

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2017/0151

BETWEEN:-

**(1) ZHAO LONG
(2) KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO LTD**

Claimants

-v-

**(1) ENDUSHANTUM INVESTMENTS CO LTD
(2) JADE VALUE INVESTMENTS HOLDING CO LTD
(3) ZHONGZHI INVESTMENT HOLDING CO LTD
(4) SHARON WEI
(5) LUNAN PHARMACEUTICAL GROUP CORPORATION**

Defendants

CLAIM NO. BVIHC 2017/0125

BETWEEN:-

**(1) HENGDE CO (PTC) LTD
(2) ENDUSHANTUM INVESTMENTS CO LTD**

Claimants

-v-

**(1) ZHAO LONG
(2) LUNAN PHARMACEUTICAL GROUP CORPORATION**

Defendants

Appearances:

Mr. Tom Lowe QC, with him Mr. John Crook of Walkers Hong Kong, Mr. Oliver Clifton and Ms. Yegâne Güley of WalkersBVI for Zhao Long and Kunlun Newcentury Investment Holdings Co Ltd

Mr. Robert Nader of Forbes Hare for Edushantum Investments Co Ltd

Mr. Stephen Rubin QC, with him Ms. Laure-Astrid Wigglesworth of Appleby (BVI) for Lunan Pharmaceutical Group Corporation

Mr. Gilead Cooper QC, with him Mr. Jonathan Addo of Harneys for Hengde Co (PTC) Ltd, Jade Value Investments Holding Co Ltd and Zhang Guimin

Ms. Lisa Walmisley of Bedell Cristin (who were not yet on the record) for Mrs. Sharon Wei and Wang Jianping

Zhongzhi Investment Holding Co Ltd did not appear and was not represented

2021 September 13
September 20

JUDGMENT (No 2)

- [1] **JACK, J [Ag.]**: On 20th July 2021, I handed down my substantive judgment in this matter. Consequential matters were adjourned to a two-day hearing on 13th and 14th September 2021. I shall use the same shorthand for the various protagonists as I used in that judgment.
- [2] On 27th August 2021, apparently without notice, Ms. Zhao issued an application in the two actions currently before me in respect of alleged contempts of court committed by Lunan, Zhang Guimin, Jade Value, Zhongzhi, Mrs. Wei and Wang Jianping. It will be noted that neither Zhang Guimin nor Wang Jianping were existing parties. The effect, as was readily foreseeable, was completely to disrupt the consequentials hearing.
- [3] Although it does not appear on the face of the application, the only basis for the contempt application was that the alleged contemnors were guilty of criminal contempt of court. The Court was never asked to, and never made, a freezing order or other injunction against any of the defendants. Insofar as complaint is made in the committal application of a breach of various respondents' disclosure obligations, none of the Court's orders for specific disclosure included a penal notice. Thus, there was no Court order broken which might found an application to commit for civil contempt.
- [4] Criminal contempt of court in this Territory is governed by the **Contempt of Court Act 1898**.¹ The background to passing of this Act was concern at the behaviour of certain judges in the then Colonies of the West Indies, who were abusing their power to punish for contempt. The particular trigger for the 1898 Act was an incident involving the Acting Chief Justice of St

¹ No 15 of 1897, an Act of the General Legislative Council of the Leeward Islands, given continuing effect in this Territory by SRO 22/1956. The 1898 Act was given Royal Assent on 23rd June 1898, hence the disparity in the year of passing it. It apparently follows similar legislation in Bermuda passed shortly before.

Vincent, a Mr. St. Aubyn. He apparently disliked a local barrister, a Mr. McCleod. McCleod had received by post some copies of the *Federalist* newspaper. Before reading them, he lent a copy to the local librarian for placement in the library. Unbeknownst to McCleod, the newspaper contained an article and a letter, both redolent with vitriol against the Acting Chief Justice.² On 3rd May 1897, St. Aubyn CJ sent McCleod to prison for fourteen days for criminal contempt in passing the newspaper to the librarian, notwithstanding that there was no evidence McCleod had known the contents of the paper. McCleod appealed. The Privy Council advised quashing the finding of contempt and ordering the judge to pay the costs in the Privy Council personally (presumably on the basis that he appeared himself through counsel on the appeal, rather than have the Government of St. Vincent defend the appeal).³

- [5] Criminal contempts are primarily matters for the Attorney-General. The claimants in the current matter, however, never troubled themselves to approach her. This is surprising. The gist of the allegations against the alleged contemnors is that they entered a conspiracy to pervert the course of justice. The penalties for this offence are much greater than those available for criminal contempt under the 1898 Act (a \$240 fine or one month's imprisonment in most cases; a \$480 fine or six months for "spoken or written comment on legal proceedings then pending": section 4(8)). Further there is the possibility, which does not exist for contempt, of extraditing the conspirators.
- [6] The 1898 Act does not on its face state that it only applies to criminal contempts, but section 10 provides that the Act does not interfere with affect the power to punish any person who disobeys any order or direction of the Court. Thus, the Court can deal with civil contempt in the usual way. In particular, under the Act trial is by jury⁴ with no option for trial by judge alone (presumably to provide some protection against partial judges like St. Aubyn CJ), whereas civil contempts are invariably dealt with by judge alone.

² "A man of the Torquimada type, narrow, bigoted, vain, vindictive, and unscrupulous": the quotes from the newspaper reproduced in the advice of the Privy Council are classics of the genre.

³ *McCleod v St. Aubyn* [1899] AC 549.

⁴ Section 4(4). This reflects American practice: *International Union, United Mine Workers of America v Bagwell* 512 US 821 (1994) (US Supreme Court).

- [7] It is possible at common law for an individual to apply to commit a respondent for criminal contempt. However, it requires the permission of the Court. In the older language used for the procedure, as shown in **Rex v Davies**,⁵ the applicant applied *ex parte* for a rule nisi (in other words a preliminary order) for the respondent to show cause why he or she should not be attached or committed for the contempt set out in the application. There was then a substantive hearing where the respondent showed cause why the rule should not be made absolute.
- [8] The common law procedure is reproduced in the 1898 Act. The applicant needs to apply for a rule nisi directed to the Provost Marshal: see section 4(1) and (3). Although the Act does not say this expressly, the intention is that the Provost Marshal shall serve the respondent with the rule nisi, so he or she can defend him or herself. The position of Provost Marshal still exists, because as recently as 30th August 2021 the Government of this Territory was advertising for a senior bailiff for this Court, the seventh of whose tasks was to “[u]ndertake the duties of Provost Marshal when required to aid the effective and effective [sic] management of the Court.”⁶
- [9] When the Court decides whether to grant a rule nisi, an important consideration will usually be whether the Attorney-General has been approached to act and, if she has decided not to bring proceedings, her reasons for not doing so. Further the Court will have regard to the realities of the matter. I have not heard full argument on whether it is possible to serve outside the jurisdiction a respondent to an application to commit. (The CPR appear to have no gateway for service, even supposing applications to commit for criminal contempt are governed by the civil rules of procedure, which is doubtful. At common law personal service seems to be required.) Even if it is, the reality is that the only respondents in practice amenable to the jurisdiction of the Court are the BVI company defendants. The Court will not permit its limited resources to be wasted on pointless litigation.
- [10] The failure to obtain a rule nisi under section 4(1) of the Act is in my judgment fatal to the application as currently formulated. It therefore stands to be dismissed. However, the order

⁵ [1906] 1 KB 32 (King’s Bench Divisional Court).

⁶ Senior Bailiff | Government of the Virgin Islands accessed 13th September 2021.

needs to be clear that this dismissal is without prejudice either to the Attorney-General bringing proceedings herself for criminal contempt, if she is so minded, or to the claimants bringing a fresh application using the proper procedure.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar