Neutral Citation Number: [2019] EWHC 2711 (Comm)

Case No: CL-2016-000797, CL-2016-000798 & CL-2018-000312

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2019

Before :

SIR MICHAEL BURTON GBE
(sitting as a Judge of the Hight Court)

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Between :

(1) Super Max Offshore Holdings	**Claimants**
(2) Actis Consumer Grooming Products Limited	
- and -	
Rakesh Malhotra	**Defendant**

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Ms Bingham QC & Ms Rogers (instructed by **Clifford Chance**) for the **Claimants**
Mr Marshall QC & Mr McCourt Fritz (instructed by **Hill Dickinson**) for the **Defendant**

Hearing dates: Monday 7th, Tuesday 8th & Thursday 10th October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR MICHAEL BURTON GBE

Sir Michael Burton :

1. This has been the hearing of an application by Mr Marshall QC on behalf of the Defendant to strike out some of the grounds of application in the four contempt applications which have been put before me.

2. The Defendant was, until his dismissal for gross misconduct (as found by Popplewell J in his judgment of 13 December 2017 [2017] EWHC 3246 (Comm) at 117-118), the Executive Chairman of Super Max Offshore Holdings ("SMOH") (the First Claimant), and he remains non-executive Chairman under the terms of the governing shareholder agreement.

3. In December 2016 the Defendant sought to remove Mr Anindo Mukherji, the Group's CEO and other senior employees, and appoint himself as CEO with immediate effect, contrary to (inter alia) the terms of the Second Claimant's right of veto under that agreement. This led to the grant of injunctive relief by Picken J on 20 December 2016 ("Picken 1"), which was followed by a series of injunctions granted and continued by this Court, relevantly to this judgment by Baker J on 6 January 2017 ("Baker 1" and "Baker 2"), by Males J on 27 January 2017 ("Males I"), by Baker J on 3 March 2017 ("Baker 3") and by Popplewell J on 8 August 2017 ("Popplewell 1") and then, after his judgment, on 13 December 2017 ("Popplewell 2") and, by final Order, on 27 March 2018 ("Popplewell 3").

4. Popplewell J, in his judgment at 116, concluded as follows:

> "(1) [The Defendant] *staged a coup whereby he removed Mr Anindo Muherji as CEO, installed himself as CEO and exercised the powers of a CEO to dismiss four senior employees, rearrange reporting lines and responsibilities, and to appoint Mr Khan to a senior position. He knew he was not entitled to do so. This behaviour constituted a breach of* [his contract].
>
> *He conducted a sustained campaign of aggressive abuse and disparagement towards Mr Anindo Mukherji and Mr Abraham intending thereby (a) to force them to resign (b) to foment dissent and insubordination from junior employees (c) seriously to undermine them in the eyes of the workforce and (d) thereby to impede their ability, and that of senior management, to exercise effective management of the workforce and the business. This behaviour constituted a breach of* [his contract]."

5. The relevant clauses of the above Orders in issue before me can be briefly summarised as follows (I do not set out Baker 1, Males 1, Baker 3 and Popplewell 2 and 3 because any differences are not material for this purpose, save as discussed below):

   (i) Picken 1:

   > "2. *The Defendant must not directly or indirectly:*

(a)Take any steps to procure or implement the suspension or removal of Anindo Mukherji from his position as Chief Executive Officer of the Super-Max group of companies;

(b) Take any steps to procure or implement the suspension or removal of any Relevant Employeee (save in accordance with Clause 17.2.1 of the Subscription and Shareholders' Agreement entered into in respect of [SMOH] *dated 4 December 2010 (as amended);*

Hold himself out as or purport to act as Chief Executive Officer of the Super-Max group of companies."

(ii) Baker 2:

"2. *The Defendant must not:*

(a) communicate directly or indirectly with any Relevant Employee in terms that are disparaging of any of the Relevant Management [as defined] */Independent Officers or calculated/likely to undermine their authority in their respective positions, save that nothing in this clause 2(b) prevents the Defendant from participating in discussions amongst members of the Super Max Group Advisory Board at meetings of the Advisory Board about the performance of the Super Max Group; or*

(b) communicate directly or indirectly with any Relevant Employee otherwise than for the purpose of discharging the responsibilities allocated to him in the Authority Matrix…. [these are then set out as (i) to (xvii))

provided always that nothing in this clause 2(c) shall prevent the Defendant from communicating with the Super Max Group Advisory Board of Relevant Employees for the purpose of discharging any of his other duties under his employment contract or with the prior written consent of Actis Consumer Grooming Products Limited (such consent not to be unreasonably withheld or delayed)."

(iii) Popplewell 1:

"The Defendant must not:

(a) [almost exactly as per clause 2 (b) of Baker 2, but with the proviso that

"nothing in this clause 2(d) shall prevent the Defendant from communicating with his personal assistants (Ms Linet Pereira and Ms Antoinette Fernandes) members of the Super Max Group Advisory Board or Relevant Management [as defined] *for the purposes of discharging any of his duties as (i) non-*

executive Chairman of the Super Max Group Advisory Board 0r (ii) a director of SMOH or any Group Company."

6. The contempt applications now brought by the Claimants relate to alleged breaches by the Defendant of the various Orders, to the making by the Defendant of false statements in a significant witness statement, and to harassment and intimidation of witnesses. Several of the breaches, relating to the Defendant's sending of abusive and threatening WhatsApp and SMS messages to Mr Mukherji and others in March 2018 in breach of clause 5 of Popplewell 2, are not denied.

7. I now turn to the strike out application, which is made in respect of some, but not all, of the alleged contempts. I shall first set out the principles which have guided me in considering this strike out application, coupled with the emphasis that it is the Defendant who has the onus of establishing that the applications should be struck out.

8. First, the court order and the particulars of breach of it must be clear and comprehensible, and the particulars must make plain the thrust of the claimant's case (see e.g. per Woolf LJ in **AG for Tuvalu v Philatelic Distribution Corporation Ltd** [1990] 1 WLR 926 at 42).

9. Secondly, the particulars of breach must be supported by prima facie evidence contained in the affidavits or witness statements, and any exhibits, accompanying the application, so as to show a real prospect of success.

10. Thirdly, an application must not be brought for an illegitimate purpose.

11. Fourthly, an application must be proportionate (see **Sectorguard plc v Dienne** [2009] EWHC 2693 (Ch)) to the need of enforcing court orders and preventing interference with justice.

12. Fifthly, both the order and the particulars of breach must be seen and read in context and given their natural and ordinary meaning, in the light of the knowledge of the relevant participants (see **Pan Petroleum AJE Limited v Yinka Folawiyo Petroleum Co Ltd** [2017] EWCA Civ 1525 per Flaux LJ at 41(3)).

13. Sixthly, in construing an order there is need to pay regard to the mischief sought to be prevented by that order.

14. Seventhly, an order is not vitiated by cross-referring to documents, including contractual documents, but indeed the reference to such documents may assist in making it clear; and such injunctions are frequent, and rightly so (as for example in **Pan Petroleum)**. The principle still remains whether the order was clear as to what a recipient should do (see Woolf LJ in **Harmsworth v Harmsworth** [1987] 1 WLR 1676 at 1686D). **Harris v Harris** [2001] 2 FLR 923, referred to by Mr Marshall, where a 'layman was left to disentangle a complicated set of orders' (per Munby J at 292) is not an apt analogy.

15. Eighthly, whereas at the end of a committal hearing, <u>after</u> all the evidence has been considered, if there can be seen to be more than one reasonable inference to be drawn, and at least one of them is inconsistent with a finding of contempt, or if an innocent explanation of the contempt is a real possibility (see **Daltel Europe Ltd v Makki**

[2005] EWHC 749 Ch at 30 per David Richards J, followed by Teare J in **JSC BTA Bank v Ablyazov** [2012] EWHC 237 (Comm) at 9), the claimant fails. But that is not the appropriate test in considering a claimant's claim at the outset, such as I am doing here.

16. Ninthly, a negative injunction may carry within it an obligation to ensure compliance by, as in **Hone v Page** [1980] FSR 500, himself, his servants, or agents or otherwise howsoever. That includes the need for reasonable endeavours where an instruction has been given to someone under a defendant's control who has obeyed that instruction, and who can be procured by the person who gave it to withdraw or recall that instruction, in compliance with the order. The passage in Slade J's judgment in **Hone v Page** at 507, as approved by the Court of Appeal in **Tuvalu** and in **World Wide Fund For Nature v THQ /Jakks Pacific LLC** [2004] FSR 10, is not limited to a defendant's employees but extends to anyone whom the defendant can control (as to which see paragraph 20 below).

17. I turn then, in the light of that, to the result, which must be concise, given that this is a strike out application and not the determination of the applications.

18. The first Application (a) to (f). The allegations in 1(a) to (f) of the first contempt application are of arguable breach of clause 2(b) of Picken 1, implementing the removal of the named employees. In context, the 'saving' in that Order of clause 17.2.1 of the shareholder agreement (relating to appointment to and removal from the Board of nominee directors) is clear, and does not affect the breach. Further, there is an arguable breach of clause 2(c) of Picken 1, the Defendant exercising the role of CEO in doing what he did, taking account of the Group's authority matrix, which I have been shown, which gives the final approving authority in respect of dismissals to the CEO. I note also (though I have not relied on it) Popplewell J's finding, on the balance of probabilities, after trial, as set out in paragraph 116(1) of his judgment set out in paragraph 4 above.

19. There are sufficient particulars, including the best evidence available to the Claimants of dates and times (analysed in the Claimants' Skeleton at paragraphs 51-54), further clarified by the amendment, which I allow, as no prejudice has been suffered by that amendment. I do not propose to strike out 1(a) to (f).

20. As to 1(g). If the acts of implementation started before the Defendant's knowledge of the Order, then if they continued afterwards, they should have been stopped. Alternatively, the instruction could and should have been given to those who had received the original instructions to recall them. I again note, as an aside, the words of Popplewell J, at paragraph 4 of his judgment of 26 March 2018 [2018] EWHC 705 (Comm), granting the final injunction, Popplewell 3, after referring to his findings, set out in paragraph 4 above:

> "*The conduct has taken place not only directly by Mr Malhotra himself, but by his using a number of individuals as his agents or nominees. In the course of my judgment I identified that he had used a number of individuals in that way, in particular Mr Chaudhuri, Mr Sameer Khan, Mr Kishor Wagh.*"

21. There is a clarifying amendment which purports to add (g)(i), although that was already part of the original order, simply not in red, but does add (g)(ii). That, in the light of my conclusions, causes no prejudice. 1(g) should not be struck out.

22. As to 1(j) and (k), relating to the Defendant's appointment of Mr Khan, similarly, there is an arguable breach of clause 2(c) of Picken 1 (just as there is in 1(h) and (i), to which no exception is taken); and sufficient particulars are given. I do not strike them out.

23. As for 1(l), as amended, this concerns communications by the Defendant with Mr Khan as a relevant employee, and, through Mr Khan, with Datta K and Pushkar Kulkarni as relevant employees, in breach of Baker 2, clause 2(b).

24. I am satisfied that the communications were disparaging, and calculated to undermine, in breach of that clause. I am also satisfied, as I shall expand in a moment, that Mr Khan was a relevant employee; but Datta K and Pushkar Kulkarni, to whom, through Mr Khan, the Defendant communicated, plainly were.

25. However, I conclude that because the Baker 2 Order has a proviso that the Defendant would not be prevented from participating in discussions amongst members of the Claimants' Advisory Board at meetings of the Advisory Board about the performance of the Super-Max Group, it would be technical and disproportionate to find him in contempt with regard to putting together information for the purpose of those items being presented at the Advisory Board, even though in the event the Defendant did not attend it. I, therefore, do strike out 1(l).

26. The second application, relating to false statements in Mr Malhotra's witness statement, is not the subject of any application to strike out. Mr Marshall pointed out that after permission was granted in respect of the issue of the second application, the application itself was not served.

27. I have waived any defect on the basis, as I understand it, that he is now being served, but service would in any event have been unnecessary in the circumstances of this case, given the degree of notice that there has been of its existence.

28. I turn to the third application, grounds 1 to 5. The first two consist of arguable breaches of Baker 2, clause 2(c), and the next three are arguable breaches of Males 1, clause 3(c).

29. First, all the communications were with Mr Khan. I am satisfied that there is an arguable case that Mr Khan was a relevant employee. Though the Claimants objected to his having been employed, he did in fact become an employee on or about 3 January 2017, and remained an employee until his dismissal in October or November 2017, and the Defendant knew that he was employed by the Claimants. Mr Khan and his relationship with the Defendant were described by Popplewell J in his trial judgment at paragraph 50(9), concluding that he "*was prepared to say in evidence whatever he believed would support Mr Malhotra's case, even when he knew it to be untrue*."

30. Plainly, the mischief which the Order was aimed at was to prevent contact between the Defendant and anyone working at the Claimants. There was, as set out above, a proviso to the Baker 2 Order, which included the following passage:

> "*Provided always that nothing in this clause 2(c) shall prevent the Defendant from communicating with the Super-Max Group Advisory Board or Relevant Employees for the purposes of discharging any of his other duties under his employment contract, or with the prior written consent of* [the Second Claimant]…"

The existence and context of the proviso was noted by Baker J at paragraph 8 of his judgment granting Baker 2, on 6th January 2017.

31. That proviso may possibly give the Defendant a defence, but there is, plainly, an arguable case for the Claimants that, by corresponding privately with Mr Khan by their personal emails, he was not acting pursuant to his contract of employment, quite apart from the content of those emails.

32. However, that is made even clearer by the proviso in Males 1 (materially repeated in Popplewell 1, set out above), which is in slightly different terms:

> "*Provided always that nothing in this clause 2(c) shall prevent the Defendant from communicating with his personal assistants……., members of the Super-Max Group Advisory Board or Relevant Management for the purposes of discharging any of his other duties under his employment contract or with the prior written consent of Actis* [etc as before]."

33. *Relevant Management* is defined exclusively in Males 1 (and later in Popplewell 1) as meaning Anindo Mukherji, Ketan Desai, Kenny Abraham and R Sreeram.

34. I do not strike out those five paragraphs.

35. The next ground to which complaint was made is number 3(10), relating to a WhatsApp message sent on the Defendant's behalf to Mr Merani and, by mistake, also to Mr Balan by a Mr Chaudhuri.

36. Mr Chaudhuri was the Defendant's agent. He is described in the application as his personal adviser. In fact, he was not only that, but there was a consultancy agreement between Mr Chaudhuri and the Defendant, exhibited in the bundle. At paragraph 51 of his trial judgment, Popplewell J concluded that: *"Mr Chaudhuri was a go-between, through whom Mr Malhotra communicated with others when he wanted to conceal his direct involvement*". Mr Merani and Mr Balan were relevant employees.

37. There is an arguable breach of Popplewell 1, clause 2(d) in those circumstances. It appears to me most unlikely that there would be a defence for the Defendant, though I do not rule it out, by reference to the third proviso at (e). But that possibility does not detract from the arguability of the breach, and I do not strike out 3(10).

38. I turn to (3)11 and 12. These relate to the Defendant, allegedly through his agents and accomplices, Mr Wagh and Mr Awwad, instigating the filing of false criminal complaints in Dubai.

39. There is plainly an arguable breach, both on the basis alleged in this application as being calculated to put pressure on employees to resign in breach of clause 3 of Baker 1; alternatively, as in the fourth application, deliberately aimed at preventing or inhibiting the proposed witnesses from coming to the United Kingdom to give evidence at the trial fixed for 25 September 2017.

40. There is, in my judgment, sufficient evidence of falsity in the evidence before me in relation to those allegations, and of the intended impact upon Mr Anando Mukerji and Mr Desai and upon their being witnesses at the trial in London. But there is raised by Mr Marshall an issue as to the effect of two Dubai judgments, one civil and one in the labour court, both subject to appeal by the Claimants, upon the question of whether there has been a contempt of this Court by way of (inter alia) interference with witnesses.

41. In the alternative to a strike out, which I am satisfied is not appropriate in the light of the sufficiency of the arguability of the contempt of this Court, Mr Marshall asserts that there should be a stay pending resolution of those appeals which are already mounted and, it is to be hoped, will not take more than a few months.

42. The answer that Ms Bingham has put forward, among others, which caused me the most worry, was to invite the Court to assume against the Claimants that the underlying complaints were well-founded. She asserted that, if that were assumed, then given the instigation of them by the Defendant, who, on the Claimants' case, himself knew that they were ill-founded, and particularly in the context that they were made immediately before the High Court case in London and plainly intended to inhibit the witnesses from attending, by virtue of the consequential forfeiture of their passports, the application against the Defendant could still go forward.

43. I can see the force of the argument that what is being decided in Dubai is whether the complaints were well-founded, as made by the two employees, said to be agents of and instigated by the Defendant, whereas the issue before this Court would be (i) whether the Defendant believed they were well-founded; and (ii) in any event whether the timing was deliberately aimed, in relation to application 4, so as to stymie their giving evidence in London. Indeed, that was very nearly achieved by the events of which I have read.

44. I am concerned about whether this hearing could be effected on the basis of such assumption. I am also concerned as to whether a stay, such as is sought by Mr Marshall, would in fact lead to a relevant resolution of this issue in the appeals in Dubai, by virtue of the fact that it is possible that the Dubai court may, for example, uphold the appeals, but not in such a way as to render it plain as to the basis upon which they have done so vis-a-vis the issues in this case.

45. Mr Marshall has shown me the decision in **Reichhold Norway v Goldman Sachs International** [2000] 1WLR 173, which makes it plain that it is not necessary for there to be concurrence of the parties in the sets of proceedings which are running alongside each other in order to justify a stay of one of them.

46. I am persuaded by him that the appropriate course is to stay paragraphs 11 and 12 of the third application, and paragraphs 1 to 7, and insofar as 9 relates to 1 to 7 that paragraph, in the fourth application, pending the result of the appeals in Dubai.

47. I do not think it would be a satisfactory course for the judge hearing a contempt application, and hearing evidence from the Claimant's witnesses that there was no substance in the allegations, and that the Defendant knew that, for such application to go forward against the background in which a Dubai court has found that there was sufficient substance in the allegations for the complaints by the individuals themselves not to be vexatious and not to amount to sufficient for dismissal from their employment.

48. That is not to say that I do not see very powerful force in the case by Ms Bingham that, on any basis, if the Defendant did cause those applications to be brought forward by the two individuals as his agent, the timing of them was quite plainly deliberate. But I do not consider that while there are outstanding appeals in Dubai it is sensible to take the course she suggests.

49. Consequently, I grant a stay of those grounds pending the outcome of the appeals in Dubai, or in any event until 1 February 2020, whichever is the earlier.

50. So far as paragraph 14 is concerned, there is no application to strike it out. There is an amendment proposed to it, which has two heads: (a) is clarificatory and causes no prejudice, in my judgment, and I shall allow it; in (b), as explained by Ms Bingham, it requires there to be added to it the words "if the Defendant's case is ..." So, if and in the event that the Defendant's case in the contempt application is that, contrary to the Claimants' primary case, the relevant instruction to Ms Pereira, referred to in 3(14) was given not by the Defendant but by Subhash Chaudhuri, that is a contingent allegation in response by the Claimants. On that basis, Mr Marshall has not opposed it, and I grant that amendment.

51. In relation to the fourth application, I grant the stay on the same terms in respect of paragraphs 1 to 7, and that part of 9 to which they relate, and there is no challenge to paragraphs 8 relating to the very abusive emails, and that part of 9 which relates to paragraph 8, and, in any event, there is a prima facie case made out in relation to those allegations.

52. The result therefore is that with regard to the first application, 1(a) to (g) remain; (h) and (i) have been unchallenged; (j) and (k) remain and (l) is struck out.

53. The second application is unchallenged.

54. As to the third application: 1 to 5 remain; 6 to 9 are unchallenged; 10 remains; 11 and 12 are stayed; and 13 to 22 are unchallenged.

55. As to the fourth application, 1 to 7 (with that part of 9 which relates to them) are stayed; 8, and that part of 9 which relates to 8, remain.