EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
[Civil]

Claim No. BVIHCV 2011/222

BETWEEN:

LIAO HWANG HSAING

Respondent/Claimant/First Defendant to Counterclaim

AND

LIAO CHEN TOH

Applicant/Defendant/Counterclaimant

AND

LIAO WEN TOH

Second Defendant to Counterclaim

Appearances:
Mr. Jeremy Child for the Applicant
Mr. Paul Dennis QC and Ms. Nadine Whyte for the Respondent

2013: May 6th

JUDGMENT

[1] ELLIS J: This is an application by the Defendant/Counterclaimant herein brought pursuant to the Eastern Caribbean Supreme Court Civil Procedure Rules 43 and the inherent jurisdiction of the Court which he seeks:

1. A declaration that the Claimant/First Defendant to the Counterclaim having breached the orders of Court granted on the 28th October 2011 and 28th June 2012 is in contempt of this Honourable Court.

2. Such penalty in respect of the breach of the Order as the Court sees fit, including without limitation an order debarring the Claimant from pursuing her claim in the proceedings herein.

3. Costs.

[2] The Application is brought within the context of a protracted litigation history between the parties which is critical to the matter in issue. For that reasons the relevant background is summarised below.

BACKGROUND

[3] At the time of his death the Respondent's husband (YC), was the sole shareholder of Triple Dragon Limited (TDL) a company registered in the British Virgin Islands. TDL holds a 62% shareholding in Loyal HQ Industrial Corporation (LHQ) which is the holding company of more than ten companies engaging directly or indirectly in chemical productions and trading in Taiwan, China, Hong Kong and the British Virgin Islands.

[4] At the time of his death YC was one of three directors of the TDL together with the Applicant (CT) and his brother Liao Wen Toh (WT). YC was also the Chairman and a director of LHQ. CT and WT were and are also directors of Loyal HQ. Following the death of YC, CT became the Chairman of LHQ.

[5] The Respondent was appointed administrator *ad colligenda bona* of YC's estate on 11th August 2011 to collect and preserve the assets of her husband's estate. On 12th August 2011, the Respondent removed the Applicant as a director of TDL and appointed herself as a director in his stead. Representation in respect of the estate of YC is fiercely contested in collateral legal

proceedings both in the British Virgin Islands and in Taiwan and there have been numerous interlocutory applications which have arisen as a result.

[6] On 28 October 2011 the Honourable Bannister J. granted an injunction against the Respondent enjoining her from procuring, causing, using, permitting, or acquiescing in the use of TDL's votes in any general meeting of LHQ Industrial Corporation (LHQ) to remove the Applicant as a director of LHQ.

[7] On 28 June 2012 the Honourable Olivetti J. granted an expanded positive injunction against the Defendant directing her to ensure that the votes of TDL at any general or shareholders' meeting of LHQ be used to ensure that:

(a) The Applicant remains a director of LHQ until judgment in the probate proceedings herein as envisaged by the 28 October 2011 order of Mr Justice Bannister, and that

(b) The Applicant not be required to stand down as director of LHQ whether for re-election or otherwise prior to judgment in the probate proceedings herein.

[8] In December 2012, notice of a shareholders meeting of LHQ (to be held on January 4, 2013) were sent to the shareholders of LHQ. The shareholders' meeting was scheduled by the Board of Directors of LHQ. The notice included an agenda for the meeting which was also fixed by the Board of Directors. Prior to the meeting it is clear that the Applicant was the Chairman of the Board of Directors of LHQ, was the chairman of the board of LHQ and would have been aware of the prescribed agenda for the meeting.

[9] That Agenda included the proposal for the removal of the Applicant as a director and a proposal for the re-election of all the directors and supervisors of LHQ.

[10] On January 4, 2013, Liao Hao Chin (LHC) attended the meeting as TDL's representative. However, commencement of the meeting, CT as chairman refused to allow LHC to represent TDL and announced that the shareholders' meeting should be adjourned due to lack of a quorum because LHC could not represent TDL without his consent. He then left the meeting.

[11] The Respondent contends that this was course of conduct was contrary to the Order of June 28, 2012, against CT which specifically prohibited him from obstructing the Respondent in voting or appointing a representative to vote TDL's shares at shareholders meetings of LHQ.

[12] The shareholders of LHQ nevertheless resolved to continue the meeting on the basis that TDL was legitimately represented by LHC and that CT's refusal to accept him as TDL's representative was unlawful. The shareholders elected a new chairman Lee Chin-Liang pursuant to Article 182-1 of the Taiwan Company Act and the meeting proceeded under his chairmanship.

[13] The following motions which are relevant to these proceedings were discussed and resolved at the shareholders' meeting:

(a) Increasing the number of directors from five to seven as well as supervisors from one to two – TDL voted for the motion and the motion was passed.

(b) The removal of CT as a director of LHQ - TDL voted against the motion and the motion was denied

(c) The removal of the two directors representing Outstanding Co. Ltd. - TDL voted for the motion and the motion was passed.

(d) The re-election of all seven directors including CT and two supervisors TDL voted to re-elect all the sitting directors including CT and as a consequence CT was re-elected.

[14] WT later sent CT a letter confirming that CT was elected as director of LHQ requesting that he sign the attached Consent to Act as director, and informing him of the time and date of the next board meeting.

[15] By letter dated January 8, 2013 CT's BVI lawyers, Harney Westwood and Riegels (Harneys) wrote to the Respondent's BVI lawyers, O'Neal Webster setting what was they contend was her alleged breach of the injunctive orders and indicating that unless she rectified the breach by 12 noon (Hong Kong time) on Friday January 11, 2013, they would file contempt proceedings against her.

[16] O'Neal Webster responded by email dated January 10, 2013 in which they explained that the Respondent did not breach the injunction against her because TDL did not vote to remove CT as director of LHQ and that TDL in fact voted to re-elect CT as a director of LHQ. O'Neal Webster indicated that any application to the court for contempt proceedings against the Respondent would in the circumstances be wholly misconceived. O'Neal Webster also informed Harneys that they would be responding further (formally) to the January 8 2013 letter by 4:00 pm BVI time on January 11, 2013.

[17] O'Neal Webster responded formally to Harneys, by letter dated January 11, 2013. In this letter O'Neal Webster identified the relevant motions that were voted on at the January 4, 2013 shareholders' meeting and indicated how TDL voted on each motion. O'Neal Webster also asserted that the Defendant did not breach the injunction and again reiterated that any application to the court for contempt proceedings against her would be entirely misconceived.

[18] On January 11, 2013, the Applicant filed this Application for Contempt. The Application was set for hearing on February 27, 2013.On February 8, 2013 LHH filed an Application to strike out the contempt proceedings with affidavit evidence which stood in response to CT's application and in support of her own application. LHH's Application was also fixed for hearing on February 27, 2013.

[19] On February 22, 2013 Harneys wrote to O'Neal Webster seeking their agreement for (a) an adjournment of both applications, (b) permission to adduce expert evidence on Taiwan law regarding Article 199-1 of the Taiwan Company Act (c) directions for filing of expert evidence and (d) directions for the filing of additional evidence.

[20] O'Neal Webster responded by letter dated February 22, 2013 indicating that LHH was not prepared to accede to Harneys' proposal as she did not agree that expert evidence is necessary or required to dispose of the proceedings and that she intended to pursue her Strike-Out Application.

[21] The Court considered the Applicant application to adduce expert testimony and by Order dated 27th February 2013 the court ordered the Applicant and the Respondent do each have permission to adduce expert evidence on the following questions:

Where a shareholders' meeting has been convened at which the board of director of a Taiwan Company is re-elected as directors and consent to act is delivered to one of the directors who has not executed it.

i. Does the said director's appointment take effect on the passage of the resolution or does he first have to consent to act as director? and

ii. If he does not expressly consent to act as director what is his legal status if any? Can he act as director by virtue of the re-election?

EXPERT TESTIMONY

[22] On 25 March, 2013 pursuant to an order granted by this Honourable Court, expert evidence was adduced by Mr. Lipu Lee for CT, who concluded that even if CT is subsequently re-elected by a shareholders resolution of LHQ, unless and until CT expresses his agreement to become the director of LHQ, either explicitly by a signed consent to act form or implicitly by actually attending the board meetings after being elected, under the Taiwan law, CT is not a director of LHQ.

[23] The expert evidence adduced by Dr. Edgar Chen (Ph.D) on behalf of the Respondent appears to agree with this conclusion.

[24] On the basis of the expert testimony it appears to be common ground that:

i. A director's appointment does not take effect upon the resolution electing or re-electing him as a director. Such resolution operates as an offer from the company to the elected of re-elected person to be a director of a company.

ii. The appointment only becomes affective after the elected or re-elected person accepts the appointment to act as director.

iii. Such acceptance can be made expressly or impliedly. Executing the relevant consent document would effectively amount to express acceptance. However if an elected of re-elected person does not expressly consent to act but has given his implied consent for example attending a board meeting he will be regarded as having accepted the appointment.

iv. If the elected of re- elected person does not expressly or impliedly consent to act as a director, the appointment as director does not take effect and the elected or re-elected person will not under Taiwan Law become a member of the board of directors and would not be entitled to act as such.

[25] The Parties also accept as common ground the interpretation of Article 199-1 of the Taiwan Company Act which is set out at paragraph 14 of the Applicant's Ninth Affidavit.

Article 199- 1 provides as follows:

> *"I. Where re-election of all directors is effected, by a resolution adopted by a shareholder's meeting prior to the expiration of the term of office of existing directors and in the absence of a resolution that existing directors will not be discharged until the expiry of their present term of office, all existing directors shall be deemed discharged in advance.*
>
> *II. The aforesaid resolution of re-election shall be attended by shareholders who represent more than one-half of the total number of the issued and outstanding shares."*

[26] CT relies on the advice of his Taiwan lawyers who have advised that in the absence of a resolution stating otherwise, a person is deemed to have been removed when re- elected.

APPLICANT'S CASE

[27] It is CT's contention that the Respondent breached the orders of the 28th October 2011 and the 28th June, 2012, she allowed shares of TDL to be used in such a way that CT would be removed as a director of LHQ.

[28] He submitted that the Respondent well knew of the terms of the orders as she has not made any claims to the contrary and it is clear that she was represented by legal counsel at the relevant hearings. She was aware of TDL's voting because she appointed Liao Hao Chin (LHC) to represent TDL at the shareholders' meeting and instructed him to vote pursuant to her administrator *ad colligenda bona* powers. He asked the Court to note that there has been no suggestion that LHC voted TDL's shares without the Respondent's approval.

[29] Counsel for the Applicant noted the terms of the Respondent's 7th Affidavit in which she avers that she only took legal advice on the effect of the re-election resolution after contempt proceedings were brought against her. He submitted that even if the Respondent were to argue that she was unaware of the full legal effect of the resolution, it would effectively amount to a submission that she acted in reckless disregard of the injunction orders rather than in deliberate breach of them. This would not preclude the Respondent being (i) in breach of the injunctions and (ii) in contempt.

[30] He submitted that as an officer of the court, the Respondent should have first satisfied herself of the legal effect of the resolution before deciding whether to vote for it particularly taking into account the fact that the proceedings are extant with judgment imminent and there have been two injunctions granted to preserve CT's status as a director.

[31] In any event, Counsel for the Applicant submitted that in order to prove contempt, it is not necessary for the Applicant to show that the Respondent intended to breach the order. He relied heavily on the dicta in Masri v Consolidated Contractors Intl. SARL [2011] EWHC 1024 (Comm) and submitted that it is not necessary to show that the Respondent to a contempt application appreciated that what he was doing was a breach of the court order and intended to breach the court order.

[32] Counsel for the Applicant also noted that both the Respondent and LHC have failed to explain in their affidavits why re-election of LHQ's entire board was necessary in the circumstances. Neither is an explanation given in the purported minutes (which are unsigned, verified or witnessed) of the Second Ordinary Shareholders' Meeting on 4 January 2013. He submitted that the Respondent only has the power to vote TDL's shares pursuant to her grant administrator *ad colligenda bona* which he contends limits her power to collecting in and preserving the assets of YC's estate. He submitted that she has failed to explain how using her administrator *ad colligenda bona powers* to re – elect the entire board of LHQ fell within that limited ambit of collecting in and/or preserving the assets of the Estate.

[33] Counsel for the Applicant submitted that the absence of an explanation is very surprising given the sensitive nature of the issue and the two injunctions.

[34] Counsel for the Applicant submitted that there is now no doubt that the Respondent's actions resulted in his removal as a director and therefore amounted to a breach of the Orders. In light of this, CT asks that the Court order the Respondent to rectify the breaches of the Orders by:

(a) Procuring TDL to:

i. Take all actions necessary to ensure that the shareholders' resolution dated 4 January 2013 is avoided *ab initio* so that our client was never removed from his position as director of LHQ.

(b) Not procuring TDL to cause, acquiesce to, or permit by any means:

i. The filing or registering of the minutes of the purported shareholders' meeting of LHQ chaired by Lee Chin-Liang on 4 January 2013; and/or any other related documents, with the Taiwan Ministry of Economic Affairs.

ii. In the event the filing or registration has already been made to procure and cause the appropriate notices to reverse the filing.

iii. Or in the alternative, to procure the reappointment of CT as a director of LHQ immediately.

RESPONDENT'S CASE

[35] The Respondent contends that she did not breach the relevant order of the court because the minutes of January 4, meeting clearly reflect that:

i. On the motion to remove CT as a director of LHQ, LHC voted against the motion and as a result CT was not removed as a director of LHQ.

ii. On the motion to re-elect CT as a director of LHQ, LHC voted in favour of re-electing CT and he was re-elected.

[36] She further submitted that the minutes of the shareholders meeting do not disclose that the current directors were required to stand down before re-election. Accordingly, contrary to CT's assertions, the Respondent submitted that she has complied fully with these Orders in that TDL's votes were used to ensure that CT remained a director of LHQ until judgment in these proceedings. CT was re-elected at the meeting of January 4, 2013 after LHC was instructed to vote the TDL shares in his favour. It simply remains for CT to accept the appointment either expressly or impliedly by his

conduct. The Respondent contends that the fact that CT is no longer a director of LHQ is entirely a matter of his own choice.

[37] The Respondent however does not dispute the interpretation of Article 199-1 of the Taiwan Company Act and she accepts that if there is no resolution to the contrary, the directors who are re-elected are deemed to have been removed upon re-election. Counsel for the Respondent relied on the case of R v Norfolk County (1891) 60 QB 379 in which the Court held that:

> *"When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that notwithstanding it is not that particular thing, nevertheless it is to be deemed to be that thing."*

[38] Applying this definition of the word "deemed", Counsel for the Respondent suggested that CT is simply to be treated as having being removed on his re-election. However, he was not actually removed. As such, the Respondent cannot be said to have voted to remove him as a director of LHQ. He further submitted that any removal of CT as a director arising from the operation of Article 199-1 would be a mere technicality of no real consequence in this case, given that he was at once re-elected to the Board.

[39] Additionally, Counsel for the Respondent also submitted that the standard of proof in proceedings for contempt is the criminal standard – beyond a reasonable doubt. Counsel for the Respondent submitted therefore that CT must show that the Respondent's conduct defeated the purpose of the injunction and that she had the intention to defeat that purpose. CT must also demonstrate that the Respondent has the requisite foresight that his removal would be the consequence of her actions.

[40] He relied heavily on the case of Steen v HM Attorney General & Anor[1], in which Lord Phillips MR explained what must be shown for the Court to hold that the *actus reus* and *mens rea* of contempt are made out. He stated at paragraph 21 that:

> *"The actus reus was conduct which defeated the purpose of the court in ordering the injunctions. The mens rea was an intention to defeat that purpose. This did not mean that*

[1] [2001] EWCA Civ. 403

the Attorney-General had to demonstrate that the appellant had wished to defeat the purpose of the court, merely that he had foreseen that this would be the consequence of his conduct."

[41] Counsel for the Respondent submitted that the purpose of the injunctions was to ensure that CT remained a director of LHQ pending resolution of the substantive case. He contended that conduct did not, and in the circumstances, could not possibly have, defeated this purpose. He posited that there was no *actus reus* in the circumstances.

[42] He also submitted that CT cannot prove that the Respondent had the requisite *mens rea*. He submitted that the Respondent could not have intended to remove him as a director in breach of the orders. Otherwise she would not have voted in favour of the motion to reappoint hm. He submitted that the very fact that CT suggested that expert evidence is required to determine the legal effect of the vote militates against the assertion that the Respondent should be taken to have foreseen that voting to re-elect him would have technically resulted in his removal. He contended that if this Court needed expert evidence to determine whether the Respondent breached the injunction, then CT cannot prove to the required standard – beyond a reasonable doubt –that the Respondent either wished to defeat the injunction or must have foreseen that she would have breached it when TDL voted to re-elect him as a director of LHQ.

[43] Finally, the Respondent submitted that, even if this Court were to hold that by virtue of the operation of Article 199-1, she was technically in contempt of the injunction by voting to re-elect CT, she would have at once purged her contempt by re-electing him as a director of LHQ.

COURT'S ANALYSIS AND FINDINGS

[44] The power to commit for contempt must be exercised only where the court is sure to the criminal standard of proof that the alleged contemnor is in breach of an unambiguous order. The burden of proof being upon the applicant, the relevant application must therefore make it clear with sufficient particularity what is being alleged and provide sufficient cogent proof which will satisfy a court beyond a reasonable doubt that the relevant breach has been committed.

[45] The Court must therefore examine whether this Application satisfies this criteria.

WAS THERE A BREACH OF THE COURT ORDERS?

[46] There can be no doubt in the present case but that the Respondent has at all times been fully aware of the relevant orders of this court. Indeed, the Respondent makes no suggestion to the contrary. The terms of the relevant orders were clear and unambiguous. They impose both negative and positive obligations on the Respondent. The Respondent is enjoined from procuring, causing using, permitting or acquiescing in the use of the TDL votes in any general meeting of LHQ to remove CT as a director of LHQ. Conversely she was directed to ensure that the votes of TDL shares were used to guarantee that CT remains as a director of LHQ until judgment in the probate proceedings and to ensure that he not be required to stand down as director of LHQ whether for re-election or otherwise prior to judgment in the probate proceedings.

[47] The Respondent contends that she is not liable for contempt because she lacked the requisite *actus reus*. She relies on the case of Steen v HM Attorney General and Anor where Lord Phillips explained the *actus reus* as "*conduct which defeated the purpose of the court in ordering the injunctions*." Counsel for the Respondent submitted that the purpose of orders was to ensure that CT remained as a director pending resolution of the substantive case. In the light of the fact that the Respondent voted in favour of the resolution to re-elect CT, he submitted that the Respondent's conduct could not possibly have defeated the purpose of the court orders.

[48] The Court is satisfied that the clear intent of the court orders was to ensure that the Respondent took no steps to effect the removal of CT as a director of LHQ pending the resolution of the substantive probate proceedings. Conversely, the Court also intended that the Respondent take active steps to ensure that CT remained as a director and was otherwise not required to stand down as a director whether for re-election of otherwise.

[49] The evidence before the Court clearly reflects that the Respondent was cognizant of her obligations under the relevant court orders. Indeed, it is apparent that at the January 4th 2013 shareholders' meeting, her agent, LHC unequivocally voted against CT's removal so as to secure his place as a director of the Board.

[50] However, the minutes of that meeting also reflect that the members were invited to vote for the re-

election of the entire Board of Directors which included CT. There is no indication that the expiry of CT's term of office as a director was imminent. Neither do the minutes of the meeting reflect that there was any resolution to the effect that the existing directors (including) would not be discharged until the expiry of their present terms of office. The result is that in spite of a vote which was meant to ensure that his re-election as a director of LHQ, CT (unless he takes positive steps on his own accord) is not currently under Taiwanese law, a director of LHQ.

[51] On the basis of Article 199-1 of the Taiwan Company Act and the expert evidence of both parties, it is common ground between the Parties that in voting to secure the re-election of the entire LHQ board of directors, CT was effectively removed as a director of the Board notwithstanding that he has not been required to stand down as director for re-election.

[52] Although, there is no indication that the shareholders of the company had any role to play in setting the agenda and certainly the Court was not presented with any cogent evidence that the Respondent had any role to play in securing the inclusion of this or any other item on the agenda, it is clear that this resolution was passed with the support of the TDL's votes at the meeting.

[53] CT is not currently a director of LHQ (although the Parties concede that this would only be temporary pending his express or implied consent to act as director) and this is clearly inconsistent with the intent of the Court Orders. The Court is satisfied that the Respondent's actions in voting TDL's shares in support of CT's re- election effectively defeated the purpose of the court in ordering the injunctions.

[54] It is however clear that proving a breach of a court order does not without more equate to civil contempt. For contempt to be established an applicant must also prove that the contemnor had the requisite *mens rea.* Unfortunately when it comes to the nature of *mens rea* which must be proved in such circumstances, the legal position is somewhat murky and requires some examination.

THE MENTAL ELEMENT FOR CIVIL CONTEMPT

[55] Counsel for the Respondent submits that the Respondent is not liable for contempt because she lacked the requisite *mens rea*. He relies on the dicta of Steen v HM Attorney General which indicates that an applicant needs to show that a contemnor had foreseen the consequences of his conduct or that he intended to or wished to defeat the purpose of the Orders.

[56] He submitted that the very fact that CT has suggested that expert evidence is required to remove CT by voting to re-elect him militates against the assertion that she should have taken to have foreseen that voting to re-elect him would technically result in his removal. In the premises he submitted that CT cannot therefore prove to the required standard that the Respondent wished to defeat the court's orders or must have foreseen that she would have breached them by voting to re-elect CT as a director of LHQ.

[57] Counsel for the Applicant disputes the applicability of the Steen decision to the particular factual circumstances of this case. In light of this the Court must examine the facts of that case.

[58] In Steen the appellant, editor of *Punch* magazine, published a series of columns written by David Shayler, a former employee of the English Secret Service. Prior to the publication of the columns the Attorney-General had successfully obtained an interlocutory injunction restraining both Shayler and Associated Newspapers from publishing any material of a confidential nature which Shayler had acquired while in the employ of the Secret Service. The columns published in *Punch* contained previously published material and also new material, which up until its publication had been confidential.

[59] The Attorney-General brought contempt proceedings against Steen on the basis that the publication of this material impeded and interfered with the administration of justice. Steen, who was unsuccessful in the trial court, defended against the charge on the basis that the Attorney-General had failed to prove that he had the requisite *actus reus* or *mens rea*. He succeeded on appeal, the Court having concluded that the Attorney General had failed to establish the *mens rea* of contempt in the appellant.

[60] On appeal the issue boiled down to whether an injunction could bind a third party. Lord Phillips MR summarized the principles thusly:

> *Intentional interference with the manner which a judge is conducting a trial can amount to a contempt of court. b) When in the course of a trial a judge makes an order with the purpose of furthering some aspect of the conduct of the trial, a third party who, with knowledge of that purpose, intentionally acts in such a way as to defeat that purpose can be in contempt of court. c) When a plaintiff brings an action to preserve an alleged right of confidentiality in information and the court makes an order that the information is not to be published pending trial, the purpose of the order is to protect the confidentiality of the information pending trial. A third party who, with knowledge of the order, publishes the information and thereby destroys its confidentiality will commit a contempt of court. The contempt is committed not because the third party is in breach of the order – the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted.*

[61] After an extensive review of the Spycatcher cases, the Court of Appeal held that the requisite *actus reus* was met when the Attorney-General proved that Steen had published the columns so as to defeat the purpose of the injunction which was; "to preserve until trial the confidentiality of material whose disclosure arguably posed a risk of damaging national security".

[62] In considering the question of *mens rea*, a majority of the appellate court held that it had not been met because the Attorney-General had failed to prove that the appellant had the requisite knowledge "that publication would interfere with the course of justice by defeating the purpose underlying the injunction". The evidence showed that Steen was anxious not to publish material that would impact upon national security. In addition, Steen had corresponded with the Treasury Solicitor, the appropriate government officer, to determine the parameters of the injunction and whether the material he was about to publish was a threat to national security. The correspondence with the Treasury Solicitor never clarified these areas and, with respect to the particular column that had precipitated the contempt charge. Further, he argued and the majority accepted, that the inclusion of a proviso in the original injunction, which had purported to exclude

from the injunction's ambit subsequent material in which the Attorney-General made a statement indicating that no confidentiality would be claimed, made the purpose of the order difficult to discern.

[63] This judgment therefore demonstrates just how narrow the jurisdiction is in bringing suits for contempt against third parties based on impeding or interfering with the administration of justice. Counsel for the Applicant submitted that the *mens rea* requirement for the form of contempt which was considered in Steen is different from the requirement for contempt by a named party in disobeying a court injunction. He submitted that in respect of the latter, all that is required is that the defendant acted intentionally to breach the court's order and liability then follows.

[64] Under English law the position is conveniently summarised in Arlidge, Eady & Smith on Contempt[2] where the learned authors state as follows:

> *"Warrington J. expressed the principle in Stancomb v Trowbridge Urban District Council:*
>
> *"If a person or corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order."*
>
> *That this expressed the true position has since been confirmed by the Court of Appeal and also by the House of Lords in Heatons Transport (St. Helens) Ltd. T.G.W.U and in Director General of Fair Trading v Pioneer Concrete (U.K.) Ltd. and in Re M. Motive is immaterial to the question of liability.*
>
> *What was traditionally required was to demonstrate that the alleged contemnor's conduct was intentional in the sense that he actually did or omitted to do was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must be shown to know of the existence of the order and, as has already*

[2] 2nd edition (1999) paras 12-71 – 12-73

been pointed out, he must be shown to have been served with the order.

Yet there is no need to go so far as to show that the respondent realised that his conduct would constitute a breach or even that he read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general."

[65] More recently, a clearer statement of what is required of an applicant in order to establish *mens rea* is set out in the judgment in Christopher Clarke J in Masri v Consolidated Contractors Intl. SARL where he stated[3]

"In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors [2009] EWHC 1445 (QB) . There can be no doubt in the present case but that the judgment debtors have at all times been fully aware of the orders of this court. It is not and could not sensibly be suggested that the conduct of which complaint is made was casual or accidental or unintentional. However, the question arises whether it is, also, necessary to show that they acted knowing that what they were doing was a breach of, and intending to breach, any of the orders."

[66] As regards the latter question, in paragraphs 151-155 of the judgment, the learned judge went on to consider two opposing lines of authority (including ***Irtelli v Squatriti [1993] QB 83***) and concluded:

" In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order – particularly when a belief that it was not a breach may have rested on the slenderest of foundations or on convenient advice which was plainly wrong."

[3] [2011] EWHC 1024 (Comm) paras 150 -155

[67] The *Masri* judgment has since been considered and approved in several recent cases.[4] In JSC BTA Bank v Ablyazov, Teare J considered the judgments in Masri and also Irtelli. He held that:

> *"For the reasons given by Christopher Clarke J. in Masri v Consolidated Contractors International [2011] EWHC 1024 (Comm) at paragraphs 150-155 it is not necessary to show that the defendant to a contempt application appreciated that what he was doing was a breach of the court order and intended to breach the court order. I respectfully agree with that decision. I am not persuaded that Irtelli v Squatriti [1993] QB 83 is a decision to the contrary (as opposed to the expression of an assumption as to the law).*

[68] These two judgments of Christopher Clarke J and Teare J are clear authority that it is not necessary to show that a Respondent appreciated that what he was doing was a breach of the order. It is the act of disobeying the injunction or order that must be done wilfully or deliberately; it is not the requirement that it must be done with an illicit intention or motive. Indeed a person would be guilty of contempt even though he did not have an actual intention of disobeying the order or committing contempt of court.

[69] The Court accepts that the Steen case concerned allegations of contempt levied against third parties and involving the interference with the administration of justice. Having reviewed the relevant authorities, the Court is satisfied that the line of authorities consistent with the Masri Case more accurately define the scope of mental element which is required to prove contempt in the circumstances of this case.

[70] It follows therefore that provided she knew of the terms of the order, and that she acted or failed to act in a manner which breached the order and knew of the facts which made his conduct a breach, the contempt will be proved. However the Court also accepts that if after considering all of the evidence it concludes that there is more than one inference to be drawn from the facts and at least one of such inference is inconsistent with a finding of contempt then the application must fail.

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[4] JSC BTA Bank v Ablyazov; Adam Phones Ltd. v Gideon Goldschmidt and Ors [200] FSR 163; Westwood v Knight [2012]EWPCC 14; McCann v Bennett [2013] EWHC 283

Application of the legal principles to the facts of this case

[71] The evidence before the Court is that the agenda for the meeting of January 4th 2013 was prescribed by the board of directors of LHQ which included CT. The Court was provided with no cogent evidence to suggest that the Respondent had any role to play in setting this Agenda and the Applicant did not seek to advance this as a positive contention. Rather, Counsel for the Applicant asked the Court to infer and surmise from the circumstances that a somewhat sinister motive attended the setting of the Agenda. He was however unable to provide any basis for concluding that *this* Respondent, who is not a director of LHQ settled the agenda for the meeting. What is clear is that as Chairman, CT was given advance notice of the Agenda and was therefore well aware of its terms.

[72] That Agenda listed two separate items which concerned CT and his ability to continue to act as director of LHQ. In respect of first resolution which proposed the removal of CT as a director, the minutes reflect that this proposal was advanced by WT (the Applicant's brother). The minutes also reflect that the Respondent and her agent were well aware of the terms of the court orders so that when the first resolution was tabled, LHC representing TDL is recorded as stating;

> *"Although I think every shareholder here has their own opinions with regards to Liao Wen Toh ("WT")'s statement but as TDL is required to follow the BVI court orders, TDL is required to oppose this proposal to remove CT as a director."*

[73] The recorded minutes reflect that he then voted the TDL shares against the removal of CT as a director of LHQ with the result that the resolution failed to pass. It follows that the *actus reus* for contempt could not be made out here.

[74] In respect of the second resolution, this is recorded in the Minutes as Election II – Complete re-election of directors and supervisors. The recorded explanation for this proposal is set out in the minutes of the meeting in the following terms:

> *"The term of the newly elected directors/supervisors shall commence on the date of the shareholders' meeting, or in other words from January 4th 2013 to January 2016."*

[75] All seven directors of the LHQ Board were re-elected including CT and two supervisors. It is apparent that the LHC voted the TDL shares in support of this resolution. The Applicant's evidence is that she was only advised of the legal implications of this (i.e. the fact that on a re-election of the Board of Directors, the current directors/supervisors who are re-elected are deemed to have been removed on their appointment) after being served with the CT's application for contempt. At paragraph 4 of her seventh affidavit she avers that:

> *"At the shareholders' meeting of LHQ on January 4, 2013, TDL on Liao We Toh's and my instructions voted <u>against</u> removing CT and in favour of his re-election. CT was not asked to stand down as a director. In those circumstances, I had no reason to contemplate that exercising TDL"s voting rights as I directed could possibly have been in breach of the Orders of this Honourable Court."*

[76] This evidence was not traversed by CT. Rather he sought to shift the burden to the Respondent and points to the fact that no reasonable justification has been advanced by the Respondent explaining why it was necessary for the Board to be re-elected. He contends that in light of the sensitive nature of the issues and the two injunctions some cogent explanation should have been forthcoming or at the very least the Respondent should have sought the Court's guidance on the correct use of her powers prior to exercising them.

[77] Given the nature of the application, and the attendant standard and burden of proof, the Court is not persuaded that a decision to hold a Respondent in contempt of court can or should be based merely on the absence of a reasonable explanation by the Respondent.

[78] In light of the evidence, the Court accepts without reservation that at the material time, the Respondent was unaware of the legal technicality of Article 199-1 of the Company Act which mandates that the re-election of existing directors would by operation of law have the effect of discharging those directors unless there was another resolution which mandated that the existing directors would not be discharged until the expiry of their present term of office. When combined with the fact that the Respondent instructed LHC to vote against the removal of CT as a director, the Court is satisfied that the Respondent did not intend to breach the orders of the Court.

[79] Counsel for the Applicant has contended that as administrator, the Respondent was obliged to seek the guidance of the Court before exercise the TDL's voting rights. However it is apparent and the Court accepts that in voting to secure the re-election of CT to the board of directors, the Respondent believed that she was in fact complying with the relevant court orders.

[80] However in light of the relevant legal authorities, the Court is satisfied that the mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking. All that is required is that the contemnor intended the act or omission in question and knew the facts which made it a breach of the order. Where, as in this case the act of voting the TDL shares was deliberate (i.e. not accidental) and resulted in a breach of the court orders, contempt of court would therefore be established notwithstanding that the Respondent did not intend to breach the court orders.

[81] Even so, the Court is also satisfied that the nature of the mental element required for contempt assumes that the alleged contemnor has some choice as to whether to commit the relevant act or omission.[5] Given that the Agenda was prescribed by the Board of Directors of LHQ and placed before the general meeting, the members of the Company were compelled to vote on the several proposals tabled during the meeting of January 4, 2013.

[82] In the circumstances of this case, the Court is not satisfied that as a shareholder, the Respondent could have taken any other decision. Indeed neither party was able to assist the Court as to what would be the legal consequence (under Taiwan law) if the Respondent had simply abstained from voting in favour of CT's re-election. This is particularly so in light of the fact that (1) CT had not been required to stand down for re-election and (2) there was no resolution to the effect that the existing directors would not be discharged until the expiry of their current terms of office. The Court can only surmise that where a decision had been taken to re-elect all of the other directors of the Board of LHQ, to abstain from voting from CT's re-election would mean that he would cease to be a director.

[5] Sectorguard Plc. v Dienne Plc. [2009] EWHC 2693(Ch)

[83] During his submissions, Counsel for the Applicant posited that the only appropriate course for the Respondent would have been to use the TDL shares to vote against the re-election of the entire Board of Directors. It is apparent that save for the potential impact on CT's directorship, in the normal course such a resolution would have been otherwise unobjectionable. Given that several new directors and supervisors were elected to the Board at that very meeting, it is not immediately clear what would have been the implications (for LHQ) of such a vote.

[84] In an event the Court is not satisfied that the Respondent knew or could have known that not voting to strike down the proposal for the re-election of the entire Board would have caused her to be in breach of the court orders.

[85] The Court is satisfied on the authority of JSC BTA Bank v Ablyazov that if after considering the evidence there is more than one reasonable inference to be drawn from the facts and at least one such inference is inconsistent with a finding of contempt, the contempt application must fail. On the facts of this case and given the purpose and term of the injunctive orders, it would not in the Courts view be unreasonable for Respondent to have voted the TDL shares to ensure that CT remained a member of the Board.

[86] In the premises, the Court accepts that the Respondent's actions were taken in furtherance of an intention to comply with the court orders. While CT's removal is clearly in breach of the Court orders it is not in the judgment of the Court a contempt of court.

TECHNICAL BREACH

[87] However, in the event that the Court has reached an incorrect conclusion, and after having considered the totality of the evidence, the Court is satisfied that the Respondent's conscious decision to vote the TDL shares in favour of re- election of the Board, amounted to no more than a unintentional and technical breach of the court orders. The uncontroverted evidence before the Court discloses that the Respondent was unaware that a vote to re- elect the Board would have the unhappy and opposite result or removing CT as a director, simply by virtue of the operation of that statutory provision.

[88] It is therefore contempt of the most technical variety. Indeed, the Court has no doubt that had the full import of this statutory provision been realised, that the Court Orders would have been more carefully drafted in order to clearly define and prescribe the parameters of the Respondent's obligations.

[89] In the premises the Court is in no doubt that it would be completely inappropriate to impose any penalty on the Respondent for what would be a highly technical contempt of court.[6] The Court recognises that despite the parties' intentions, the purpose of the injunctive orders remains frustrated unless CT consents to act as a director. This is indeed unfortunate. While the Court concurs with Counsel for the Applicant that it is incongruous that the Applicant should have to take any positive steps to secure his place on the Board of Directors of LHQ when he was entitled to rely on the protection afforded by the Court orders, it is clear that any prejudice currently being suffered by him could very easily be mitigated.

[90] Nevertheless the Court is not satisfied at this stage that there would be any practical utility in granting the purging relief sought by the Applicant. The first claim of relief demands that the Respondent take steps to ensure that the resolution removing CT as a director is voided *ab initio*. The Court accepts the submission of Counsel for the Respondent that this relief is entirely vague and would involve the Court in "casting wide net" with no assurance of any real relief for the Applicant.

[91] Further, during the hearing, Counsel for both sides indicated that there are extant legal proceedings on going in Taiwan wherein the Applicant seeks to challenge the validity of the entire proceedings of 4th January, 2013. No doubt the resolution of his status as a director of LHQ is also the subject of these proceedings. The Court cannot ignore that this matter involves a Taiwan company (LHQ) registered and governed by the laws of Taiwan and subject to the jurisdiction of Taiwanese courts. Such relief will require a court to examine validity of a resolution of a Taiwan Company re-electing an entire Board of Directors. In the event the CT feels unable to consent to act as director, there are already on going proceedings in Taiwan where these matters will be fully ventilated.

[6] Adam Phones Ltd. v Gideon Goldschmidt and Others at page 172

[92] In respect of the third claim of relief, given that CT is not currently a director; any election or appointment will, of necessity require him to expressly or impliedly consent to act as a director. This will effectively place him in exactly the same position which he now finds himself.

[93] Finally, the Court is not minded to consider what can only be described as the collateral relief sought by the Applicant in relation to the registration of the minutes of the meeting. The validity of the meeting of January 4, 2013 and the minutes arising therefrom are not and cannot be the subject of these contempt proceedings. Indeed it is settled law that the process of contempt should not be used in aid of a civil remedy where some other method of achieving the desired result is available. The Applicant will need to pursue these remedies in the appropriate forum.

[94] The Court order is therefore as follows:

i. The Application is dismissed.

ii. The Parties are to provide written submissions on costs within 14 days of this Order.

Justice Vicki Ann Ellis
High Court Judge