Neutral Citation Number: [2021] EWHC 3559 (Comm)

Case No: CL-2016-000126

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date of hearing: 17th December 2021

Before:

MR JUSTICE ANDREW BAKER

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Between:

COLOSSIENS SA	**Claimant/ Applicant**
- and –	
(1) SOCIETE DIFEZI & FILS SARL **(2) AFFOUSSATOU KARIMOU** **(3) SANNY MOUKAILA**	**Defendants/ Respondents**

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Mr Ralph Morley (instructed by **HFW LLP**) for the **Claimant/Applicant**
The **Defendants** did not attend and were not represented

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APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

Mr Justice Andrew Baker:

1. We will come on in the context of whether it is appropriate to say that I am sure, as I have to be, of contempt, and/or (if I am) which of the defendants is properly to be held to that standard as guilty of a contempt, to the question of whether all the various methods of delivery and notification that you have just been summarising came to all of the right people's attention in the right way.

2. For the immediate question of whether to proceed in the defendants' absence, the reality is that on everything that is in front of the court, this is as good as it is going to get, if I can put it that way. It is plainly to be concluded from the material before the court that the claimant has done all it reasonably can to bring the proceedings to the attention of the defendants and either that is not doing enough to cause them to want to participate or they are deliberately not participating. We will come on to look at what is the right inference to draw as part of the substance of the matter. But the claimant having done all it reasonably can and having complied in that regard with orders that the court has made in relation to methods of service that are to be deemed effective service, the claimant can say that everything has been properly served (multiple times) and that the defendants are not here and, it seems, are never going to be here.

3. In those circumstances, to adjourn because the defendants are not here is merely to delay the holding of this hearing, which whenever it takes place is going to take place in their absence, thereby to delay the claimant knowing the court's judgment as to whether they have material now available sufficient to prove, and if so against which of the defendants, that they are in contempt and, if so, what the court will do about that. There is no sensible reason to put the matter off any further, there will be no prejudice caused to the defendants by proceeding now rather than in a few months' time when we would have inflicted another hearing date on the court and not made use of the time today. There is potential prejudice to the claimant in the sense that if it now persuades the court to make relevant determinations of contempt and/or grant relief, and if doing so will achieve anything (about which, being realistic, one has to say one rather wonders), but if there is some chance that that will achieve anything then the sooner it is achieved the better and, therefore, we should proceed.

(Hearing continued)

4. So far as concerns formal requirements to have effected service, amongst others in view of the fact that the claimant has already obtained orders that have not been challenged for various methods of service to count as good service and/or to be dispensed with if they would otherwise be required by the rules, I am satisfied that all is in order. There is no question mark here over the satisfying of formal requirements as to the service of the original order or of the contempt application, it is more of what to make of what has been done, and the defendants' failure to respond to it, as an element of the substance of what the court is in a position to conclude as to each defendant, but particularly as regards each of the individual defendants, in terms of their liability or not for contempt.

(Hearing continued)

5. This is an application by the claimant and applicant, Colossiens SA, as assignee of an original claimant with a claim against the first defendant, Societe Difezi et Fils SARL, to have the court declare as in contempt of court both Difezi, the first defendant I have

named, and also Madame Affoussatou Karimou and Mr Sanny Moukaila, the second and third defendants respectively. Madame Karimou is the principal and sole formal office holder of Difezi. Mr Moukaila is her son, and on the evidence I am entirely satisfied that he is also directly involved in the affairs of Difezi having in the relatively recent past indeed held himself out to the outside world as occupying a role of "managing director". I am satisfied by the evidence so as to be sure that both Madame Karimou as a formal office holder and also in reality the primary *alter ego* of the corporate entity, and also Mr Moukaila, *de facto*, continue to be directors or officers of the company so as potentially to be liable individually as contemnors if the company has failed to comply with orders of this court.

6. The original claimant, Novel Commodities SA, obtained an award of arbitration before Gafta. The litigation in this court arises out of the attempts that have been made to enforce that Gafta award as a judgment of the court in the ordinary way pursuant to the Arbitration Act 1996. The principal sums awarded originally to Novel and to which Colossiens as the claimant is now entitled are a little over €725,000, and the same amount also in US$.

7. On 19 February this year, 2021, on notice to Difezi and in aid of the potential enforcement of Colossiens' rights, Cockerill J made an asset disclosure order against Difezi, the company, requiring it, in summary, to disclose and provide information as to all of its assets exceeding US$5,000. The disclosure order as issued and in due course served was endorsed with a penal notice which named Madame Karimou and Mr Moukaila individually, as well as addressing the directors and officers of Difezi generally, as part of the standard wording as recipients of the order by way of service of their potential liability for contempt of court if it be not complied with.

8. There has been no compliance whatsoever with the disclosure order. The case therefore does not give rise to any complications as to breach as sometimes arises where, for example, there is some apparent attempt to comply but the allegation is that it is so defective as to be capable as being regarded as in substance no compliance at all. In this case Difezi has provided no responsive information of any kind. Indeed, neither Difezi nor Madame Karimou nor Mr Moukaila personally has responded in any way to any of the proceedings in this court.

9. Pursuant to orders of the court relating to methods of service, as I commented earlier in the hearing when dealing briefly with the question of whether to proceed in the absence of the defendants today, the claimant has effected delivery of all conceivably relevant materials relating to the disclosure order and relating to this contempt application, and correspondence concerning the same and the company's non-compliance, so as to constitute by those previous court orders proper service on each of the company and Madame Karimou and Mr Moukaila personally.

10. Those methods of service have included, in particular, successful transmission by email to the email address of mouksane@difezi.com, which I am certain on the evidence is and has been consistently for a period of years Mr Moukaila's individual email address at the difezi.com corporate server, and delivery to the Difezi corporate offices, not only in that latter case delivery of the written materials as addressed to the company but also always separate copies addressed personally to Madame Karimou and Mr Moukaila.

11. Prior to the initial attempts to serve the disclosure order itself letters for the purposes of service were prepared in English and French by HFW (that is, Holman Fenwick Willan LLP), solicitors for the claimant, addressed to Madame Karimou and Mr Moukaila at their respective last known residential addresses and to the company at their corporate offices. The local *huissier*, court bailiffs effectively, in Benin, engaged on the instructions of HFW to effect service, reported that they had made contact with the individual on whom service was to be effected, so that would include Madame Karimou and Mr Moukaila, and was given the instruction to deliver at the corporate offices and duly did so. Efforts were also made to deliver at the residential addresses. There domestic staff confirmed the addresses in question as being addresses of, respectively, Madame Karimou or Mr Moukaila but directed the *huissier* to effect delivery at the Difezi corporate offices saying that they were not instructed or authorised to take delivery of the documents.

12. As delivered at the corporate offices the packages received there have consistently been signed for by a lady identifying herself as Mrs Salamata Adam, who in receiving delivery purportedly on behalf of the two individuals has identified herself as doing so as those individuals' secretary.

13. In different circumstances, where the evidence was less clear as to the role of the individuals in the company or where perhaps the court had only information as to one or two pieces of correspondence or documentary delivery that had been ignored, it might be less clear whether the court could be satisfied to the appropriate standard that the documentation in question must have come to the attention of the individuals being served, by way of inference from the absence of response, in view of the possibility of error, omission or failure on the part of employees to pass the material on. In the present case, however, and although, as I described it to Mr Morley during his very helpful submissions, it might have been the icing on the evidential cake had there been on at least one occasion some explicit acknowledgement on the part of either of the individuals of receipt, there is nonetheless such a wealth of occasions on which materials required to ensure that the disclosure order would be complied with have been delivered and ignored in circumstances where in each individual case it is inherently highly unlikely that the material would not be drawn to the attention of the individuals that in my judgment cumulatively the weight of that evidence is overwhelming.

14. I therefore draw the inference, on the basis that the weight of the evidence compels it so I can be sure, that Madame Karimou and Mr Moukaila have each been well aware from the service processes that have been undertaken of the disclosure order, of its requirements on the company, and of the company's failure to comply with that order.

15. Their respective roles and involvement in the company mean that I am equally sure that they were in the position to direct and ensure compliance, as Mr Morley rightly submits. If by any chance they directed compliance by way of delegating it to others but that has achieved nothing, the steady stream of reminders, complaints and warnings of consequences received from HFW notifying them that there had been no compliance would have left them in no doubt that any such delegation had failed to achieve its purpose. In fact it seems to me it is far, far more likely that they have simply decided to seek to bury their heads in the sand as regards these proceedings, ignore them and hope that that will result in no consequences.

16. The upshot of all of those attempts, in my judgment, I am sure, successful attempts, to bring these proceedings and this application to the attention of the three defendants is also of course that all the formal requirements for the bringing and pursuit of a contempt application have been satisfied. There have been orders dispensing with personal service, which orders have not been challenged.

17. For those reasons I am satisfied so as to be sure that the first defendant, Difezi the company, was duly notified of and served with the disclosure order and then the contempt application following upon non-compliance, that it has failed to comply, that being a total failure, and that the company therefore is in contempt of court. I am equally satisfied so as to be sure for the reasons I have indicated that both Madame Karimou and Mr Moukaila as, respectively, *de jure* and *de facto* directors or officers of Difezi have been well aware of and in the circumstances have been responsible for the company's failure to comply with the disclosure order of this court so as themselves equally to be in contempt of court, and I so find.

(Hearing continues)

18. As regards the company, certainly in circumstances where the court is not invited at the insistence of the claimant to impose any specific sanction, I can see little practical purpose in imposing on my own initiative any additional punishment. There is no reason not to declare formally that the company is in contempt, that no additional sanction will be applied, and move on.

19. As regards Madame Karimou and Mr Moukaila, I agree with Mr Morley that, for similar reasons to those for which I have proceeded in their absence, there is no constructive or other purpose in adjourning this matter further as regards sanction. Whatever sanction I decide now is appropriate will have built into it a liberty to apply for it to be varied or discharged, without strict limit on the grounds on which some such application might be attempted but clearly having in mind in particular that were there now at last either compliance with the disclosure order or, even better, discharge of the underlying ultimate financial obligations, the court, without binding its hands today, is likely to be amenable at least to reconsidering the severity of any sanction now imposed. With that protection in place on whatever sanction that is imposed it does seem to me appropriate to proceed to deal with the question of sanction today.

(Hearing continued)

20. There is a relatively close precedent in *JSC BTA Bank v Stepanov* [2010] EWHC 794 (Ch), *per* Roth J, and in *Ifaco Feed Company SA v Societe De Distribution Nouvelle D'Afrique (Sodinaf) SARL & Fabrice Siaka* [2019] EWHC 3715 (Comm), *per* Phillips J, as he was then, for the imposition of the maximum custodial term of two years in cases where there is a deliberate and ongoing flouting of the court's attempt by asset disclosure order to assist a judgment creditor in the task of seeking to enforce its entitlements under the judgment.

21. Phillips J recorded at [22], in imposing the two year term in his case, following the example of Roth J, that there was "*…a flagrant breach and disobedience of the court order with no attempt to explain or excuse the disobedience… a judgment for a very significant sum of money… [and] orders [that] are an attempt but to enforce IFACO's rights resulting from that judgment…* ."

22. Roth J in the *Stepanov* case had concluded that it was appropriate to impose the maximum sentence of imprisonment because of the seriousness of those circumstances, as a type, but building in express provision entitling the defendant to apply to vary or discharge that order if so advised, which without ever tying the court's hands plainly would envisage, amongst others, the possibility that the defendants might finally comply with the disclosure order hitherto flouted and/or even take steps to procure that the underlying judgment sum be discharged.

23. In my judgment, as was also the judgment of Phillips J in the *Sodinaf* case, it is appropriate to take the same course as adopted by Roth J in *Stepanov*. I therefore do now make the order that Madame Karimou and Mr Moukaila each be committed to prison for two years for contempt but with liberty to apply to vary or discharge that order if so advised.

(Hearing continued)

24. With regard to costs, the application has been prepared impeccably. Significant work is involved, and bearing in mind the work involved and the quality with which it has been done the costs are plainly reasonable. Even were I not assessing them as in present circumstances it is appropriate to do on the indemnity basis, I would have said also that they were plainly proportionate and should be recoverable in full even on the standard basis. Therefore, I am content that the defendants should have a joint and several liability to pay the claimant's costs summarily assessed in the amount claimed of £10,885.51.

This Judgment has been approved by Baker J.