect of or connected with the ADA Shares or the Property.

The alleged breaches of Paragraph 4 of the 6 October Order are:

- (1) **Count A.1** I am satisfied that **Hoss** knowingly breached paragraph 4 of the 6 October Order by continuing to take steps and participate in the Malta Action generally, and in particular, by assigning its rights under the Documents to Ruth and Vertical Malta and then not doing anything to stop Ruth and Vertical Malta from filing the Note in the Maltese Action substituting Ruth and Vertical Malta as claimants in the Action; by opposing ECI's application for a stay of the Maltese Action; and by not taking steps to prevent these acts. This count is proved.
- (2) **Count B.1 – Jacob**, as the sole director of Hoss was aware of the 6 October Order and wilfully caused Hoss to carry out the actions listed in the preceding sub-paragraph (v) in breach of the Order; and/or he did

not take reasonable steps to ensure that the Order was obeyed. By so acting and/or failing to act I find him guilty of contempt.

(3) **Count C.1 Dr Valletta** knowingly, intentionally and therefore wilfully helped, caused and/or permitted Hoss to breach paragraph 4 of the 6 October Order by:

- (a) accepting a power of attorney on 9 October 2023 from Ruth authorising him to act on her behalf as claimant in the Maltese Action;
- (b) signing the Note as attorney for Vertical Malta and Ruth and submitting it in the Maltese Action on their behalf; and
- (c) generally prosecuting the Maltese Action on behalf of Vertical Malta and Ruth in the face of the 6 October Order of which he was aware.

(4) **Count D.1 - Ruth** knowingly, intentionally and therefore wilfully helped, caused and/or permitted Hoss to breach paragraph 4 of the 6 October Order by authorising Dr Valletta to act on her behalf in the proceedings; by intervening in the proceedings as a claimant; by opposing ECI's application for a stay; and generally participating in the proceedings. This count is proved.

(5) **Count E.1 - Vertical Malta**, acting through Jacob as its director, knowingly, intentionally and therefore wilfully helped, caused and/or permitted Hoss to breach paragraph 4 of the 6 October Order by intervening in the Maltese Action as a claimant, by opposing ECI's application for a stay, and generally participating in the proceedings. This count is proved.

Category 3 – Breaches of paragraph 1(a), (2)(a) and 2(b) of the December Order

[54] As stated above, Mangatal J continued the ASI on wider terms in the December Order:

- (1) paragraph 1(a) of the Order ordered Jacob, Ruth, Dr Valletta and Vertical Malta not to “pursue, prosecute, continue or take any steps in or otherwise participate” in the Maltese Action;
- (2) paragraph 1(b) ordered Jacob, Ruth, Dr Valletta and Vertical Malta not to commence any further or other proceeding in any jurisdiction in connection with or related to the ADA shares and Property;
- (3) paragraph 1(c) ordered Jacob, Ruth, Dr Valletta and Vertical Malta not to “induce, encourage or assist others to pursue the Maltese Action;
- (4) paragraph 2(a) ordered the Respondents not to oppose any application, motion or other form of request made by ECI in the Maltese Action for a stay of those proceedings and/or an indefinite extension of the deadline by which ECI was required to file and/or serve a sworn reply (“**the Stay**” or “**the Stay Application**”); and
- (5) paragraph 2(b) ordered the Respondents not to take any steps to prevent, delay or otherwise frustrate the grant of the Stay.

[55] The analysis of the counts for breaches of these paragraphs of the December Order follows.

- (1) **Count F.1 – Hoss**, in breach of paragraph 2(a) of the December Order, knowingly opposed the Stay by causing an application to be filed in its name on 3 January 2023 inviting the Maltese Court to refuse the Stay Application. This count is proved.
- (2) **Count F.2 – Hoss** in breach of paragraph 2(b) of the December Order, took steps to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application by (1) causing an application to be filed in its name on 20 December 2023 seeking an extension of the deadline set by the Maltese Court for a response to ECI’s the Stay Application; (2) causing a formal response to the Stay Application to be filed in its name on 3 January 2024 inviting the Maltese Court to refuse the Stay Application; and (3) failing to procure the withdrawal of its response to the Stay Application. This count is proved.

(3) **Count I.1 – Dr Valletta**, in breach of paragraph 2(b) of the December Order, knowingly took steps to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application by:

- (1) preparing, filing and making an application in Hoss's name on 20 December 2023 seeking an extension of the deadline set by the Maltese Court for a response to the Stay Application; and
- (2) preparing and filing a formal response on behalf of Hoss, Ms Agam and/or Vertical Malta to the Stay Application which was later filed on 3 January 2024 inviting the Maltese Court to refuse the Stay Application.

This count is proved.

(4) **Count J.1 – Ruth**, in breach of paragraphs 1(a), 2(a) and 2(b) of the December Order, took steps to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application by instructing, permitting or otherwise authorising Dr Valletta to prepare and file a formal response on behalf of the respondents to the Stay Application inviting the Maltese Court to refuse the Application. This count is proved.

(5) **Count K.1 – Vertical Malta**, in breach of paragraphs 1(a), 2(a) and 2(b) of the December Order, knowingly opposed the Stay Application and took steps to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application by instructing, permitting or otherwise authorising Dr Valletta to prepare and file a formal response on behalf of Vertical Malta inviting the Maltese Court to refuse the Stay Application, and knowingly participated in the opposition to the Stay. This count is proved.

(6) **Count H.1 – Jacob**, in breach of paragraph 1(c) of the December Order, knowingly assisted Hoss to pursue, prosecute, and/or take steps in the Maltese Action by opposing the Stay, delaying the progress of the

Stay Application and inviting the Maltese Court to refuse the Application. This count is proved.

(7) **Count I.1 – Dr Valletta** - In breach of paragraph 1(c) of the December Order, Dr Valletta knowingly assisted Hoss to pursue, prosecute, and/or take steps and participate in the Maltese Proceedings by:

- (i) preparing, filing and making an application in Hoss's name on 20 December 2023 seeking an extension of the deadline set by the Maltese Court for a response to the Stay Application; and
- (ii) preparing and filing a formal response on behalf of Hoss, Jacob and/or Vertical Malta to the Stay Application which was later filed on 3 January 2024 inviting the Maltese Court to refuse the Stay Application; and appearing in court in the Maltese Action on behalf of Hoss.

This count is proved.

Category 4 – Breaches of paragraph 4(a) and 4(b) of the December Order

[56] Paragraph 4 of the December Order provides that if ECI remained under an obligation to file and/or serve a sworn reply to the claim in the Maltese Action as at 4 pm (Maltese time) on 26 December 2023, paragraph 4(a) and (b) of the Order ordered Hoss, Ruth and Vertical Malta (as former and current parties in the Maltese Action), and Jacob and Dr Valletta (as non-parties) to take all steps within their powers to discontinue and withdraw the Maltese Action forthwith and, in any event, before the date when ECI was required to file and/or serve a sworn reply in the Maltese Action.

[57] The Application lists five counts of breaches of paragraph 4 of the December Order:

- (1) **Count F3 – Hoss**, in breach of paragraph 4(a) of the December Order, knowingly failed to take any steps to discontinue or withdraw the

Maltese Action forthwith or at all. The evidence is clear. As at 4 pm on 26 December 2023 ECI remained under an obligation to serve a sworn reply in the Maltese Action. Hoss did not take any steps up to this time, or at all, to discontinue the Maltese Action in breach of paragraph 4(a). This count is proved.

- (2) **Count H.1 – Jacob.** The finding for Count F3 is repeated substituting “paragraph 4(a)” with “paragraph 4(b)” and the name Jacob for Hoss wherever the name Hoss appears;
- (3) **Count I.3 – Dr Valletta.** The finding for Count F3 is repeated substituting “paragraph 4(a)” with “paragraph 4(b)” and the name Dr Valletta for Hoss wherever the name Hoss appears.
- (4) **Count J.2 – Ruth.** The finding for Count F3 is repeated substituting the name Ruth for Hoss wherever the name Hoss appears; and
- (5) **Count K.2 – Vertical Malta.** The finding for Count F3 is repeated substituting the name Vertical Malta for Hoss wherever the name Hoss appears.

Category 5 – Breaches of paragraph 1(a), 2(a) and 2(b) of the January Order

[58] The relevant provisions of the January Order are:

“1.Until further order of the Court, each of the Respondents must not (whether by themselves, their (as appropriate) directors, officers, servants, agents or otherwise):

- (a) pursue, prosecute, continue or take any steps in or otherwise participate the Maltese Proceedings”

...

“2. Hoss and the Respondents must not:

- (a) oppose any application, motion or other form of request made by ECI in the Maltese Proceedings for the Stay; and/or
- (b) take any steps to prevent, delay or otherwise frustrate the grant of the Stay.”

[59] The Respondents did not comply with any of these orders and were charged with three counts for their breaches:

- (1) **Count F.4 – Hoss.** I find that Hoss, in breach of paragraph 2(a) of the January Order, continued to oppose, alternatively failed to withdraw its opposition to the Stay Application. Particulars of this conduct are set out in sub-paragraphs (1) and (2) of paragraph 55 of the Contempt Application. The evidence shows that Hoss was aware of the January Order and committed the acts complained of with full knowledge of the terms of the Order. This count is proved.
- (2) **Count J.3 – Ruth.** I find that Ruth, in breach of paragraphs 1(a), 2(a) and 2(b) of the January Order, took steps to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application. Particulars of this conduct are set out in paragraph 55(4i) above. The evidence shows that Ruth was aware of the January Order and committed the acts complained of with full knowledge of the terms of the Order. This count is proved.
- (3) **Count K.3 – Vertical Malta.** I find that Vertical Malta, acting through its director Jacob, took steps in breach of paragraphs 1(a), 2(a) and 2(b) of the January Order to prevent, delay and/or frustrate the grant of the relief sought by the Stay Application. Particulars of this conduct are set out in paragraph 55(5) above. The evidence shows that Ruth was aware of the January Order and committed the acts complained of with full knowledge of the terms of the Order. This count is proved.

Category 6 – Breaches of paragraph 1(c) of the January Order

[60] Paragraph 1(c) of the January Order orders each of the Respondents, until further order of the Court, not to induce, encourage or assist others to pursue the Maltese Action or to commence any further or other proceedings insofar as they may seek relief or involve applications arising out of and/or concerning claims in respect of or connected with the ADA shares and/or the Property. Two counts are charged for breaches of this order:

(4) **Count H.3 – Jacob.** Count H.3 alleges that Jacob, in breach of paragraph 1(c) of the January Order, assisted Hoss to pursue, prosecute, and/or take steps in and participate in the Maltese Action by causing it to take or fail to take the steps particularised at paragraph 46.1 to 46.5 of the Application. The conduct in paragraphs 46.1 to 46.5 relates to matters that predated the January Order and are separately charged. I do not find that Jacob is separately guilty of this breach. Insofar as the alleged conduct is continuing it can be taken into account in sentencing. Count H.3 is dismissed.

(5) **Count I.4 – Dr Valletta.** Count I.4 alleges that Dr Valletta, in breach of paragraph 1(c) of the January Order, assisted Hoss to pursue, prosecute, and/or take steps in and participate in the Maltese Action by attending on behalf of Hoss a hearing by video conference before the Maltese Court on 30 January 2024. Dr Valletta is a defendant named in the January Order and I find that he was aware of the Order and wilfully assisted Hoss to breach the order by attending the hearing on 30 January 2024. This count is proved.

Category 7 - breaches of paragraph 4(a) and 4(b) of the January Order

[61] Paragraph 4(a) and 4(b) of the January Order is a continuation of the orders granted in paragraph 4(a) and 4(b) of the December Order. The Respondents are charged individually with five counts for breaches of this Order, namely counts F.1, H.4, I.5, J.4 and K.4. The particulars of these counts relate to the same conduct that supports the counts for breaches of paragraphs 4(a) and 4(b) of the December Order. As with count H.3 above, I do not find that the Respondents should be found separately guilty of these breaches. Insofar as the alleged conduct is continuing, it can be taken into account in sentencing. Counts F.1, H.4, I.5, J.4 and K.4 are dismissed.

Category 8 - breaches of the December Order and the January Order by Jacob as director of Hoss

[62] Finally, count G1 charges **Jacob**, as the sole director of Hoss, with knowledge of the January and December Orders, with wilfully causing Hoss to commit the breaches set out above and, further or alternatively, failed to take reasonable steps to prevent Hoss from committing such breaches. The conduct relied on in support of this count is the same as set out in paragraphs 46.1 to 46.5 of the Application. This conduct has been dealt with in support of other counts in the Application¹⁴. For the reasons expressed in paragraph 61 above, and because the count lacks the degree of specificity required for a charge of contempt of court, this count is dismissed.

Summary and Disposal

[63] I am satisfied so as to feel sure that the charges against the Respondents in counts A.2, B.2, C.2, A.1, B.1, C.1, D.1, E.1, F.1, F.2, I.2, J.2, K.1, H.1, I.1, F.3, H.1, I.3, J.2, K.2, F.4, J.3, K.3 and I.4 are proved and the Respondents are guilty of contempt of court individually as set out in my analysis of the various counts.

[64] The charges in counts E.2, H.3, F.1, H.4, I.5, J.4, K.4 and G.1 are dismissed.

[65] The Respondents shall pay ECI's costs of the Application reduced to 70% of those costs to reflect the degree of success on the application. Such costs to be assessed if not agreed within 21 days.

[66] The application is adjourned for sentencing. The Court's listing office is directed to fix the date for sentencing during the month of July 2024.

¹⁴ See paragraph 61.

[67] The Court shall serve a copy of this judgment on the Respondents by email.

Paul Webster (Ag.)
High Court Judge

By the Court

Registrar