

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM No. BVIHC (COM) 2022/0016

BETWEEN:

**(1) NAM TAI PROPERTY INC.
(a company incorporated in the British Virgin Islands)
(2) NAM TAI GROUP LIMITED
(a company incorporated in the Cayman Islands)
(3) NAM TAI INVESTMENT (SHENZHEN) CO LTD
(a company incorporated in the People's Republic of China)**

Claimants

-and-

**GREATER SAIL LIMITED
(a company incorporated in the British Virgin Islands)**

Defendant

AND CLAIM No. BVIHC (COM) 2022/0042

BETWEEN:

**(3) NAM TAI PROPERTY INC.
(a company incorporated in the British Virgin Islands)
(4) NAM TAI GROUP LIMITED
(a company incorporated in the Cayman Islands)
(3) NAM TAI INVESTMENT (SHENZHEN) CO LTD
(a company incorporated in the People's Republic of China)**

Claimants

-and-

**(1) GREATER SAIL LIMITED
(a company incorporated in the British Virgin Islands)
(2) LI JIANPING (also known as GIGI LEE)
(3) MAI FAN**

Defendant

Appearances:

Mr. Edward Davies QC and Mr. Ben Griffiths, with them Mr. Nicholas Burkill of Ogier
for the Claimants

Ms. Sue Prevezer QC, Mr. Ben Woolgar and Mr. Gerard Clarke, with them Mr.
Andrew Emery of Emery Cooke for the Defendants

2022 March 11
 March 14

JUDGMENT (RECUSAL, CONTEMPT AND EXTENSION OF TIME)

- [1] **JACK, J [Ag.]:** On 11th March 2021 I handed down judgment on a jurisdictional forum challenge which the defendants brought as to the claim being pursued in this Territory. I shall use the same shorthand and shall not repeat the background facts as set out in that judgment.
- [2] There are three applications before me. Firstly, an application dated 28th February 2022 by Greater Sail that I should recuse myself. Secondly, an application of the same date again by Greater Sail for an extension of time for compliance with my order of 31st January 2022. This application was amended on 8th March 2022 to add a claim for relief from sanctions pursuant to CPR 26.8. Thirdly, an application by fixed date claim form in action BVIHC (COM) 2022/0042 by the claimants for declarations that Greater Sail, Ms. Lee and Mr. Mai are in contempt of court and that Greater Sail be subject to sequestration, that Ms. Lee and Mr. Mai be committed to HM Prison Balsam Ghut and that all three be fined.

Recusal: the law

- [3] I shall deal with the first application first. With one minor exception, there was no dispute as to relevant law. Both sides were content to rely on the authorities cited in **Goldteam Group Ltd v Qin Hui and others**.¹ I noted in that case that the law was summarised by Freeman J in **Surrey Heath Borough Council v Robb**,² as follows:

“19. It is of fundamental importance that judicial decisions should be made free from bias or partiality. It has long been recognised that justice must

¹ BVIHC (COM) 2018/0180 (determined 22nd October 2020).

² [2020] EWHC 1952 (QB).

not only be done, it must also be seen to be done see **R v Sussex Justices, ex parte McCarthy**.³

20. The classic statement in respect of the legal test for apparent bias is not in dispute. It is taken from... the speech of Lord Hope in **Porter v Magill**,⁴ whether:

‘the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’

21. As Lord Hope stated at [102-103], this was a minor modification from the test used in **re Medicaments and Related Class of Goods (No.2)**⁵ *per* Lord Phillips MR at [85]:

‘The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility... that the tribunal was biased.’

22. [Counsel for the defendants] helpfully drew attention to the judgment of Lord Hope in **Helow v Secretary of State for the Home Department**⁶ setting out the characteristics of the notional fair-minded and informed observer as follows:

‘2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in **Johnson v Johnson**.⁷ Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainant makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is ‘informed’. It makes the point that, before she takes a balanced approach to any information she is given,

³ [1924] 1 KB 256.

⁴ [2001] UKHL 67, [2002] 2 AC 357 at para [103].

⁵ [2000] EWCA Civ 350, [2001] 1 WLR 700.

⁶ [2008] UKHL 62, [2008] 1 WLR 2416.

⁷ (2000) 201 CLR 488 at para 53

she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political, or geographical context. She is fairminded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

23. In **Locabail (UK) Limited v Bayfield Properties Ltd**,⁸ it was stated by Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C in a joint judgment at [25] that:

‘...By contrast, a real danger of bias might well be thought to arise if.... on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v Kelly**⁹); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. Finally, [counsel for the claimant] drew to the attention of the Court a further passage in **Locabail**... to the following effect: Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.’”

I proceeded to note:

“[6] Mr. Baird, for Goldteam, took a neutral stance on the application, ‘because’, as he put it in his skeleton, ‘as a matter of principle, it is not for the parties to choose their own judge.’ He helpfully drew my attention

⁸ [1999] EWCA Civ 3004. [2000] QB 451.

⁹ (1989) 167 CLR 568.

to our Court of Appeal's decision in **Riley v Attorney General**,¹⁰ which cited the leading cases cited above. Our Court of Appeal laid particular weight on the English Court of Appeal decision in **Otkritie International Investment Management Ltd v Urumov**,¹¹ which held:

'There must be substantial evidence of actual or apparent bias before the general rule can be satisfied. The issue of recusal is extremely fact sensitive and recusal ought not to be lightly done. Bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case in which a party has participated and been heard) unless it can be shown that he is likely to reach his decision by 'reference to extraneous matters or predilections or preferences'. [B]ias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case.'

[7] He also drew my attention to **JSC BTA Bank v Ablyazov**,¹² where the first instance judge had held the defendant to be in contempt of a freezing order and to have lied while being cross-examined about his assets. The judge refused to recuse himself from subsequent involvement in the case. That decision was upheld by the Court of Appeal, which asked itself 'whether there could be any difference between the judge who bears in mind his own findings and observations and another (second) judge who reads what the first judge has written, as he must be entitled to do', and answered at paras [69]-[70]:

'[U]nless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge — other than that he is more experienced in the litigation. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not 'pre-judging' by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case... He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias.'"

¹⁰ [2020] ECSCJ No 313, MNIHCVAP2020/0003 (determined 23rd June 2020). *Stuart A Lockhart v Valentina Nonini and others* [2020] ECSCJ No 347, ANUHCVP 20198/0004 (determined 14th October 2020) is to the same effect.

¹¹ [2014] EWCA Civ 1315 at paras [13] and [22].

¹² [2012] EWCA Civ 1551, [2013] 1 WLR 1845.

[4] The minor area of dispute concerned an observation of Andrew Smith J in **Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hasim Al Refai**,¹³ where he said: “Cases in which there is any real ground for doubt should be resolved in favour of recusal.” Insofar as this suggests there is some “grey zone” where a judge should err on the side of recusal, I respectfully disagree. Whether bias has been shown is a binary decision. Either a judge is biased or the judge is not biased. There is no middle ground. In particular, the consequences of recusal on the parties and the case-management of a matter are irrelevant; there is no discretion. (It may of course be relevant to the Court of Appeal, when considering whether to direct a judge to stand aside whilst an appeal against a recusal refusal is pending. Such directions can very severely disrupt the conduct of matters at first instance due to the paucity of numbers of judges in the Commercial Court.) However, these considerations have no impact in the current case.

Recusal: the facts

- [5] Ms. Prevezer QC argues that there are four grounds on which I should recuse myself. Before I set these out, I need to emphasise that in my judgment this case was and is a case of urgency. The management of Nam Tai changed following the meeting of shareholders on 30th November 2021. Since then Nam Tai has been unable to gain physical control of its PRC subsidiaries. This is extremely serious. Nam Tai do not know what is happening in these subsidiaries. In particular they have no control over the money and assets of the subsidiaries. There is no explanation given by any of the defendants to the current proceedings as to why physical possession has not been transferred. As senior executives in Kaisa, Mr. Mai and Ms. Lee can be expected to have a good idea of what is going on (and if they do not, they should be able to explain why not).
- [6] Greater Sail’s approach has been to ask for time. On 31st January 2022, Mr. Carrington QC, who appeared for Greater Sail, asked for the whole question of the injunction to be stood over for 28 days. On 7th February 2022 (the day before the 8th February deadline for Greater Sail’s PRC lawyers to write to the AMR), Greater

¹³ [2014] EWHC 1055 (Comm).

Sail's lawyers wrote a letter to the Court of Appeal inquiring about obtaining a stay of execution of the injunction I ordered on 31st January 2022, but no formal application for a stay was issued until 22nd February 2020.

[7] On 24th February 2022 Mr. Carrington QC was visibly shocked when I indicated that I would list Nam Tai's contempt application for 11th March 2022. He wanted it after 15th March, when the Court of Appeal were (at least potentially) going to deal with his stay application. Yet it is trite law that an appeal does not give a stay. Given the urgency of the whole matter, an early date for the hearing of the contempt application was desirable. Mr. Davies QC submits that it was this early listing of the contempt application which did actually galvanise the defendants into complying with the order of 31st January. I do not need to determine whether he is right on this, but, insofar as the early listing did have that effect, then that was in my judgment a good thing.

[8] Ms. Prevezer QC's submits as follows:

“12. First, at the hearing on 24 February 2022, the Judge suggested of his own motion that NTP should make various applications, which the Judge intimated would be well received by the Court, and which would be seriously prejudicial to GSL.”

It is correct that I raised the question of what applications might be going to be made. Ms. Prevezer could in argument show no examples of my indicating that those applications might be “well received” by the Court. She resorted to arguing that I would not have raised the issue of other applications unless I was in favour of granting the applications. This is not a proper inference. It is unfortunately a regular occurrence in the Commercial Court that parties delay making applications and then expect the Court to accommodate them regardless of the limited listing resources possessed by this Court.

[9] It is only sensible case management to flush out as soon as possible what applications might be in the offing, so that suitable directions can be given. For example, I raised the question of whether Nam Tai might be seeking an anti-suit injunction. No such application has been made. Given that the point was

canvassed on 24th February, Greater Sail would no doubt argue, if such an application were now issued, that it was too late for Nam Tai now to seek such an injunction. Raising the issue of an anti-suit injunction was neutral.

[10] Ms. Prevezer's skeleton continued:

"He did so notwithstanding that (i) NTP had not intimated that it was contemplating or had even considered those applications at any stage; (ii) the proposals made by the Judge did not arise as a result of matters being debated in the hearing between the Judge and NTP's counsel, but were suggested by the Judge on his own motion, and (iii) NTP was and is represented by numerous lawyers in various jurisdictions around the world, including in this jurisdiction by experienced practitioners, and specialist leading and junior counsel.

13. In particular:

13.1 The context was that the 2022/0016 (that is, the underlying conspiracy action in which NTP obtained the 31 January Order, and not the Contempt Application) was listed on 24 February for a directions hearing only.

13.2 The Judge first suggested that NTP should make an application to him for an anti-suit injunction to restrain GSL's claims in China. The Judge listed GSL's *forum non conveniens* challenge for 1 March 2022. When GSL's counsel enquired as to what that application was being listed for, the Judge said as follows:

'THE COURT: To consider whether you've got any arguable claim for saying that this action can properly be brought in the way you have. Because I suspect what Mr. Griffith[s] is going to want to do is to have a cross-application of an anti-suit injunction on the basis that this is merely a form of harassment. You have got no claim against these subsidiaries and the action ought to be stopped.'

13.3 It should be noted that the premise of this suggestion — that GSL had 'no claim against these subsidiaries' — was that (i) there would be no equivalent claim as a matter of BVI law, and (ii) that the opinion prepared by Chinese counsel, Guangdong Shengtianping Law Firm, did not say there was a claim under Chinese law. However (i) the position as a matter of BVI law was irrelevant (the question of whether GSL might have claims against the subsidiaries is and was a matter of Chinese law), and (ii) Guangdong Shengtianping had only been instructed to consider the issue of whether the mainland Chinese courts had jurisdiction over the claims, not the substance of the claims. At that time, no one had raised any issue as to the merits of the Chinese claims, and so that there was no ground for the Judge's intervention, and in particular, the premise of his suggestion that

an anti-suit injunction was warranted because GSL could not proceed in China against the subsidiaries.”

This is revisiting my judgment on forum. What I said to Mr. Carrington QC on 24th February was this:¹⁴

“THE COURT: I have looked at the expert evidence you produced. I mean, obviously it is not in the form which one expects of an expert[’s] evidence, but on an interlocutory application that happens fairly frequently, but there does seem to be a problem with in that they say... [t]hat Greater Sail has a right to file a lawsuit in court of Mainline China regarding this case. That’s not a problem. [I discuss the matters which the expert report does deal with and continue:] But what is a problem is that the underlying claim is that Greater Sail have paid \$145 million to its firm, former firm, Nam Tai Head Company and Nam Tai has invested that in Nam Tai Investment and in Zastron Electronic.

Now as a matter of BVI law, once Great Sail pay the money for the PIPE shares, that money becomes Nam Tai[’s] to do [as] it wants with. So there is no question of any tracing remedy which Greater Sail might have against Nam Tai Investment or Zastron Electronic. So as a matter of BVI law, it is a non-starter, the claim, there isn’t any suggestion in Guangdong Shengtianping’s opinion that there is any claim in Chinese law either.

I mean, it seem to me that’s a matter which can be determined potentially summarily...

[Y]ou haven’t shown a claim under Chinese law. I mean, if you did, then possibly it would be a different question, but at the moment, you haven’t shown what the particular section of the civil code or the company law you are relying on in order to say that you have got any claim at all against that. So it seem[s] to me that you may want to put further evidence in...”

It can be seen that I am pointing up a deficiency in the evidence which Greater Sail was presenting for its forum challenge. That is hardly evidence of bias against Greater Sail. It was an attempt to ensure that Greater Sail was able to present its best case.

[11] The skeleton continued:

“13.4 The Judge thereafter reiterated this suggestion.

¹⁴ Transcript pp 6-7.

13.5. At the same time, the Judge also suggested that he ‘might’ make such an application (if made by NTP as suggested by the Judge) returnable on 1 March 2022, notwithstanding that (i) no such application had yet been made or even contemplated by NTP; (ii) even if it was made on the same day, there would only be two clear days until a 1 March hearing, so that no adequate notice could be given to GSL, and (iii) no consideration was given to what sort of evidence in opposition from GSL might be submitted, or indeed, how any such reply evidence could be submitted by GSL in the very short time period indicated by the Judge.”

This was simple case-management. There was obviously going to be no determination of any fresh application on 1st March, but it was important that all applications were issued in such a way that sensible case-management directions could be given on 1st March, for example as to timetabling the service of evidence.

[12] It is then submitted:

“13.6 Shortly thereafter, the Judge also suggested (again of his own motion) that he might appoint receivers over the shares in GSL:

‘There is an urgency about this. The court can, of course, appoint receivers over the shares in Greater Sail and then the receivers can appoint new directors who can then send the letter. The alternative is that if the contempt proceedings find Greater Sail in contempt, then I could appoint sequestrators which would then allow them to send the letter. But, Mr. Griffiths, if you are wanting to make an application for the appointment of receivers, then that too can be issued and I can give consideration to it on the 1st of March.”

13.7 Again, there was no reason for the Judge to suggest any applications to NTP, (let alone applications to appoint receivers), in circumstances where NTP was well able to determine for itself what applications to make. Further, as stated above, the suggestion that GSL could be expected to respond to a receivership application in just two working days was unreasonable, especially given the draconian consequences of such an order.”

[13] Again, I repeat the comments above about the need to flush out applications. The fact that a party is represented by “experienced practitioners, and specialist leading and junior counsel” does not avoid the problem of the late issuance of applications

with an expectation that they be dealt with regardless of listing difficulties. Indeed such lawyers may be especially prone to such behaviour.

- [14] The point about receivers is that this Court's powers of enforcement in cases with an overseas element are quite weak. The standard remedies for contempt of court are imprisonment, fines and sequestration. Imprisonment is no deterrent to a contemnor resident abroad. Contempt of court is not an extraditable offence.
- [15] Fines are also problematic, because of the "revenue rule". Courts will not generally enforce penal orders of foreign states. As I discussed in **West Bromwich Commercial Ltd v Hatfield Property Ltd and another (No 2)**:¹⁵

"4. The detailed facts are set out in my first judgment.¹⁶ The essential problem is that the English winding-up order was made based on a sum of £134,227.00 in unpaid Value Added Tax owed to HMRC. Mr. Hellard, as an appointee of the English Court, is answerable to that Court. Thus, by recognising his appointment, this Court would, at least potentially, be indirectly enforcing the payment of a foreign revenue debt. It has long been established that, in the absence of legislation permitting enforcement of a foreign tax debt, recovery is barred by the "revenue rule": **QRS 1 ApS and others v Frandsen**¹⁷ and **Re Meribelle Investments Ltd**.¹⁸

5. Mr. Donovan, who appeared for the applicant, argued that the revenue rule only applied where all the debts of the debtor were owed to the Revenue. In **Wahr-Hansen and others v Compass Trust Co Ltd**,¹⁹ the plaintiff was the administrator of the estate of a Mr. Jahre. The action in Cayman was to trace various trust assets which had belonged to the deceased. Mr. Jahre had been a tax fraudster and owed large sums to the Norwegian Revenue, but there were others with an entitlement to the estate. Henderson J, sitting in the Grand Court, held that it was only where the sole creditor was the Revenue that the revenue rule barred recovery.

6. **Peter Buchanan Ltd v McVey**²⁰ was a case decided by the Irish Supreme Court. McVey had defrauded the Scottish Excise of a large amount of duty owed by his one-man company on whisky traded by the company. He absconded to Ireland. The Revenue put the company into

¹⁵ [2021] ECSCJ No 446 (determined 21st January 2021)

¹⁶ [2020] ECSCJ No 370 (determined 12th November 2020).

¹⁷ [1999] 1 WLR 2169.

¹⁸ BVIHC (COM) 2020/0013 (the second judgment in the matter, determined 16th March 2020). But see most recently *Skatteforvaltningen v Solo Capital Partners LLP* [2022] EWCA Civ 234.

¹⁹ [2007] CILR 55.

²⁰ [1955] AC 516 (Note) at 533.

liquidation. The liquidator then brought proceedings in Ireland for the monies wrongfully abstracted from the company by McVey. The Irish High Court and the Supreme Court on appeal held that the proceedings were solely for the benefit of the Scottish Revenue and thus debarred by the revenue rule. Maguire CJ held that ‘if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets of the company under the control of the liquidator. But there is no question of that here.’

7. These (like **Frandsen**) were cases where the cause of action was an ordinary private law claim. Where this Court orders the liquidation of a company, the position is different. Only provable debts can be admitted in a company liquidation. A foreign revenue debt is not provable: **Government of India v Taylor**.²¹ Thus a VAT liability owed to HMRC is not in my judgment provable in a BVI liquidation.”

- [16] A fine imposed for contempt of court is caught by the “revenue rule”: see **Dicey, Morris & Collins on the Conflict of Laws**.²² Thus a foreign jurisdiction may well not recognise the appointment of a liquidator appointed to get in a fine imposed by this Court. Likewise a foreign court will not recognise an order appointing sequestrators: **Larkins v National Union of Miners**,²³ where the Irish High Court refused to recognise in the Republic of Ireland an order of the English High Court appointing sequestrators over the assets of the NUM at the height of the miners’ strike. The appointment of receivers over the shares in Greater Sail potentially avoids this problem, because the receivers can appoint new directors of Greater Sail who can carry out the Court’s orders. Although there is still a risk that a foreign court will not recognise directors appointed by receivers under these circumstances, the risk is much less than with fines or sequestration: **Industrial Bank Financial Leasing Co Ltd v Xing Libin**.²⁴

- [17] Further it is often good practice to remind a party in breach or potential breach of an order that the Court has powers of punishment. It encourages compliance with the

²¹ [1955] AC 491.

²² 15th Ed (2012) at para 5-27.:

²³ [1985] IR 671 at pp 688-689.

²⁴ [2020] ECSCJ No 420.

Court's orders. It also assists the legal advisors to the party in breach because they can reinforce their own advice with reference to the judge's comments.

[18] Ms. Prevezer QC continues:

13.8 It was also reasonably to be inferred from the Judge's suggestion (both as regards the making of the application itself and the proposed return date) that he would be amenable to granting any such application made by NTP, regardless of any evidence that might be served in opposition by GSL.

14. In short, a reasonable and fair-minded observer would have inferred from these suggestions, by the Judge that (i) the Judge wished to assist NTP in advancing its case, at the expense of procedural fairness to GSL, and (ii) the Judge intended to make draconian orders wherever possible to assist NTP, with a closed mind to any submissions which GSL might make in opposition, in the very short time that the Judge indicated he would allow GSL to respond.

This is a repetition of the points I have already dealt with. I reject them.

[19] The skeleton then submits:

"15. Second, at the same hearing, the Judge gave permission to NTP to serve the contempt proceedings on Mr. Mai and Ms. Lee out of the jurisdiction, notwithstanding that no application for permission to do so was before him:

15.1 Mr. Griffiths (counsel for NTP) told the Court that (i) the application had not yet been served, and (ii) he did not propose to pursue that application at that hearing.

15.2 The Court nevertheless proceeded to determine that point in NTP's favour, and ordered substituted service out of the jurisdiction, without hearing submissions from NTP's counsel.

Applications to serve outside the jurisdiction are often dealt with on papers. I had read the papers and considered the application was unproblematic. (So far as I am aware there is no application to set aside the grant of permission to serve out or appeal against that order. If that is right, then the defendants presumably agree that the application raised no issues which needed argument.) It was in accordance with

the Overriding Objective to determine the application for service out in the manner I did.

[20] The skeleton continued:

“15.3 What rendered this procedure especially unfair was that the Court then proceeded to fix the hearing of the Contempt Application for 11 March 2022 — i.e. in two weeks’ time. That was done (i) without considering whether it would even be possible to effect service abroad in that time; (ii) how long GSL might need to put in evidence, a matter which GSL could not possibly have had a position on at that time, since the Contempt Application had only been made the previous day.”

CPR 53.8(1) requires that seven days’ notice of an application be given. Fifteen day’s notice was thus in compliance with the Rules. If service could not have been effected, then the hearing would have been ineffective. However, in the event, service was effected successfully and the hearing on 11th March was effective. If the respondents had needed more time to adduce evidence, then they could have made an application for that purpose. In fact they have not done so. No unfairness has resulted.

[21] The submissions continue:

“15.4 Further, as the Judge was informed by GSL’s counsel at that hearing, the Court of Appeal is due to consider whether or not to stay the 31 January Order (which was the Order which GSL was alleged to be in contempt of) on 15 March 2022. It would have plainly been desirable to fix the Contempt Application for a date shortly after 15 March. If the Court of Appeal had stayed the 31 January Order, then the Contempt Application could not have proceeded (at least pending determination of the full appeal), and thus the Court’s decision both risked unfairness to GSL, and was a waste of court time and resources. In fixing the hearing for 11 March 2022, the Judge said:

‘I haven’t heard you on what defences they might have, but at the moment there appears to be a fairly clear case that they haven’t complied with the Order.’

16. A reasonable and fair-minded observer would have concluded that the Judge had no regard to procedural fairness towards GSL, and had pre-judged the issue of whether there had been a non-compliance by GSL with the Court order and/or the need for GSL to be punished for contempt.

[22] What this submission ignores is that there has *never* been any dispute between the parties that Greater Sail did not by 8th February send the letter nor that it failed by 15th February to disclose the documents ordered or make the required affidavit. It was and is common ground that the order was not complied with by the dates ordered. Whether that did or did not amount to contempt of court is a different question (and something to which I shall come shortly). As I repeatedly said in the transcript, there are defences to an allegation of contempt.

[23] The application to the Court of Appeal does not affect a stay of the order of 31st January 2022. It was (and at time of writing this judgment is still) unclear whether the 15th March date is going to be effective. If the existence of the application to the Court of Appeal was determinative of the listing of the contempt application, then an adjournment by the Court of Appeal would result in a further adjournment of the hearing of the contempt application. There seems no principled basis on which this Court could do otherwise. Yet it is wholly undesirable that a contempt application be left hanging in the ether. Such matters should be determined as speedily as is possible consistent with giving the parties a fair hearing.

[24] Even if the Court of Appeal ordered a stay, that would not mean that Greater Sail was not in breach of the order as at 8th and 15th February. As Ms. Prevezer QC accepted in oral argument, even the overturning on appeal of the order of 31st January, would not have the effect of retrospectively pardoning the breach of that order. It would be a matter going to mitigation of punishment (a point also relevant to Ms. Prevezer's fourth point).

[25] The next submission is:

“17. Third, the Judge's approach to GSL's application for a *forum non conveniens* stay also exhibited apparent bias in favour of NPT:

17.1 That application had originally been made on 22 February 2022.

17.2 It came on for directions at the aforementioned hearing on 24 February 2022. At that hearing, the Judge, rather than giving directions for the due hearing of the application, immediately raised issues about the merits, or

more accurately, the lack of merit (as the Judge perceived to be the case), of the application.

17.3 In particular, the Judge seized on the question of whether GSL's claim against NTP had any merit, and pressed the issue... about Guangdong Shengtianping's Chinese law opinion. But that issue was irrelevant — the claim which would be stayed on *forum non conveniens* principles would be NTP's claim against GSL (currently brought in the BVI, which the Defendants say should be stayed in favour of the Chinese courts). The merits or otherwise of GLS's claim under Chinese law was not one that the Judge could properly assess and was irrelevant in any event.

17.4 The Judge then decided to list the forum application again for 1 March, which again was only two working days later, 'to consider whether you've [GSL] got any arguable claim for saying that this action can properly be brought in the way you have.'

That was an unfair course, because... (i) the issue raised by the Judge was in fact irrelevant; (ii) NTP itself had taken no point about the merits of that Chinese claim, such that there had been no need to consider it; and (iii) GSL was put under enormous time pressure to produce the further evidence as to the merits of its Chinese law claim which the Judge had sought.

18. The reasonable and fair-minded observer would have concluded from the way that the Judge handled GSL's stay application that the Judge had already decided to reject it, regardless of its merits, and to do so in a way which had no regard to procedural fairness to GSL.

...

22. Moreover, the Judge summarily dismissed GSL's forum challenge, again focusing on the merits of GSL's claim in the PRC and not on the claim made by NTP in the BVI Court. "

[26] These are largely substantive points about my decision on the forum challenge. They will, I understand, shortly be under appeal. I cannot see that they go to any issue of bias. I had read the forum application and perceived there were legal problems with it. I flagged these up to Mr. Carrington QC (see above), so that Greater Sail could deal with the point. Greater Sail did then serve further expert evidence dealing with the substantive cause of action in China. Now, as can be seen from my judgment on the forum issue, I decided that this further evidence did not sufficiently plug the gap which I had identified to Mr. Carrington. However, this is a substantive issue (namely, that I got it wrong), not a bias issue.

[27] It is right that listing the matter for an assessment of the viability of the application is an unusual course, but it is not unheard of. If an application has no reasonable prospect of success, then the Court should dispose of it as soon as possible (having of course given the applicant adequate opportunity to show cause why the application was viable). There is no point listing such an application for a substantive hearing with further evidence from both sides at substantial expense to the parties and significant waste of Court time. Judges in the twenty-first century are not expected to sit back and silently umpire disputes. They have a duty actively to case-manage matters before them: CPR 25.1. The Court can make orders and give directions on its own initiative: CPR 26.2.

[28] The skeleton then submits:

19. Fourth, when the matter came before the Court on 1 March, the Judge made further comments indicative of bias.

20. In relation to the issue of GSL's alleged contempt of Court and its application for an extension of time, the Judge said this:

'Mr. Clarke, effectively what you're putting forward is mitigation, isn't it? It wouldn't be appropriate for me to effectively waive a breach of a court order by retrospectively giving you an extension of time on this. It's a matter which goes to mitigation. So that instead of a very large fine, you might get a smaller fine and you probably won't have any issue about sequestration.

21. Later, the Judge again made comments that appeared to assume that NTP's claim was already made out, apparently having decided as a fact that GSL was liable in respect of non-delivery of the company chops:

'THE COURT: It's not a complaint. It's established, isn't it? What possible defence do you have to the failure to deliver up the chops?
MR. CLARKE: But, My Lord, with respect no facts have been found, My Lord. It is not — GSL, My Lord, remember does not possess the chops, My Lord. Never has possessed the chops.

23. Individually and cumulatively, these matters constitute a sufficient basis for the Court to conclude that there is a risk of apparent bias on Jack J's part, so that he should recuse himself from hearing this action further."

[29] These passages show the danger of cherry-picking passages from 43 pages of transcript. The reference to the failure to deliver up the chops is obviously to the underlying dispute between Nam Tai on the one hand and Kaisa on the other. It was not a reference to the current action. Greater Sail did not have the chops and there was no claim to deliver them up. The reference to mitigation of punishment is in the context of the application for relief from sanctions, which I shall deal with below. I was foreshadowing the issues which arose on that application. There was no assumption that the defendants were guilty of contempt.

Conclusion on recusal

[30] Accordingly, in my judgment there are no sufficient grounds for me to recuse myself. The matters of which complaint is made are no more than normal case-management in a case where concrete and effective relief was urgently sought.

Contempt: law and issues

[31] It is convenient, as the advocates did, to deal with the third application next. Neither Mr. Mai nor Ms. Lee gave live evidence in circumstances to which I shall come. Each had given evidence by affirmation. Because they did not give live evidence they were not cross-examined on their affirmations. The only other evidence adduced on behalf of the defendants was an expert report of Wang Jiang dated 9th March 2022 and some medical evidence from Ms. Lee. This further evidence was admitted without challenge on the claimants' part.

[32] There are three allegations of breach of the order of 31st January 2022, which are alleged to be a contempt of court by each of the three respondents. I take these from the fixed date claim form in action 2022/0042:

“12. In breach of paragraph 6 of the Order, GSL failed and/or refused by 4pm Beijing time on 8 February 2022, or at all, to deliver letters in the form of the draft at Schedule 3 to the Order bearing the chop of the law firm sending the letter to (a) the Bao'an Branch of Market Supervision Administration of the Shenzhen Municipality, (b) the Guangming Branch of Market Supervision Administration of the Shenzhen Municipality and (c) any other branch of the Market Supervision Administration to which GSL caused objections to be made to the registration of changes with respect to any directors, legal representative, supervisor or general manager of a

subsidiary of NTP (and consequently GSL also failed to send duplicates of such letters to the Claimants' PRC lawyers, as further required under paragraph 6 of the Order).

13. In breach of paragraph 7 of the Order, GSL failed and/or refused to provide to the Claimants by 4pm BVI time on 15 February 2022, or at all, copies of any correspondence sent or received by or on behalf of the Defendant with the Bao'an Branch of Market Supervision Administration of the Shenzhen Municipality, the Guangming Branch of Market Supervision Administration of the Shenzhen Municipality and any other branches of the Market Supervision Administration.

14. In breach of paragraph 8 of the Order, GSL failed and/or refused by 4pm BVI time on 15 February 2022, or at all, to file and serve an affidavit by a director or other proper officer setting out any of the matters required to be set out in such affidavit by paragraph 8 of the Order.”

[33] The law in relation to contempt was largely agreed. The burden of proof is on the applicant. A respondent has no burden of showing a defence; it is for the applicant to disprove any defence advanced. A respondent bears no burden of showing his, her or its innocence. The standard of proof is the criminal standard. The Court can only find a respondent guilty of contempt if it is satisfied so that it is sure that that respondent is guilty. Another way of putting this is that a respondent must be acquitted if the Court has a reasonable doubt as to that respondent's guilt. The Court has to examine the evidence on each allegation of contempt separately and needs to consider the evidence on each count against each respondent separately. I must determine the application on the evidence which has been adduced. I must not speculate on evidence which has not been given. A respondent can only be convicted of contempt if both the *actus reus* of the contempt is proven and the *mens rea* of the respondent is proven to the criminal standard.

[34] Ms. Prevezer QC makes the following concessions:

“27.1 GSL accepts that it did not comply with the 31 January Order in the three respects alleged... by the stated deadline of 8 February 2022.

27.2 Whilst GSL accepts that it was in breach of the 31 January Order, the breach did not constitute a contempt, because the Defendants did not have the necessary *mens rea* for contempt. That was because they were

dependent for their ability to comply with the 31 January Order on the actions of others, specifically its Chinese lawyers and those on the ground in China, and GSL's failure to comply was therefore not 'contumacious'.

27.3 In respect of all three Counts, GSL has now complied with the 31 January Order. It accepts that, because it did not comply on time, it was in breach for 20 days. However, if the Court grants the Extension Application, then that breach will be cured retrospectively, and there will be no basis for a finding of contempt.

27.4 If the Court refuses the Extension Application, then whilst it may grant declarations as to GSL's contempt, it should pass no sentence and/or suspend any sentence, to reflect GSL's curing of its breaches."

[35] Ms. Prevezer cites no authority for the proposition that the grant of an extension of time for complying retrospectively with an order endorsed with a penal notice frees a respondent from liability for contempt. For reasons which I shall explain in respect of the extension and relief from sanctions application, I reject this submission.

[36] The main issue before me is whether the applicant has adequately proved the *mens rea* of each of the three respondents. Ms. Prevezer QC states the law, correctly in my judgment, as follows:

"35. The *mens rea* for a contempt of court (often referred to as 'contumaciousness') requires that a respondent intended to do the act or omit to do the act which is said to constitute a breach of the order (as opposed to an intention to breach the order, which is not required): **Mumford & Grant on Civil Fraud**.²⁵

36. As a result, failure to do an act which, on analysis, turns out to be impossible will not constitute a contempt. In **Sectorguard plc v Dienne plc**,²⁶ a breach of confidence claim, Dienne had given an undertaking to disclose which of the Sectorguard's customers it had contacted as a result of having misused Sectorguard's confidential information. However, it transpired that no record had been kept of which customers had been contacted. Briggs J, as he then was, said as follows:

'32. By contrast, I accept the thrust of Mr. Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not

²⁵ 1st Ed. (2018) at §35-025.

²⁶ [2009] EWHC 2693 (Ch)

that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see **Adam Phones Ltd v Goldschmidt**.²⁷

33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court.’

37. As regards Mr. Mai and Ms. Lee, the test for whether they may be held liable for contempt as directors was explained in **Attorney-General of Tuvalu v Philatelic Distribution Corp Ltd** as follows:²⁸

‘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.’

38. As a result, it is not sufficient for a committal application against a director simply to assert non-compliance by the company — the basis for the director’s own liability on **Tuvalu** principles must be pleaded and proved: **Mumford & Grant** at §35-044.”

[37] Neither Mr. Mai nor Ms. Lee gave oral evidence before me. Nor did Greater Sail call any separate evidence on its behalf, apart from the expert evidence. This raises the question what, if any, inferences I can draw from their failure to respond.

[38] In England, the Court of Appeal held in **Inplayer Ltd v Thorogood** that:²⁹

“A person accused of contempt, like the defendant in a criminal trial, has the right to remain silent: see **Comet Products UK Ltd v Hawkex Plastics Ltd**.³⁰ It is the duty of the court to ensure that the accused person is made aware of that right and also of the risk that adverse inferences may be drawn from his silence.

²⁷ [1999] 4 All ER 486 at 492j to 494j.

²⁸ [1990] 1 WLR 926.

²⁹ [2014] EWCA Civ 1511 at [40].

³⁰ [1971] 2 QB 67.

The ability to draw inferences was further discussed by Whipple J (as she then was) in **VIS Trading Co Ltd v Nazarov**.³¹

- [39] The difficulty with applying this rule in this Territory is that the right to silence has developed differently in the two jurisdictions. In England, the **Criminal Justice and Public Order Act 1994**³² made major inroads into the right to silence. Section 35 of the Act, so far as material, provides:

“(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.”

- [40] This Territory has no similar legislative provision. Thus the common law position is preserved in criminal trials. No adverse inference may be drawn from a defendant in criminal proceedings exercising the right to silence. The standard words delivered by the judge at the conclusion of the prosecution case in this Territory are these:

“The Crown has closed its case. Mr./Ms. [defendant’s name], you have heard the evidence against you. Now is the time for you to make your defence. You have two options:

³¹ [2015] EWHC 3327 (QB), [2016] 4 WLR 1.

³² 1994 c. 33.

You may remain silent and say nothing in response to the case for the prosecution or you may give evidence in the witness box, in which case you may be cross-examined by prosecuting Crown Counsel.
With either option, you may also call evidence/witnesses, if you choose.
[To counsel:] Does the Defendant wish to give evidence?
Does the Defendant wish to call any evidence/witnesses?"

No warning is given as to adverse inferences potentially being drawn by silence.
This is because they cannot be.

- [41] There are indications in **Thorogood** and **VIS** that the court was acting on analogy with criminal proceedings. Contempt proceedings are quasi-criminal, so it may well be right to apply the criminal rules by analogy. There may also be direct application of the criminal rules. Historically, criminal contempt was also a common law misdemeanour. This has particular salience in the United States where there is a constitutional right to trial by jury in criminal cases: **International Union, United Mine Workers of America v Bagwell**.³³ The same rules of evidence should apply to civil contempt as to criminal contempt. In my judgment it is right to apply the criminal rules as to adverse inferences. Whether this should be by analogy or directly is immaterial. This necessarily means I should apply this Territory's rules on adverse inferences in criminal cases rather than the rules identified in the English cases. I hold that I should not draw adverse inferences from the respondents' exercise of their right to silence.

The first allegation of contempt

- [42] I turn to the first allegation of contempt, that of failure to send the lawyer's letter by 8th February 2022. The *actus reus* of the breach is accepted by Ms. Prevezer QC. I am sure that the order was served on the two directors in time for them to arrange for the sending of the letter. Ms. Lee resigned as a director of Greater Sail, but only on 9th February 2022 after the time for compliance with the order.
- [43] On these facts, the applicants have in my judgment shown a case for all three respondents to answer: **Regina v Galbraith**.³⁴ Great Sail had lawyers acting for it

³³ 512 US 821 (1994) (US Supreme Court).

³⁴ [1981] 1 WLR 1039.

in China. It would have been a simple matter to direct the lawyers to send the letter by the deadline set by the order of 31st January 2022.

[44] What Mr. Mai says about this allegation of breach in his third and sixth affirmations is this:

Third Affirmation: “4. I offer an unreserved apology for GSL’s previous non-compliance with the Order of 31 January 2022. GSL has instructed its PRC lawyers to send the letter as Ordered.

5. GSL sought to comply with the Order by asking Beijing DHH Law Firm (Shenzhen) on 8 February 2022 to send the letters required by the Order, but the lawyers declined to do this, saying that the letters did not comply with PRC legal requirements and that they could not act on foreign Court Orders. When GSL insisted that the letters be sent, the lawyers ceased to act for GSL and it had to look for new lawyers.”

Sixth Affirmation: “4. ...I again apologise for the non-compliance and stress that I and GSL had no intention to defy the Court. We acted on the basis of privileged PRC legal advice. When we tried to have GSL’s PRC lawyers send the letters, the lawyers refused to do so, and ceased to act for GSL.

5. It was not easy to find another law firm that would send the letters, and it took some time to do this, but we eventually found one.”

[45] I remind myself that Mr. Mai and the other two respondents have no need to prove anything. It is for the applicants to disprove this defence. However, it is open to the applicants to argue that the defence is so improbable that the Court should reject it, even on the criminal standard.

[46] Mr. Mai has not given oral evidence before me. I accept that, as a matter of Chinese law, he cannot lawfully give evidence remotely from China. However, there is no evidence that there is any difficulty with his flying to this Territory. I accept that that would be inconvenient and that he may well have quarantine on returning to China. However, the inconvenience results from his agreeing to be a director of a BVI company. There was no application to adjourn the matter so he could attend.

- [47] Since he has not given oral evidence, he has not been subject to cross-examination. I have no means of assessing the veracity of the evidence which he gives in these two affirmations.
- [48] The account of his dealings with DHH is in my judgment most improbable. There can, so far as I can see, be no difficulty with a BVI court instructing a BVI company to direct its lawyers in China to write a letter. There is no infringement of Chinese sovereignty. This Court was not ordering DHH to do anything: it was ordering Greater Sail to do something. In oral argument, Ms. Prevezer submitted that the reference to affixing chops to the letter in the order of 31st January was particularly problematic. I fail to see why it should be problematic: it is simply the way of verifying documents in China. If DHH were going to write a letter, I do not understand why there should be a difficulty with that firm affixing its chop to the letter.
- [49] There is no corroboration of what Mr. Mai says. He does not produce any letter from DHH explaining why they refused to comply with their client's instructions and why they withdrew from their retainer. Given that Kaisa is a major corporation in China, Greater Sail is likely to have been an important client of DHH. If there were any legal or professional difficulties with DHH following Greater Sail's instructions to write the letter, it would have been easy to obtain such confirmation. Wang Jiang gives no evidence that there was any legal difficulty in this regard.
- [50] Again I remind myself that the respondents have no obligation to produce a letter from DHH or expert evidence about DHH's ability to comply with Greater Sail's instructions. It is not something from which (as I have explained above) I can properly draw inferences. The absence of this evidence, however, leaves a blank in the evidence.
- [51] Ms. Lee has given no evidence relevant to this allegation of breach. That is her right. I draw no inferences from it. She is of course entitled to rely on the evidence given by Mr. Mai in opposition to the application.

[52] I therefore stand back and ask myself whether I am satisfied so that I am sure that there is no substance in the defence that DHH refused to send the letter. I am so satisfied. Mr. Mai's account of DHH's refusal is, as I have said, most improbable. His account has not been tested by cross-examination, although it could have been. I can attach very little weight to his evidence by affirmation. There is no other evidence to support his account. I am sure that it is not truthful.

[53] I therefore find the first allegation of contempt proven to the criminal standard. If Mr. Mai's defence had been established, then that would have enured to the benefit of Ms. Lee and Greater Sail. Since it has not been, in my judgment the case is proved against Ms. Lee and Greater Sail as well as Mr. Mai.

The second and third allegations

[54] I turn then to the second and third allegations which it is convenient to consider together. Again the applicants have in my judgment shown a case to answer.

[55] There are two defences raised. The first is raised by Ms. Lee. It will be recalled that she resigned as a director on 9th February 2022, before the time for compliance with those parts of the order which are the subject of the second and third allegations on 15th February 2022. The fact that a director resigns after service of a Court order but before the time for compliance does not mean that she bears no responsibility for ensuring the carrying out of the order. Quite the contrary. However, it may do. In particular, if the director who resigns can reasonably expect the on-going director or directors to ensure that the company obeys the Court order, that will amount to a defence.

[56] Now in the current case, Ms. Lee has changed her explanation of her reason for resigning. In her first affirmation, she says: "I resigned because I no longer have the time to deal with GSL matters due to my other commitments." In her second affirmation she said that she had worsening mental health difficulties which resulted in her resignation.

[57] Again Ms. Lee has not given oral evidence and the same comments I made in relation to Mr. Mai apply to the weight which can be given to her evidence by affirmation. The change in her account also tells against her. Nonetheless she does produce some, albeit not very strong, independent evidence that she is receiving treatment from a psychiatrist, Dr. Ip Jan-Ming, Justice of the Peace. She explains that the reason for not disclosing her mental health difficulties earlier was the shame attaching to such conditions in Chinese culture.

[58] In my judgment, Ms. Lee's evidence is sufficient to raise a doubt as to whether the reason for her resignation was in fact to escape responsibility for ensuring compliance with the order of 31st January. It is not just in Chinese culture that mental health difficulties are concealed by sufferers from such conditions. I cannot be sure that her account is wrong, particularly where there is some independent evidence to support it. Further, as a separate consideration, she was junior to Mr. Mai in Kaisa. It might as a general matter be reasonable for her to expect that he, as her superior, would carry out his duties as a director to obey Court orders. I am not sure she is guilty of contempt in relation to these two allegations and therefore acquit her of them.

[59] As regards Greater Sail and Mr. Mai, they have adduced expert evidence in proper form from Wang Jiang, a qualified lawyer in the PRC. He carries out a full review of the relevant legislation governing data protection in China. He concludes:

“11. In the present matter, I am given to understand that the BVI Court has granted an Order to request GSL to provide copies of all correspondences sent or received by or on behalf of GSL with the Bao'an Branch of Market Supervision Administration of the Shenzhen Municipality, the Guangming Branch of Market Supervision Administration of the Shenzhen Municipality and any other branches of the Market Supervision Administration, and file and serve an affidavit by a director or other proper officer of GSL setting out the contents of all oral communications by or on behalf of GSL with the Bao'an Branch of Market Supervision Administration of the Shenzhen Municipality, the Guangming Branch of Market Supervision Administration of the Shenzhen Municipality and any other branches of the Market Supervision Administration and etc. In my view the aforesaid copies, oral communications and other evidence requested to be produced in the BVI hearing may be regarded as data stored in the territory of the PRC thus, without the approval of the competent authority of the PRC, Mr. Mai Fan,

who resides in PRC, may not be allowed to attend the hearing remotely or provide relevant evidence containing data stored in the territory of the PRC.

12. In addition, according to Article 6 of the **Data Security Law**, the national cyberspace authority is responsible for conducting overall coordination of cyber data security and related supervision work. Industrial sector, telecommunications, transportation, finance, natural resources, health, education, science and technology, and other departments shall undertake the duty to supervise data security in their respective industries and fields. And according to the Article 60 of the **Personal Information Protection Law**, the national cyberspace administration shall be responsible for the overall planning and coordination of personal information protection work and related supervision and administration. Therefore, if Mr. Mai Fan would like to provide evidence contained data in the PRC, there may be a need for national cyberspace administration' approval. If the data is in connection with the Industrial sector, telecommunications, transportation, finance, natural resources, health, education, science and technology, etc., he shall be required to get the approval of departments in such fields. In fact, there is no specific laws, regulations or guideline in the PRC on how to get approval of the competent authority of the PRC when a domestic organization or individual provides data stored in the PRC to any foreign judicial or law enforcement authority. I tried to contact the national cyberspace administration several times, but I do not get any feedback or instruction yet. At present, it is difficult for Mr. Mai Fan to get any instruction on how to get such approval in the PRC from related departments. Therefore, at the moment, it is not possible for Mr. Mai Fan to obtain such approval when he is required to provide data in the PRC to a foreign judicial or law enforcement authority."

[60] Wang Jiang did not give oral evidence, but there was no request that he do so. His expert opinion was admitted without objection. In my judgment, this evidence is sufficient to raise a reasonable doubt as to whether Greater Sail could lawfully have complied with the requirements of this Court's order by 15th February. It is true that Greater Sail has now complied with this part of the order and there is no evidence of how difficult it proved for Greater Sail to obtain the relevant administrative approvals. Nonetheless, the **Sectorguard** defence has not in my judgment been rebutted to the criminal standard of proof by the applicants. The applicants have not shown that Greater Sail could have obtained the administrative approvals by 15th February.

[61] Accordingly, on this ground I acquit Greater Sail and Mr. Mai of breach of these allegations. If I had not acquitted Ms. Lee on the different grounds above, she too would have stood to be acquitted on this ground.

[62] I should add that my conclusion on these two allegations would be the same, even if I was wrong when I held that adverse inferences could not be drawn from a respondent's exercise of the right to silence. Greater Sail put forward a positive defence supported by expert evidence, which the applicants failed to disprove. There was no need to rely on adverse inferences.

Sentence

[63] As I indicated after announcing my decision on the contempt application, I shall adjourn sentence until after 15th March 2022, when it will be clearer what approach the Court of Appeal are taking to the outstanding issues before them. I can indicate to the respondents that, since the order of 31st January 2022 has now been complied with in full, the custody threshold has not been passed in respect of Ms. Lee and Mr. Mai. For the same reason, sequestration is not appropriate in respect of Greater Sail. I will therefore hear mitigation as to whether a fine or no order save in respect of costs should be made and, if a fine is appropriate, what the size of the fine should be. Ms. Lee and Mr. Mai should give evidence of their means, for example by the production of their pay slips.

The application for an extension of time and relief from sanctions

[64] The second application was amended on 8th March 2022 to seek relief pursuant to CPR 26.1(2)(k) and 26.8 for orders (a) that the time limited for compliance with the three relevant paragraphs of the order of 31st January be extended to 4th March 2022; and (b) that there be relief from "sanctions contained in the Orders dated 31 January 2022 and continued on 24 February 2022".

[65] CPR 26.1(2) provides that the Court may:

"(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed..."

[66] CPR 26.8 provides:

“(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be —

- (a) made promptly; and
- (b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that —

- (a) the failure to comply was not intentional;
- (b) there is a good explanation for the failure; and
- (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) In considering whether to grant relief, the court must have regard to —

- (a) the effect which the granting of relief or not would have on each party;
- (b) the interests of the administration of justice;
- (c) whether the failure to comply has been or can be remedied within a reasonable time;
- (d) whether the failure to comply was due to the party or the party’s legal practitioner; and
- (e) whether the trial date or any likely trial date can still be met if relief is granted.

(4) The court may not order the respondent to pay the applicant’s costs in relation to any application for relief unless exceptional circumstances are shown.

[67] The difficulty with relying on CPR 26.1(2)(k) for an extension of time is that Part 53 gives a comprehensive code for cases where committal or sequestration is in prospect. CPR 53.2 provides:

“(1) If a judgment or order specifies the time or date by which an act must be done the court may by order specify another time or date by which the act must be done.

(2) If a judgment or order does not specify the time or date by which an act must be done, the court may by order specify a time or date by which it must be done.

(3) The time by which the act must be done may be specified by reference to the day on which the order is served on the judgment debtor.

(4) An application for an order under this rule may be made without notice but the court may direct that notice be given to the judgment debtor.

(5) Any order made under this rule must be served in the manner required by rule 53.3 (enforcement against an individual judgment debtor) or 53.4 (enforcement against an officer of a body corporate).”

[68] CPR 26.1(2)(k) is in my judgment a provision concerned with time periods for procedural steps to be taken. It is not relevant where, as here, substantive (even if only interlocutory) relief has been granted by the Court. Even if that were wrong, CPR 53.2(1) would apply as *lex specialis* in place of CPR 26.1(2)(k). Even if this is also wrong, the Court would in my judgment still, when deciding whether to grant relief under CPR 26.1(2)(k), have to apply the well-established principles applicable to injunctions.

[69] One of these principles is that orders of the Court are to be obeyed. If they are not, then the party who is subject to the injunction is liable to committal for contempt. It is common ground in this case that Greater Sail did not comply timeously with the order of 31st January. Whether that non-compliance was a contempt or not is to be determined as at the date of the breach. There is no scope for a retrospective change of the order so as to cause the transformation of what was a contumelious breach of the Court’s order into no breach at all. This is equally so, if an order granting an injunction is successfully appealed. If there has been contempt, the successful appeal will not wipe the contempt clean; rather it will be mitigation (and quite possibly powerful mitigation) in relation to punishment for that contempt.

[70] Where a contempt has been proven, there is no scope for relief from sanctions. CPR 26.8(2)(b) will never be satisfied, because otherwise there would be no contempt. CPR 26.8(2)(a) will very rarely be satisfied. Again, as with CPR 26.1(2)(k), the relief from sanctions regime under CPR 26.8 is concerned with breaches of procedural orders, not substantive orders.

- [71] Further, the orders of 31st January and 24th February do not themselves impose a sanction. A penal notice in itself does not impose a sanction. The sanction comes from the general law, not from the orders themselves. There is in my judgment no “sanction imposed” which might fall within CPR 26.8(1). The sanction comes later, when the Court imposes the punishment for any contempt found proven.
- [72] In the current case, the application for relief from sanctions is in any event academic. The order has been complied with; such breaches as were contumelious shall be punished. If Greater Sail were still in non-compliance, then the Court would make an order under CPR 53.2(1) fixing a further date for compliance. (This is traditionally known as a “four day order”, although there is no requirement to fix compliance within four days.) It would probably also make an order requiring production of the correspondence with the relevant data protection authorities.
- [73] As it is, I dismiss the application for an extension of time and relief from sanctions.

Conclusion

- [74] Accordingly, I dismiss the application dated 28th February 2022 that I recuse myself. I refuse the application of the same date (as amended on 8th March 2022) for an extension of time and relief for sanctions.
- [75] I find all three defendants guilty of contempt of court in respect of the allegation that Greater Sail failed and/or refused by 4pm Beijing time on 8 February 2022 to deliver letters in accordance with the order of 31st January 2022. I acquit them of the other two allegations of contempt of court. I adjourn sentence to a date to be fixed after 15th March 2022.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar