

Neutral Citation Number: [2022] EWHC 2449 (Comm)

Case No: CL-2022-000390; CL-2022-000425;
CL-2022-000431; CL-2022-000441

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2022

Before :

Justice HHJ Mark Pelling QC

Between :

CL-2022-000425 (1) KEA INVESTMENTS LTD;
(2) LIDMAN HOLDINGS LIMITED

- and -

FARRER & CO LLP;
(2) ANNE-MARIE PIPER CL-2022-000431
(1) KEA INVESTMENTS LTD;
(2) LIDMAN HOLDINGS LIMITED

- and -

ARABELLA DI IORIO CL-2022-000390 BLUE
SIDE SERVICES SA

- and -

(1) KEA INVESTMENTS LTD;
(2) SIR OWEN GEORGE GLENN KNZM
ONZM CL-2022-000441 (1) KEA
INVESTMENTS LTD;
(2) DAS HOLDINGS AG –

- and -

- SIR OWEN GEORGE GLENN KNZM ONZM

Mr Gareth Tilley and Mr Oliver Jones (instructed by Farrer & Co LLP) for the Group 1

Hearing dates: **12th September 2022**

JUDGMENT

Justice HHJ Mark Pelling QC
(14:29 pm)

Monday, 12 September 2022

Judgment on General Civil Restraint by **JUSTICE HHJ MARK PELLING QC**

1. The issues I now have to determine are whether or not to make a general civil restraint order against two individuals, Mr Watson and Mr Hussain. I start by identifying the basis on which a general civil restraint order can be made. A general civil restraint order is covered by paragraph 4 of practice direction 3(c), and can be made:
 2. " ... where the party against whom the order is made persists in issuing claims or making applications which are totally without merit in circumstances where an extended civil restraint order would not be sufficient or appropriate".
3. An extended civil restraint order is covered by paragraph 3 within the same practice direction and may be made where a party has persistently issued claims or made applications which are totally without merit. The key difference between the two orders are that with a general civil restraint order a party against who such an order is made will generally be restrained from missing any claim or making any application in this context in either the High Court or the County Court, without first obtaining the permission of a judge, whereas if an extended civil restraint order is made, then it will restrain the party against whom it is made from making claims or issuing applications in either the High Court or the County Court which are claims or applications:
 4. " ... concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order".
5. As will be well known, where a judge certifies a particular application or claim to be totally without merit then a court is obliged to consider whether or not to make a civil restraint order, but as the two quotations I have set out a moment ago show, even where the court is satisfied that the level of persistency necessary for the making of an order is made out, it is then necessary to consider what is the bare minimum intervention required in order to achieve the desired result.

In this context, whilst it is true to say that civil restraint orders do not preclude the commencing of proceedings or the making of applications providing, always, that permission from the judge is obtained, the making of such -- such orders are, by their very nature, an interference with or derogation from the rights of access to the court enshrined in Article 6 of the European Convention on Human Rights as was carried into English law by the Human Rights Act 1996, and therefore any such interference must be proportionate or, by definition, unlawful. It is for that reason that enormous care needs to be taken before these orders are made.

6. That is all the more case, in my judgment, where the application is made against someone who is not a named party to the application or claim by reference to which the applications are made. It is open to a party to apply for a civil restraint order against an individual who is not named as a party in the circumstances identified by Newey,~J as he then was in C26 Ltd, an authority approved by the Court of Appeal in *Sartypi v Tigris Industries Incorporated* [2019] EWCA 225. In that case at paragraph 32 already Males, J said:
 7. " ... as Newey,~J also held in CFC 26 minute of the term, 'A party [who] has ... issued such claims or applications refers not only to the named party but also to someone who is not a named party but is nevertheless the 'real' party who has issued a claim or made an application ... although the 'real party' is not a concept expressly found in the Civil Procedure Rules, it is a concept which has been deployed from time to time, for example, in the context of funding proceedings ..."
 8. It is unnecessary to explore in this appeal the limits of the, "Real party", concept, but it must extend to a person who is controlling the conduct of the proceedings and who has a significant interest in that outcome".
 9. Against that background it is necessary to, first, identify whether the level of persistency required for the making of an extended has been made out. So far as that is concerned, I'm satisfied that the relevant level of persistency has been shown, at any rate, by reference to the three Kea investment claims that I struck out at the beginning of today's hearing, and by reference to the

Blue Side action that I struck out as well. That is four. There are two applications which I determined at the outset which again I certified as totally without merit. In each case applying the test identified in the Sartipy case at paragraph 27 where it was said that for a claim to be -- or application to be completely without merit it must be one that is bound to fail in the sense that there is no rational basis on which it could succeed. As I have explained in the judgments I delivered in relation to both the three Kea investment claims and the Blue Side claim the no rational basis test is plainly made out, and the same may be said for the applications for the reasons I gave at the time.

10. On this analysis, therefore, there have been six totally without merit findings in relation to the present claim. The civil restraint order is sought against Mr Rizwan Hussain. The basis on which that is sought is that he is a person who plainly satisfies the test identified by Males,~LJ at paragraph 32 of his judgment in Sartipy because he is a person, so it is said, on the basis of the evidence available, controls the conduct of the proceedings and has a significant interest in their outcome.
11. So far as the first of these points is concerned, I have no hesitation in reaching the conclusion that Mr Hussain is someone who is controlling the conduct of the proceedings. For all the reasons that I have identified in the judgments that I gave earlier today but in summary because the modus operandi is very closely similar to that which has been adopted in other cases which Mr Hussain has been found to be involved in. The language used in the correspondence of the pleadings is, in material respects, highly similar to language used in similar contexts in other cases where Mr Hussain has been involved, and overall pseudonyms have been used in this litigation which have been used in other cases where Mr Hussain has been found to be involved. All of this leads me to the conclusion that the real person controlling this litigation is Mr Hussain.

12. So far as significant interest in outcome is concerned, it's difficult to see, short of naked irrationality, why it is that Mr Hussain will be orchestrating these proceedings and incurring the very substantial costs that are incurred if by no other means than by issuing the proceedings, unless it was perceived that there was an economic interest in succeeding in the litigation. That being so, I'm satisfied that the procedural requirement in relation to the making of a general civil restraint order, an extended civil restraint order, so far as -- is satisfied so far as Mr Hussain is concerned.
13. The next question is whether, as an exercise of discretion, the court ought to make an order, and if so in what terms. It's plain that a limited civil restraint order would be of no value in the circumstances of this case, given the history of litigation being used as a means of stepping, cuckoo-like, into the affairs of very substantial trading companies and entities. The real question, therefore, is whether or not an extended or general civil restraint order is appropriate. In arriving at a conclusion about that I'm bound to take into account the context as a whole. As I have said, the history, when looked at as a whole, suggests that Mr Hussain is someone who is willing to use litigation as an illegitimate mechanism for attempting to obtain control of the valuable economic interests of either substantial companies or other entities by using a common mechanism and in those circumstances I'm satisfied that an extended civil restraint order would not provide the necessary protection for the public at large that is necessary in the circumstances of this case. No attempt has been made by anyone apart from, least of all, Mr Hussain, to justify why it is that such an order should not be made against him, and in those circumstances I have earnestly looked into all the circumstances which are available in evidence before me, but have come to the conclusion that there are no countervailing circumstances which should lead me to make anything other than a general civil restraint order against him.
14. The much more difficult question is whether or not such an order should be made against Mr Watson who is the other individual against whom an order is sought. The way in which this part

of the case is put is as follows; it will be recalled from what I said in earlier judgments that the stimulus for these proceedings have been the commencement of some proceedings in Kentucky by the Wikeley family trust acting by a corporate trustee. In those proceedings the Wikeley family trust contend that Kea Investments Ltd are liable to the Wikeley family trust for very substantial sums of money alleged to result from a breach of what is known in these proceedings as the coal agreement.

15. It is said that it is to be inferred that there is a continuing close relationship between Mr Watson and the individual who stands behind the Wikeley family trust, Mr Wikeley. The basis for this assertion seems to be that in the past, according to various extracts from New Zealand newspapers there was a business relationship between Mr Watson and Mr Wikeley in circumstances which led to business failure with Mr Wikeley ultimately becoming bankrupt. It is said, therefore, that I should infer -- and it is said that I should infer that that relationship is continuing, and Mr Watson is providing support for Mr Wikeley because the evidence which is available in the Kentucky proceedings suggests that Mr Wikeley, or rather the corporate trustee for the Wikeley family trust, has been able to obtain access to material which was contained in the trial bundle in an action brought against Mr Watson by Kea Investments Ltd. The evidence leading to this conclusion is set out in detail in the witness statements that have been filed in support of the application. I don't propose to go through that word-for-word, other than to say that generally the point is that the documentation which is relied upon by the Wikeley family trust at the Kentucky proceedings contains within it and on its face references which demonstrate that the particular pages of the relevant documents that are exhibited have been extracted from the trial bundle used in the English proceedings. The point which is made on behalf of the applicants is that the Wikeley family trust could not have obtained access to that material other than by Mr Watson supplying it. It is submitted, therefore, that it is to be inferred that Mr Watson has an economic interest in the outcome of the Kentucky proceedings because

he would not otherwise be providing such assistance and the assistance would -- and the provision of assistance is, therefore, something which points clearly towards an interest in the outcome.

16. By the same token, what is said in relation to the proceedings which have been commenced by and against Kea, by those who claim to be protected directors but, in truth, are not directors at all, derives from, or includes, or has been brought for the purpose of attempting to induce a settlement of the Kentucky proceedings. In support of that proposition, that my attention has been drawn to some minutes apparently prepared by the protected directors or on their behalf which -- under which Mr Tarper(?), the individual ostensibly who -- an individual director and protected director, was being authorised by the corporate protected directors to settle the Kentucky proceedings, and has sums to be negotiated of up to US\$100 million.
17. What is said, therefore, is that Mr Watson has a link with both Mr Whitely on the one hand and a demonstrable link with Mr Hussain on the other to be derived amongst other things from the conclusions that I reached in the Long Harbour litigation, but where Mr Watson again featured, this time as a defendant, filing in those proceedings first a witness statement which suggests that the proceedings were of no merit and were a concoction ultimately by Mr Hussain which is what he said in his first statement, and the second statement which purported to support the claims that were being made against legitimate directors in those proceedings. It is said, therefore, that it is to be inferred that Mr Watson is economically interested in the outcome of this litigation because he is plainly to be seen supporting the Wikeley family interests in the proceedings in Kentucky on the one hand, whilst on the other is firmly linked with Mr Hussain who in turn is operating through a cipher, Mr Tarper, and who is or was attempting to manipulate the affairs of Kea entirely illegitimately for the purpose of obtaining a transfer of proceeds in purported settlement of the Kentucky proceedings. For the reasons I have already given, that was doomed to failure because none of the directors were properly appointed or even remotely arguably

properly appointed, and therefore the whole confection collapsed because it was based upon a legal fiction which could not survive even the most limited of scrutinies.

18. In those circumstances, I'm invited to infer that Mr Watson fulfils the test identified by Males, ~LJ in *Sartipy*. I repeat that in order to be satisfied that Mr Watson is a real party for the purposes of these proceedings, I must be satisfied, first, that he is controlling the conduct of the proceedings, and (b) has a significant interest in the outcome. In my judgment, this requires a relatively high level of evidential support. It is certainly an inference that Mr Watson has an interest in the outcome of this litigation, but it is not the only inference that can be drawn, and it is very difficult to conclude that he is controlling the conduct of the proceedings, even if he has an interest in the outcome. In my judgment, a much more natural inference to be drawn from the circumstances of this case is that Mr Watson is providing assistance to Mr Hussain and whilst I'm prepared to infer that that will be an economic benefit to Mr Watson if the support he provides is successful, I'm not prepared to draw the inference on an application of this sort that he is a person, or one of the persons controlling the conduct of the proceedings. Quite the contrary seems to be the case on the material that's available. As I said, the inference to be drawn is that it is Mr Hussain who was controlling the outcome.

19. In those circumstances I decline to make a civil restraint order at this stage against Mr Watson. The concern which is expressed on behalf of the applicants in this case is that if Mr Watson is not made the subject of control he will commence other proceedings against Kea and those who truly control Kea in the weeks or months that are ahead. I see no evidence to support that conclusion because there is no evidence of legal activity against Kea or the owners of Kea, other than in relation to this litigation, and the support that was provided to Mr Hussain in the Long Harbour litigation. In those circumstances it would not be appropriate to make a civil restraining order at this stage. Mr Watson will have to -- someone will have to recognise that if, indeed, further proceedings are commenced, and if applications of this sort have to be made and succeed

then a different view might be taken on a different day with a further track record that such findings would apply. In the result, therefore, there will be a general civil restraint order against Mr Hussain but not otherwise.