In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and -

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

Defendants/Respondents

(5) THE ESTATE OF HUNG WEN-HSIUNG, DECEASED

Defendant

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

Defendant/Respondent

(7) WANG, RUEY HWA (aka "Susan Wang")

(8) WANG, VEN-JIAO (aka "Tony Wang")

(as joint administrator of the Bermudian estate of YT Wang)

(9) WANG, HSUEH-MIN (aka "Jennifer Wang")

(as joint administrator of the Bermudian estate of YT Wang)

Defendants

IN CHAMBERS-VIA VIDEOCONFERENCE

Date of hearing: November 18, 2020

Date of decision: November 18, 2020

Draft Reasons circulated: December 7, 2020

Reasons delivered: December [ ], 2020

Mrs Elspeth Talbot Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling, ASW Law Limited ("ASW"), for the Plaintiff

Mr Jonathan Adkin QC of counsel and Mr Scott Pearman and Mr Paul Smith, Conyers Dill & Pearman Limited ("Conyers"), for the 1st to 4th and 6th Defendants (the "Defendants")

HEADNOTE

Plaintiff's Notice of Motion for order purging his contempt-breach of implied undertaking not to use disclosure for collateral purposes-whether breach intentional or inadvertent-relevance of remedial steps-relevance of making criminal complaints against potential witnesses abroad-Defendants' Summons for leave to cross-examine Plaintiff-need for further investigation-governing principles-costs-Rules of the Supreme Court-Rules of the Supreme Court 1985 Orders 1A,38 rule 3(2) and 62 rule 8(2)-Criminal Code section 125A

REASONS FOR DECISION

Introductory

1. In March and July 2020, the Plaintiff's Taiwanese lawyers supplied four documents disclosed by the Defendants in the present proceedings, together with a large number of other documents, to, *inter alia*, a media outlet and the prosecuting authorities. The publication by the media outlet of one of the documents on July 21, 2020 came to the Defendants' attention. Their Bermudian attorneys Conyers raised the matter with the Plaintiff's Bermudian attorneys, ASW, on July 27, 2020. On August 7, 2020, the Plaintiff filed a Notice of Motion seeking to purge his contempt on the principal ground that the breach of the implied undertaking had been inadvertent. The Plaintiff and one of his Taiwanese attorneys voluntarily revealed that documents covered by the implied undertaking had been disclosed to parties other than the media outlet, a matter of which the Defendants were at that point unaware.

2. The Defendants on November 12, 2020 filed a Summons seeking leave to cross-examine the Plaintiff on his Affidavit filed in support of his Notice of Motion. The Defendants submitted that the Plaintiff should be cross-examined on his Affidavit either before or at trial. The dispute which arose for determination at the hearing of the Notice of Motion was whether the Court should immediately grant the relief the Plaintiff sought, or investigate whether or not the Plaintiff had been guilty of intentional breach of the implied undertaking.

3. On November 18, 2020 I granted the Plaintiff's application and declined to give directions for his cross-examination. Although the Plaintiff had sensibly been willing to pay the costs of his application on the indemnity basis, I ruled that the costs should be taxable and payable forthwith in light of the circumstances in which the breach of the implied undertaking occurred. These are the reasons for that decision.

The Plaintiff's Notice of Motion and the Defendants' Summons

4. The Plaintiff's Notice of Motion sought the following relief based on the following supporting grounds:

> *"1. A declaration that any contempt which has been or may have been committed by the disclosure of the documents set out at paragraph 6 of the affidavit of Yi-Chun Nien (the "Disclosure") has been purged;*
>
> *2. An order that the Applicant be discharged from, and not punished for, any such contempt; and*
>
> *3. An order that Dr Wong do pay the First to Fourth and Sixth Defendants' costs of and occasioned by the Disclosure and of and incidental to this motion on the indemnity basis.*
>
> *AND FURTHER TAKE NOTICE THAT the grounds of this application are:*
>
> > *1. Any and all breaches of the implied undertaking by the Disclosure were inadvertent, not intentional.*
> >
> > *2. Steps were taken to remedy the situation as soon as breaches or potential breaches were appreciated, by recalling the documents from the 4 recipients of them.*

3. The documents have been or are being retrieved from all but one recipient and all but one recipient have agreed not to make use of the documents. A response is awaited from the other recipient.

4. As a result of the foregoing steps the documents and their contents are not now, and will not be, placed in the public domain by virtue of the Disclosure.

5. A full apology has been proffered."

5. The Defendants' Summons sought an Order that:

"*1. Pursuant to Order 38 rule 2(3) of the Rules of the Supreme Court the Plaintiff attend for cross-examination on his First Affirmation dated 7 August 2020.*

2. The cross-examination of the Plaintiff on his First Affirmation dated 7 August 2020 take place in the course of his cross-examination during the trial of these proceedings.

3. The Plaintiff's application for relief in his Notice of Motion filed on 7 August 2020 be heard subsequent to the cross-examination of the Plaintiff at trial..."

The factual matrix

6. In the First Affirmation of Yi-Chun Nien ("First Nien Affirmation"), the Taiwanese lawyer deposes that he and a colleague were responsible for what they did not realise at the time was an actual or potential breach of the implied undertaking given by the Plaintiff in respect of documents disclosed by the Defendants in the present proceedings. This occurred when:

(a) three documents from the Defendants' disclosure were provided to the Taiwanese prosecuting authorities in March and July 2020;

(b) one document from the Defendants' disclosure was provided to the Taiwan Financial Supervisory Commission ("FSC") and Stock Exchange ("TWSE") in July 2020;

(c) three documents from the Defendants' disclosure were supplied to Yi Media in July 2020.

7. The First Nien Affirmation was not challenged. The deponent explains why he and his colleague did not knowingly breach the implied undertaking by reference to the fact that no similar obligations arise in relation to discovery under Taiwanese law. The documents were supplied (together with other documents) while the lawyers were acting on behalf of the Plaintiff in the course of a retainer through which they from time to time received documents from the Plaintiff's lawyers in Bermuda and England. Mr Nien did not deny ever being told of the implied undertaking. Rather, he states that when supplying the relevant documents to the prosecuting authorities in March 2020, "*neither of us had any recollection of the Bermudian undertaking*" and he "*did not think to check the position with Dr Wong's English or Bermudian lawyers...as they are not involved in any way with our dealings with the Taiwanese prosecutor...*" (paragraph 13). The word "*recollection*" was perhaps very appropriately used, because Mr Nien admitted (at paragraph 8) that he did "*recall being made aware of the confidentiality obligations in the related Beddoe proceedings*".

8. Nor did the Taiwanese lawyers appreciate the Bermuda law position when the other documents were disclosed in Taiwan in July 2020, including to Yi Media, who published one document in its entirety omitting confidentiality markings alongside a video of the Plaintiff responding to media reports about the prosecuting authorities' initial decision not to pursue the criminal complaints. The First Nien Affirmation does not reveal against whom the criminal complaints were directed. However, it was accepted in the course of argument that the subjects of the criminal complaint (first made on August 20, 2018 before discovery had occurred) included individuals who had at the time of the present disclosures given evidence for the First to Fourth Defendants in the Beddoe proceedings and who now are witnesses slated to give evidence for the Defendants at trial.

9. The First Nien Affirmation also significantly explains the steps which were taken (with some alacrity) to retrieve the impugned documents from their recipients with a view to ensuring (as regards Yi Media in particular) no risk of further publication. Finally, the affiant concluded his Affirmation as follows:

> "*25...We apologize wholeheartedly and unreservedly for having disclosed these documents and we will ensure that we do not make use of documents disclosed by others in these proceedings without taking advice from Dr Wong's Bermudian or English lawyers, and we will abide by that advice.*"

10. These averments were significant not simply as an apology. It also represented an implicit admission that the impugned disclosure could have been avoided if the Plaintiff's Taiwanese lawyers had taken advice from the Plaintiff's Bermudian or English lawyers before deploying documents disclosed in the present proceedings.

11. The Plaintiff's Affirmation was in my judgment of secondary significance. To some extent, the most pertinent averment he made was in paragraph 2 of his Affirmation: "*...I am scientist, not a lawyer, and I am therefore guided by my lawyers in relation to the conduct of all legal proceedings in order to avoid unnecessary complications...*" In the same paragraph, the Plaintiff (without waiving privilege) identified the heart of the problem which had occurred as follows:

> "*...The matters at stake in this action are very important to me and I am committed to the proper conduct of these proceedings and their fair resolution by this Court. I am therefore extremely sorry that a lack of communication between my Taiwanese and Bermudian and English lawyers has resulted in a breach or potential breach of the Bermudian prohibition on the use of documents disclosed in the proceedings for anything other than the purpose of these proceedings.*"

12. The Defendants fairly pointed out (*inter alia*, based on the Fourth Affidavit of Scott Pearman at paragraph 23) that it was not credible in light of a contested hearing resulting in a judgment delivered by Hellman J in the *Beddoe* proceedings[1] that the Plaintiff himself was not aware of the implied undertaking attached to documents received through discovery. However, the Plaintiff does not aver that he himself had no knowledge of the implied undertaking; rather he implicitly denies instructing his Taiwanese lawyers to breach the undertaking, by supporting their pleas of innocence and attributing the unintentional disclosure to their failure to properly communicate with their Bermudian counterparts. Moreover, there were express confidentiality protocols applicable to the *Beddoe* proceedings which were merely analogous to, but not the same as, the implied undertakings in issue in the present substantive proceedings.

13. The Defendants in my view sensibly declined to challenge the entirely credible and impressively forthright First Nien Affirmation. In the event it seemed to me to be improbable that cross-examination of the Plaintiff would establish that the Plaintiff expressly instructed his Taiwanese lawyers to disclose to third parties in Taiwan documents the Plaintiff knew could not be disclosed without breaching the implied undertaking given by him to this Court. What instructions he gave would *prima facie* be privileged in any event.

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[1] *Trustee N et al-v-A-G et al* [2015] SC (Bda) 50 Com (13 July 2015).

Governing legal principles

14. Mrs Talbot Rice QC identified one precedent for an application to purge contempt being made in the absence of an application for committal: *Evans v Citibank Ltd* [2000] NSWSC 1017. The plaintiff in that case supplied through lawyers affidavits sworn by the defendant to the New South Wales Crime Commission. Affidavits were sworn asserting a failure to have regard to the implied undertaking and offering apologies. The application was granted. Hamilton J opined as follows:

> "*5.It may be said that the application to the Court for the purging of the contempt could have been made earlier but I do not propose to go into that matter. The important thing is that the application is now properly made on behalf of all three applicants by senior counsel and that unreserved apologies have been tendered. There appears to be no question that either of the parties whose affidavits they were suffered any damage which requires a compensation order. I should say that the law as to the principles relating to the purging of the contempt are conveniently set out in the judgment of Samuels AP in* ***United Telecasters Sydney Limited v Hardy*** *(1991) 23 NSWLR 323 at 340. The principles are that the elements that go towards the purging of contempt are unreserved apology, compensation or reparation for damages suffered by a party and the payment of relevant costs on the indemnity basis.*"

15. In terms of governing principles in relation to determining how to punish a contempt, the Plaintiff's counsel in oral argument relied primarily on *Navigator Equities Limited-v-Deripaska* [2020] EWHC 1798 (Comm). The following passages of Baker J's judgment I found to be instructive:

> "*141. Contempt proceedings have a particular and distinctive character. They are civil proceedings but bear several important hallmarks of criminal proceedings. They have been described, I think aptly, as quasi-criminal in character: Jelson Estates v Harvey [1983] 1 WLR 1401 at 1408C-G; Masri v Consolidated Contractors International Co Sal et al. [2010] EWHC 2640 (Comm) at [22]. The hearing is not to be equated with a criminal trial and the process is not to be equated with a private prosecution (Masri at [21]). But the quasi-criminal character of this particular species of civil litigation process has important consequences.*

142. One consequence I have already identified, namely that the court recognises the particular capacity of contempt applications or the threat of contempt applications to be used vexatiously by litigants to further interests that it is not the function of the contempt jurisdiction to serve. That leads to the obvious materiality, at all events if there is some reason to question it on the facts of a given case, of the 'prosecutorial motive' of a claimant / applicant pursuing a contempt charge...

162...Although Ms Berard would not accept this when Mr Pillow QC put it squarely to her, and I am willing to accept from her that she indeed did not see it this way, in my judgment she had lost, or never had, that degree of objectivity and detachment from her client that a fair prosecution of this contempt application, with its quasi-criminal character, required...

163. It would have been better, in my judgment, if the contempt application had not been handled by the same Clifford Chance team that had had conduct of the arbitration, the Section 67 Proceedings and the WFO application (and its various follow-on hearings).."

16. Mr Adkin QC was quick to confirm that the Defendants would not be seeking committal if intentional breach of the implied undertaking was proven to have occurred. He nonetheless also accepted that public rather than private interests dictated how an issue of contempt was dealt with and that how the Plaintiff's Notice of Motion was determined was ultimately a matter for the Court. I was assisted by the following passage in *Harris-v-Harris* [2001] EWCA Civ 1645 to which he referred:

> "*21.... the application to purge is rooted in quasi-religious concepts of purification, expiation and atonement. On such an application the judge may only say yes, no or not yet.*"

17. I extracted the following guiding principles from the submissions advanced by counsel:

(a) an application to purge contempt should be made as soon as possible after the applicant becomes aware of the actual or potential contempt;

(b) the seriousness of the relevant "offence" depends on the circumstances of the case, but whether it was deliberate or accidental and whether damage was caused or not will generally be material considerations;

(c) whether the application should be granted will usually depend on the seriousness of the actual or potential contempt and whether or not an apology or (where applicable) an offer of compensation has been made;

(d) whether the Court should grant the application summarily or conduct a fuller inquiry should be based on the objective determination of the Court having regard to the public interest in protecting the integrity of the Court's processes;

(e) the partisan interests and/or wishes of the "aggrieved" opposing litigants are irrelevant to the trial of a contempt or contempt purging motion. It will generally be undesirable that any such inquiry be conducted at the trial of the main action, particularly in highly contentious litigious contexts; and

(f) the applicant will ordinarily be expected to pay the costs of the application on the indemnity basis.

18. Mrs Talbot Rice QC also relied on Bermudian authority on the constitutional importance of legal advice privilege, in support of her broad submission that cross-examination of the Plaintiff about his communications with his lawyers would probably not be permitted. In *Re Braswell* [2001] Bda LR 41, Meerabux J held (at page 16):

> "*I am guided by the principles mentioned above and I rule that legal professional privilege is a fundamental human right protected by the European convention of Human Rights which applies to Bermuda, that it is much more than an ordinary rule of evidence, that it is a fundamental condition on which the administration of justice as a whole rests and that it forms part of the constitutional right to a fair trial and as such cannot be abridged by statute. I further rule that an incident of a person's constitutional right to a fair trial includes a right to legal professional privilege.*"

19. Meerabux J's findings were (as regards the European Convention on Human Rights) supported by the observations of Lord Taylor in *R-v-Derby Magistrates' Court* [1996] AC 487 at 507. As regards section 6 of the Bermuda Constitution, his findings were supported by dicta of Ground J (as he then was) in *Fubler-v-Attorney-General*, Judgment dated July 18, 1994 (unreported). I regarded the sanctity of legal professional privilege, subject of course to the iniquity exception, to be uncontroversial. The Plaintiff's counsel also relied by way of illustrating the practical

application of the rules of privilege and how this would limit the utility of the proposed cross-examination of the Plaintiff on, *inter alia*, the following authority. In *Wentworth-v-Lloyd* [1864] 10 HLC 589, Lord Chelmsford held that where privilege is asserted, no adverse inference can be drawn from the refusal to reveal the contents of the privileged communication:

> "*The law has so great a regard to the preservation of the secrecy of this relation , the relationship between solicitor and client , that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business... The exclusion of such evidence is for the general interest of the community and therefore to say that when a party refuses to permit professional confidence to be broken everything must be taken most strongly against him. What is it but to deny him the protection which, for public purposes, the law affords him and utterly to take away a privilege which can thus only be asserted to his prejudice...*"

20. This passage was cited with approval at paragraph 117 of the judgment of Kellock J (Acting) in *JP Morgan Multi-Strategy Fund LP et al-v-Macro Fund Limited et al* [2003 CILR 250]. The Cayman Islands Grand Court also noted that *Phipson on Evidence* cites the same 19th century case as authority for this proposition, which I accepted.

21. In summary, the fundamental fair trial rights embodied in legal professional privilege will ordinarily receive generous protection so that no adverse inference may be drawn from the refusal to disclose the contents of lawyer-client communications.

22. Finally, it is important to note that Mr Adkin QC submitted in oral argument (without dissent)[2] that the August 2018 criminal complaints in Taiwan were made against six deponents on behalf of the First to Fourth Defendants in the *Beddoe* proceedings. They were, he submitted, clearly likely to be witnesses at trial (fixed for hearing in March 2021) when the prosecution campaign was continued in July 2020. This supplanted the broader submission that[3]:

> "*And it is an extremely unattractive stance for a party to litigation to seek to bring to bear the pressure of prosecution on the opposing party's key witnesses; and even less attractive to do so through the use of that party's*

[2] Transcript November 18, 2020 page 162 line 9-page 163 line 14.
[3] Transcript November 18, 2020 page 123 lines 10-17.

own documents. Even by the standards of this hard fought litigation, that is an extremely unfortunate and, in my submission, unattractive state of affairs. And it is not one to be shrugged off."

23. While there was no suggestion that these criminal complaints met the threshold for legally impermissible witness-tampering, the circumstances in which the impugned disclosures occurred justified remembering that such legal prohibitions do exist and I felt unable to accept the Plaintiff's counsel's suggestion that the issue could be ignored because it was not formally before the Court. The most pertinent provision of the Criminal Code is the following:

> "***Intimidating a witness an offence***
> *125A Any person who—*
>
> *(a) threatens, intimidates or restrains;*
>
> *(b) uses violence to or inflicts injury on;*
>
> *(c) causes or procures violence, damage, loss or disadvantage to; or*
>
> *(d) causes or procures the punishment of, or loss of employment of,*
>
> *a person for or on account of his having appeared or being about to appear, as a witness in a judicial proceeding is guilty of an offence and shall be liable on summary conviction to a fine of $50,000 or to imprisonment for five years, or both; and on conviction on indictment to an unlimited fine or imprisonment for ten years, or both.*"

24. The mere existence of this criminal prohibition (which obviously includes attempts[4]), even assuming it does not have extra-territorial effect, means that even civil litigants resident abroad should exercise extreme care when initiating or pursuing criminal complaints abroad against actual or potential witnesses in proceedings pending before the Bermuda courts[5]. However, the mere fact that the litigant and witnesses are located abroad will ordinarily be immaterial in civil proceedings before this Court if engaging in conduct which, if it occurred within the jurisdiction this Court, would

[4] Criminal Code, sections 31-33.

[5] Such caution would not of course apply to certain types of complaint, for instance where the complainant alleges that they are a victim of, for instance, an offence involving personal violence.

clearly entail flirting with infringing the spirit if not the letter of Bermuda's criminal law.

25. Admittedly without the benefit of full argument on this issue, I found that the standard operating practice in modern international commercial litigation being conducted by responsible litigants ought to be as follows. Criminal complaints ought not ordinarily be instituted or pursued abroad against actual or potential witnesses in pending Bermudian proceedings without first consulting Bermudian counsel to ensure that no actual or potential infringements of Bermudian law and practice will incidentally be committed.

26. In circumstances where the Plaintiff/Applicant accepted the obligation to pay indemnity costs, I found it necessary to consider whether an additional costs sanction was warranted. The normal rule is that costs are taxed and payable at the end of the case (Order 62 rule 8(1)). However, Order 62 rule 8 of the rules of the Supreme Court 1985 provides:

> "*If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly.*"

27. Such an award may be made, apart from circumstances where a party's role in litigation is terminated before the proceedings as a whole end, to mark the Court's strong disapproval of a litigant's conduct in the context of dealing with a discrete application. Considering the Caymanian counterpart to the Bermudian Order 62 rule 8(2) in *Fortunate Drift Limited-v-Canterbury Securities Limited*, FSD 227 /2018 (IKJ), Judgment dated June 10, 2020 (unreported), I held:

> "*24. To summarize, I found that not ignoring the fact that each case falls to be determined on its own facts, the factors likely to be relevant in many cases to determining whether or not to order that interlocutory costs should be taxed and paid forthwith under GCR Order 62 rule 7(2) were the following:*
>
> *(1) whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole;*
>
> *(2) whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates;*

(3) whether the proceedings as a whole have a long time to run; and

(4) whether being required to pay the interlocutory costs forthwith before the end of the litigation would be for any reason unfair, having regard to the overriding objective of GCR Order 62."

28. As regards the Defendants' Summons for leave to cross-examine the Plaintiff on his First Affirmation, the governing principles relied upon by the Defendants were not in dispute. The following principles set out in the '*Skeleton Argument on behalf of the Trustees for 18 November applications*' were commended to the Court:

"*6. The following principles are relevant:*

6.1 Order 38 Rule 2(3) RSC provides:

"...on any application made by ...motion, evidence may be given by affidavit...but the Court may, on the application of any party, order the cross-examination of the person making any such affidavit..."

6.2 The commentary to Order 38 Rule 2(3) in The Supreme Court Practice 1999 (Sweet & Maxwell, 1998) at 38/2/6 explains, 'In contempt proceedings, where a deponent has made an affidavit, he may be cross-examined upon that affidavit. Only very exceptionally should a Judge refuse an application to cross-examine e.g. where cross-examination would be for a collateral purpose (Comet Products UK Ltd v Hawkex Plastics Ltd [1971] 2 QB 67)'

6.3 In Comet Products:

6.3.1 Megaw LJ observed at p.76G: 'In general I think that in interlocutory proceedings, where there is a bona fide application to cross-examine a deponent on his affidavit, that application should normally be granted"

6.3.2 Cross LJ said at p.77F: "I think, only in a

very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit."

29. Those pre-CPR principles to my mind had to be viewed through the lens of Bermuda's modern Rules which, while retaining many of the pre-CPR English rules, must now be construed and applied with a view to furthering the Overriding Objective (Order 1A/2). The choice between deciding the Purging Motion summarily (i.e. without cross-examination of the Plaintiff) or at a subsequent hearing and/or at trial engaged the Overriding Objective in Order 1A of this Court's Rules. The Court has a duty to actively manage cases (Order 1A/4 (1)) by, *inter alia,* "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*" (Order 1A/4(2)(c)) and "*considering whether the likely benefits of taking a particular step justify the cost of taking it*" (Order 1A/4(2)(h).

Findings on the merits of the application

Summary oral decision

30. The granting of the Purging Motion of the Plaintiff and the refusal of the Defendants' leave to cross-examine Summons was articulated at the end of the hearing in the following summary terms:

"*1. Yes. For reasons that I will give in more detail later, I grant the Plaintiff's application.*

2. *I am satisfied that it would not be sensible case management to adjourn this matter until trial.*
3. *I am also satisfied that the costs of a full inquiry into precisely what was the state of mind of the Plaintiff and what he told his Taiwanese attorneys is something that would be very disproportionate to undertake. Not least because, on the face of it, the communications he had with his lawyers were*

privileged and any disputes about privilege would be very time consuming indeed.

4. *I also take into account what appears to me to be the likely outcome of any such inquiry beyond the evidence presently before the Court. On the face of it, it seems to me there are strong reasons to doubt that the final analysis would be that there was an intentional breach of the implied undertaking.*
5. *One or two factors are significant. Firstly, the relatively small number of documents that are caught by the undertaking which were disclosed relative to the total tranche of documents that were disclosed. Secondly, the fact that the response to the discovery of the breach of the undertaking by the Defendants is, in my judgment, inconsistent with what one would expect had there been a deliberate intent to breach the implied undertaking.*
6. *The best available evidence at this point suggests that, in fact, the highest level of culpability that the Plaintiff has is that he failed to ensure that his Taiwanese lawyers consulted with his Bermuda lawyers to make sure that nothing amiss occurred, while pursuing what I think, in July 2020, was a highly questionable strategy of seeking to criminally charge witnesses or potential witnesses in the Bermuda litigation with which he has been intimately concerned for several years.*
7. *Those circumstances warranted a heightened level of caution on the Plaintiff's part; and his failure to do so was, it seems to me, more than mere inadvertence, but came nowhere close to deliberate and intentional breach of the implied undertaking.*
8. *In those circumstances, it seems to me appropriate to determine now, rather than at a later stage, and particularly not at trial, that the present application*

should be granted, subject to one consideration and that is as to the issue of costs.

9. *It might be thought that the provision in paragraph 3 of the Notice of Motion meets all concerns, but my provisional view is that those costs should be taxed and payable forthwith to record the serious view that the Court takes in very sophisticated litigation of a serious breach of the implied undertaking.*"

The grounds for granting the Purging Motion on its merits

31. The Plaintiff's response to being confronted with the fact that there had been a breach of the implied undertaking may fairly be described as a text-book response in terms of establishing valid grounds for granting a purging application. In summary:

    (a) the Motion was filed within 10 working days of receiving the Conyers letter of complaint, accompanied by the supporting Affirmations of the Plaintiff and Mr Nien;

    (b) the supporting evidence suggested that the actual or potential contempt was unintentional, not least because it revealed further improper disclosures of which the Defendants were previously unaware and the publication of one of the offending documents suggested that the Plaintiff's Taiwanese lawyers were genuinely unaware of any breach of the implied undertaking given by the Plaintiff to this Court;

    (c) the full and unqualified apologies so readily proffered accordingly seemed on their face to be genuine; and

    (d) the Plaintiff offered to pay the costs of his Motion on the indemnity basis as suggested was appropriate by the one authority on point found by his legal representatives.

32. Against this background, accepting entirely the Defendants' submission that the Plaintiff ought to have been aware of implied undertaking, I found it inherently improbable that a fuller inquiry would reveal that the breach of the implied undertaking had been intentionally procured by the Plaintiff. The First Nien Affirmation was unchallenged so I was entitled to find that the Plaintiff's Taiwanese lawyers did act innocently and were guilty only of not consulting their Bermudian

counterparts. Without deciding the privilege issue, it seemed to me to be strongly arguable that:

(a) what the Plaintiff told his lawyers would be protected by legal advice privilege; and

(b) it would be impossible to conclude that the Plaintiff procured the breach of the implied undertaking intentionally without exploring the content of his instructions in relation to the Taiwanese criminal and regulatory complaints. His bare knowledge about the existence of the implied undertaking in relation to the four offending documents, detached from any causative link to the offending disclosures, would be of no evidential weight.

33. The present legal context required the Court to form its own judgment as to whether the contempt could appropriately be summarily purged based on the evidence before the Court. The Defendants' partisan views did not have to be taken into account. Their position, after all (and quite understandably), amounted to little more than this: "The Plaintiff has kicked us in the shins. Please give us a chance to kick him back." Having regard to the public interest in protecting the integrity of the processes of this Court and the Court's duty to apply the Overriding Objective in high value contentious civil litigation, I found that it was appropriate to grant the Purging Motion without further inquiry in all the circumstances of the present case.

34. However, the Defendants' counsel did identify what I considered to be an aggravating factor in the Plaintiff's admitted "inadvertence" case. The impugned disclosures occurred in the context of the Plaintiff, through his Taiwanese lawyers, advancing, *inter alia*, a criminal complaint against potential witnesses at the pending trial of the present proceedings. For the legal reasons I have set out above, I found that this made the actual or potential contempt attributable to a higher degree of negligence than would otherwise be the case. In my judgment the Plaintiff was a sufficiently sophisticated litigant, albeit "*a scientist and not a lawyer*", to be subjected to a duty to exercise care in pressing for the institution of criminal proceedings abroad against potential witnesses before this Court.

35. A responsible sophisticated litigant would have made it clear to his foreign lawyers that they should not pursue any regulatory complaints without ensuring that there were no unintended consequences for the Bermuda proceedings. It was difficult to avoid the suspicion that the Plaintiff had, perhaps only passively, encouraged his Taiwanese lawyers to adopt a "hear no evil, see no evil" approach. The backdrop to

the present application includes *Beddoe* proceedings in which Hellman J awarded indemnity costs against the Plaintiff for advancing unjustified allegations of criminal conduct against the First to Fourth Defendants or persons allied to them.

36. Again, this omission fell far short of deliberate misconduct, because it was quite obvious from the way in which the Plaintiff fully and frankly admitted the extent of the Taiwanese criminal complaints that neither he nor his lawyers appreciated the faint scent of 'witness-tampering' which I discerned in his foreign lawyers' forays on his behalf. Nonetheless, I considered that the breach of the implied undertaking which had been admitted was sufficiently serious to warrant the more punitive costs sanction of ordering the indemnity costs the Plaintiff offered to pay to be taxed and payable forthwith. I was satisfied that:

    (a) the Plaintiff's Purging Motion (and the Defendants' related Summons) obviously dealt with an issue discrete from the litigation as a whole;

    (b) the Plaintiff had acted unreasonably by failing to ensure that his Taiwanese lawyers did not unintentionally disclose confidential documents obtained through discovery for collateral and questionable purposes in Taiwan;

    (c) despite the fact that a trial is due to commence next year, in light of expected appeals the proceedings as a whole have a long time before they are likely to conclude; and

    (d) due to the Plaintiff's financial resources, it would not be unfair to require him to pay the relevant costs on a forthwith basis.

The grounds for refusing the Defendants' application for leave to cross-examine the Plaintiff

37. The grounds for refusing the Defendants' Summons correspond in large part to the grounds for granting the Plaintiff's Motion now rather than adjourning it to trial or a special hearing for further inquiry. The distinctive context of a purging application is an exceptional one. The Defendants, in this legal context, do not enjoy the standing they would usually be entitled to invoke to seek leave to cross-examine to vindicate their personal rights. Additionally, it would be inappropriate for a public interest inquiry to be commingled with highly contentious litigation at or before trial for the reasons articulated in *Navigator Equities Limited-v-Deripaska* [2020] EWHC 1798 (Comm) at paragraphs 162-163, reproduced above.

38. I have determined, exercising the independent judgment of the Court, that it is appropriate to grant the application summarily and that, in any event, the costs of pursuing a further inquiry with cross-examination of the Plaintiff on his First Affirmation would outweigh any corresponding benefit in terms of the likely ultimate substantive outcome.

Conclusion

39. For the above reasons on November 18, 2020 I granted the Plaintiff's notice of Motion dated August 7, 2020 seeking to purge his contempt in relation to a breach of the implied undertaking not to use documents obtained from the Defendants in the present litigation for collateral purposes, and I dismissed the Defendants' related Summons.

Dated this 10th day of December 2020

SIGNED

IAN R.C. KAWALEY
ASSISTANT JUSTICE