Neutral Citation Number: [2020] EWHC 3088 (Ch)

Case No: CR-2019-BHM-000520

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Companies Court (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 17/11/2020

Before :

HHJ DAVID COOKE

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Between :

Trevor Nash (1) **Ira Magaziner (2)** **Alpha Whiskey Echo LLC (3)**	**Applicants**
- and -	
Atle Lygren (1) **Procedo Enterprises Establissement (2)** **Dr Ernst Walch (3)**	**Respondents**

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Mark Grant (instructed by **Gowling WLG (UK) LLP**) for the **Applicants**
Joseph Giret QC (directly instructed) for the **Respondents**

Hearing date: 21 October 2020

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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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HHJ DAVID COOKE

HHJ David Cooke:

1. The Applicants before me are the first three claimants in the underlying proceedings. The second respondent ("Procedo") is a Liechtenstein anstalt and is the second defendant. Its directors are the first respondent, Mr Lygren, who is also first defendant in the proceedings, and the third respondent, Dr Walch, who is not a defendant. By their application dated 4 May 2020 the Applicants seek findings that the respondents are guilty of contempt of court by virtue of breaches of an interim injunction made in those proceedings by order of HHJ Worster on 29 October 2019, and such sanction as the court sees fit to impose.

2. The proceedings concern a UK company, EMC Cement Holdings Ltd ("the Company"). I set out the following as background to the issues before me, though much of it is disputed and yet to be resolved in the proceedings.

3. The claimants' case is that the Company was established as a special purpose vehicle to develop and commercialise technology for the manufacture of a supplementary cementitious material incorporating volcanic ash. That technology is the subject of patents owned by Procedo, but past attempts to commercialise it have not been successful. The Applicants agreed to become involved and arrangements were agreed for their participation through the medium of the Company. Procedo granted a licence of the intellectual property to the Company and owns 92.5% of its shares. The remaining shares were issued to the Applicants in consideration of investment of some $10m by the third claimant and of the time and expertise of the first and second claimants.

4. The claimants say that the arrangements are governed by a shareholders agreement which entitles them to appoint a majority of the directors of the Company, notwithstanding they are only minority shareholders. They insisted on this right because of what they say is a long history of attempts to fund the commercialisation of the technology coming to grief by virtue of disputes between Mr Lygren and previous funders. The agreement accordingly entitles the Applicants to appoint three directors of the Company and Procedo to appoint two (Mr Lygren and a Mr Ronin) and contains provisions designed to prevent Procedo exercising its majority shareholder rights to remove the Applicants' directors or otherwise change the structure of the board.

5. However, the Claimants say that once their investment had resulted in successful development and imminent commercialisation of the technology, with a third party investor prepared to provide funding of $90m for a manufacturing plant in the USA, Procedo began taking steps designed to circumvent the shareholders agreement and regain sole control of the technology so as to exploit it for itself to the exclusion of the Applicants. There are allegations of a great many actions that the claimants say are improper manoeuvres, but in particular and relevantly to these proceedings Procedo called a meeting of members of the Company to be held on 30 October 2019 at which resolutions were to be proposed for the removal of the Applicants' three directors. The Applicants fear that if Procedo gains control of the board, it will use it to terminate the technology licence and/or wind up the Company (which would have the same effect) so that Procedo will be free to exploit the technology and their investment and interest will be lost.

6. The claimants sought urgent injunctive relief on 23 October 2019. The matter came before HHJ Worster on 29 October 2019. The defendants did not attend, though it is

accepted they were notified of the hearing and Mr Lygren and Dr Walch (for Procedo) made written submissions to the court. Judge Worster's order (bundle p 321) bears a penal notice in conventional form warning that breach by Procedo, or anything done by another person that helped or permitted Procedo to breach the order could amount to contempt and result in imprisonment, a fine or seizure of assets. It provided:

> "1. [Procedo] must not take any further steps to seek to remove Trevor Nash, Ira Magaziner and Kathryn Murdoch (or any of them) as directors of EMC Cement Holdings Ltd except with the written consent of all the other shareholders until the return date of their application or further order of the court in the meantime.
>
> 2. The shareholder notice of a general meeting purportedly issued by [Procedo] giving notice of a general meeting of EMC Cement Holdings Ltd at 15:00 GMT on 30 October 2019 is hereby set aside…"

7. No return date hearing has ever been fixed because, the claimants say, despite repeated prompting the defendants have never provided any available dates on which it could be listed. HHJ Worster's order has accordingly remained in force at all times since it was made.

8. On 1 April 2020 Procedo sent to all shareholders a notice (p 408) by which it purported to convene a meeting of the members of the Company to be held on 9 April 2020 to consider the following resolution:

> "That upon passing, whether or not pursuant to 'a review of the composition of the board' by the members per #18.1 of the Shareholders' Agreement dated 20.01.16, in any event and unless and until such further ordinary resolution per Art 3.1 the Articles, as forthwith practicable having due regard to any judicial fetter the board of the Company shall comprise no more than two directors and further that the directors duly appointed shall be Atle Lygren and Vladimir Ronin except as they may choose to decline."

9. The claimants through their solicitor immediately objected that proposing or passing this resolution would be in breach of the injunction and threatened that if it was not withdrawn they would issued proceedings for contempt. Procedo refused and instead on 9 April purported to adjourn the meeting to 30 April, serving a notice to that effect (p 445). Despite further correspondence, the resolution was not withdrawn and on 30 April Procedo purported to adjourn the meeting further, this time sine die (p 94). The application seeks declarations that Procedo was in contempt by (i) proposing this resolution (ii) giving notice of the meeting on 9 April to consider it and (iii) giving notice of the further meeting on 30 April for the same purpose.

10. The allegations against the two individuals are that they either helped Procedo to commit the alleged breaches, or wilfully failed to take reasonable steps to ensure the order was obeyed, in a number of respects that are detailed in the application notice. I do not need to set them out fully for the purposes of this judgment, since none of the facts alleged are disputed, but in summary they relate to participation in the various meetings, sending the notices referred to and sending correspondence maintaining the

intention to proceed or being aware of the notices and correspondence but failing to ensure the meetings and proposed resolutions did not proceed.

Relevant Law

11. The relevant law is not in dispute. Counsel agree that what must be shown was accurately summarised by Proudman J in *FW Farnsworth v Lacy* [2013] EWHC 3487 (Ch) as follows:

> "A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

The relevant standard of proof is the criminal standard, ie beyond reasonable doubt.

12. As to the potential liability of directors of a corporation, in *Attorney General of Tuvalu v Philatelic Distribution Corp Ltd* [1990] 1 WLR 926 Woolf LJ giving the judgment of the Court of Appeal said this:

> "In our view where a company is ordered not to do certain acts… and a director of that company is aware of the order… he is under a duty to take reasonable steps to ensure that the order… is obeyed, and if he wilfully fails to take those steps and the order… is breached he can be punished for contempt. We use the word 'wilful' to distinguish the situation where the director can reasonably believe some other director or officer is taking those steps…
>
> There must however be some culpable conduct on the part of the director before he will be liable to be subject to an order of committal… mere inactivity is not sufficient…
>
> … an officer [is not] liable in contempt by virtue of his office and his mere knowledge that the order sought to be enforced was made… [but that] should not be taken as meaning that it is only where a director has actively participated in the breach of an order …that [he may be liable]. If there has been a failure to supervise or wilful blindness on the part of a director his conduct can be regarded as being wilful…"

13. A director may be punished for contempt even if resident overseas (as Mr Lygren and Dr Walch are).

14. Any injunction should be drafted in terms that are as clear as possible, in order that the scope for misunderstanding of its terms is reduced. Mr Giret referred me to *Miller on Contempt*, at para 12.38-39 on this point, which cites various judicial formulations of the requirement. The author there says

> "In the nature of things the degree of clarity and specificity which is capable of being achieved will vary according to the subject matter of the proceedings…a degree of latitude may be needed in, for example, defamation proceedings and cases involving the infringement of intellectual property rights. As *Arlidge Eady & Smith* note of such cases 'the complainant will not unreasonably wish to ensure that he is adequately protected by wording which is wide enough to meet all possible permutations of misconduct within the defendant's ingenuity'".

15. Where the meaning of the order is disputed, it is a matter for the court to interpret it, on normal principles of construction, and to determine whether the facts found or admitted amount to a breach of its terms. If a breach is found, it is no defence (though it may be relevant to the issue whether any and of so what sanction is imposed) that the person charged genuinely misinterpreted the order or did not believe himself to be acting in breach or did not intend to breach the order; see *Farnsworth v Lacy*, above and *Re Supply of Ready Mix Concrete (No 2)* [1995] 1 AC 456.

16. Mr Giret does not dispute any of these propositions. Nor is it disputed that the matters alleged against the respondents occurred in fact as alleged in the notice, or that the participation or involvement of the individual directors in them was as alleged. Nor was it submitted that such involvement was not, in any instance, sufficient to amount to 'wilful conduct' potentially rendering the director liable. I am in no doubt in any event that this is the case; in all the matters referred to Procedo acted by these two directors and it is clear that to the extent any of those acts was actually done by only one of them the other was fully aware of it and either concurred or, at least, with full knowledge of the injunction and its terms did nothing to stop that act or counteract it.

17. In light of what is admitted, no issue arises as to the standard of proof required of the facts necessary to establish breach of the injunction, or assistance sufficient to render the individual respondents in contempt. If there had been no such concession, these facts would in any event have been established to the required standard by the documentary evidence.

18. There is no issue as to service. It is not disputed that all three respondents had notice of the order soon after it was made and well before any of the matters complained of. The order provided that it should be served by email and receipt was confirmed by Dr Walch. It was accepted that Mr Lygren was at all material times fully aware of the order and its terms and that I should make an order dispensing with personal service on him.

19. The issues remaining centre around whether what Procedo did was in fact a breach of the terms of the injunction, and, if it was, whether the individual respondents (whose state of mind is to be attributed to the corporation) believed or intended that any breach was being committed.

The Respondents' arguments

20. Mr Giret's principal submission is that it is made clear by the correspondence that the respondents had no intention to breach the terms of the injunction and did not believe that they had done so. They repeatedly asserted that there was no "step" within the meaning of the injunction until a director was actually removed, and so no breach would occur until a resolution to remove a director was actually voted on and passed. Accordingly they maintained they were entitled to propose the resolution and convene a meeting, and to adjourn to another date for as long as the injunction remained in force, as long as the resolution was not actually passed until after the injunction ceased for whatever reason to have effect. Their intention not actually to remove any director while the injunction was in force was, it is said, made clear by the reference in the proposed resolution to "as forthwith practicable having regard to any judicial fetter", which they said meant that the injunction was a judicial fetter and accordingly (even if the resolution was passed) no change to the board would actually come in to effect while the injunction remained in force.

21. Given that this was, he submits, the respondents' genuine belief, Mr Giret submits, in summary:

    i) That their construction of the order is correct, and accordingly the conduct admitted does not in law amount to breaches of the injunction, or

    ii) That the fact that the directors genuinely and reasonably held that belief and interpretation shows that the language of the injunction is insufficiently precise and accordingly even if the court would interpret it differently, the respondents should be forgiven for their interpretation and no penalty imposed, or

    iii) That their belief and intention should be accepted as genuine and taken into account in mitigation when considering any penalty.

22. Starting with the construction of the injunction order, I am in no doubt that the meaning the respondents seek to put on it is plainly wrong. The acts forbidden are not just the actual removal of the three directors but "any steps to seek to remove" them. "Steps to remove a director" would in any event include actions prior to the actual moment of removal, if part of a process leading to such removal, and this is made even more clear in a reference to steps "to seek to" remove. The words used plainly in my judgment include any actions that purport to initiate or pursue a constitutional process that is intended to lead at some point to removal. In correspondence the respondents argued that this would be unreasonably wide because it would apply to merely thinking about removal of the directors or informally discussing it among themselves, but there is no force in that point. Thoughts and informal discussions are not themselves steps taken towards removal of a director, but acts that initiate or are part of a legal process by which under the constitution of the company a director may eventually be removed plainly are such steps, and they are steps seeking the removal of a director whether the outcome of the procedure being followed is anticipated imminently or at some time in the future.

23. It follows that it is clear, in my judgment, that acts such as proposing a resolution for removal of a director, giving notice of a meeting to consider such a resolution, holding and adjourning such a meeting and giving notice of any adjourned meeting would all be in breach of the injunction. Nor does it matter whether the terms of the resolution are such that removal is conditional on some other event, or whether the

party proposing the resolution has or says that it has an intention to delay or suspend completion of the process for the time being, as long as it remains capable of being completed and eventually leading to removal.

24. I do not consider that the terms of the injunction are insufficiently precise for it to be enforced, or that they contain any element of ambiguity that would serve to excuse the respondents' commission of any such acts in the professed but incorrect belief that they did not amount to breaches. No doubt the wording did not specify every act that might constitute a "step", but the circumstances amply justified the use of wide, and perfectly easily understood, language so as to cater for "all possible permutations of misconduct within the defendant's ingenuity". The sheer range of manoeuvres alleged to have been adopted by the respondents disclosed by the evidence in these and the related proceedings shows, if correct, that their ingenuity is considerable.

25. As to whether the respondents did in fact, as they now say, genuinely believe that the actions they took did not breach the injunction, it is necessary to consider the terms of the resolution itself and the correspondence that has passed between the parties. That correspondence is extensive. Most if not all of it, on the respondents' part, appears to have been produced by Mr Denizhan Baytug, who states that he has qualified in England both as a barrister and a solicitor but does not practise in either capacity and is employed by Procedo, apparently specifically for the purpose of assisting with this and related disputes and litigation, and described as its internal general counsel,. Much of the correspondence comes directly from Mr Baytug; some of it is in the name of Mr Lygren or Dr Walch but is I understand accepted to have been drafted by Mr Baytug, as were the various documents such as notices and resolutions,.

26. Mr Giret invited me to accept that Mr Lygren and Dr Walch had at all times acted in honest reliance on Mr Baytug's advice, which they believed to be correct, as to the meaning and effect of the injunction, such that if I found that advice to be incorrect they should not be personally regarded as culpable for having followed erroneous advice. However as Mr Grant points out there is no evidence direct from the two individual respondents to that effect. I cannot simply assume that the two directors merely followed a course set for them by an adviser, rather than, for instance, that the adviser acted as he did in accordance with their instructions to him.

27. The respondents' correspondence is often confusing in its language, officious in its tone and of a highly assertive and argumentative nature. Much of it is repetitive. Responses to points made by the applicants or their solicitors are often either irrelevant or at best tangential to the issues raised. The documents drafted, such as minutes and notices, are in a similar vein, containing much that is self justificatory verbiage and some language that is difficult to follow at all. In these circumstances I do not propose to set any of that correspondence out at length, though it is necessary to quote extracts.

28. Mr Giret invited me to make allowances for what he described as the robust manner in which Mr Baytug expressed this correspondence, stepping back to discover the intended meaning behind the language used, which might, he said be "otherwise potentially misconceived as posturing". It was an elegant submission, but does not persuade me to take the charitable view he suggests. The individual respondents were plainly aware of the language and the approach Mr Baytug adopted over a considerable period of time and have done nothing to depart from it, so I must assume it either reflects their wishes or they were content to allow him to present matters on their behalf and on behalf of Procedo in the way he did.

29. In a letter of 2 April 2020 (bundle p 426) Mr Lygren said:

> "Hopefully this letter will provide at least some insight as to the basis of the proposed resolution. For the avoidance of doubt, for your clients' comfort, Procedo will comply with the order of 29 October 2019 and for this reason the proposed ordinary resolution states "having regard to any judicial fetter"… We thought that covered matters adequately and perhaps now we have set that out you will concur… if you want to propose alternative words that make it clear ECH's board composition will not change until the injunction is lifted, please revert, else you can be assured that was the intention of the provision. Procedo is happy to stipulate that. "
>
> (underlining in the original)

30. This letter evidently proceeds on the assumption that the resolution should be passed immediately, while the injunction is still in force, and argues that there is no breach because the words "as practicable having due regard to any judicial fetter" are intended to mean that no director is actually removed until the injunction is discharged. In fact it is to say the least unclear what the words "having due regard to any judicial fetter" mean, and in particular whether they postpone the effect of the resolution, which would on the face of it be contradictory to the earlier words of the resolution which include "upon passing…in any event and unless and until such (sic) further ordinary resolution…".

31. In response to this letter, the applicants' solicitors noted (p 428) that Procedo had not responded to a request to withdraw the resolution and undertake not further to breach the injunction. They continued:

> "As we explained yesterday, by circulating the Notice, you have breached the Injunction. By failing to withdraw the Notice following our request that you do so, you remain in breach on the Injunction. The wording of the proposed resolution neither takes your actions outside the scope of the Injunction (which prevents you not only from removing our clients' nominated directors…but also from taking 'any further steps' to remove them)… Your reliance on the wording 'having due regard to any judicial fetter' as providing absolution is misplaced; the order is not breached merely by completing the removal of the directors but by taking any steps. Clearly, purporting to propose and circulate this resolution is one step; voting for it would be another."

32. This unambiguously made the point that the injunction applied to prevent procedural "steps" prior to the moment of actual removal of any director. After several chasing messages from the solicitors threatening committal proceedings, Mr Baytug replied on 8 April 2020 (his letter at p 439 is misdated 8 March) as follows:

> "Committal
>
> I have been asked to respond. I am not given to supplying your firm or your barrister endless excerpts from *Blackstones*. Per

> the attached highlights, also recalling SOGAT, please provide forthwith any case law whereby committal is *pre-* emptive so that your demands to exceed the known boundaries of company law is understood, which states company directors and members have no authority to prevent or pre-empt a meeting's reconvention. Nor to derail it. Absent such indication, if the meeting reconvenes, it is suggested respectfully- and stolidly- that its outcome must be *resolved* before trying your clients' luck knowing fully the *rigours* committal demands upon those who allege it. By example, it is no secret Procedo has wished to remove your clients as Holdings' directors. Restating that fact does not count as 'any step' whether or not during a members' meeting, just as committal knows no inchoate measure.
>
> If you've the case law, let's be having it without delay."
>
> (emphasis in original).

33. Insofar as this can be understood at all, it appears to be making three points that are repeated elsewhere in the correspondence:

    i) There could be no breach of the injunction before the resolution was actually passed and so any contempt application before then would be premature. The earlier argument of course had been that even when passed the resolution would be saved from being a breach because of the "having due regard to any judicial fetter" wording.

    ii) Anything done prior to passing the resolution was merely a restatement of Procedo's wish to remove directors, and not itself a "step".

    iii) Once a resolution had been proposed, neither the directors nor the shareholders of the company had power to withdraw it or prevent it being voted on.

34. On 9 April Procedo sent out documents purporting to be minutes of a general meeting held that day and adjourned as inquorate, and a notice reconvening the meeting for 30 April, reiterating the proposal to pass the resolution, in unchanged terms. The applicants' solicitors sent further correspondence asserting that the failure to withdraw the resolution and continued actions to convene a meeting to consider it amounted to breaches. On 20 April Mr Baytug replied (p 456):

> "…2. The record of the shareholder meetings has been disclosed. The last one was inquorate...because as I understand it Dr Walch did not attend…No business whatsoever was transacted and no steps were taken to remove your clients at all…
>
> I have been asked to confirm Procedo has no intention of breaching any injunction. If the injunction is STILL in place by the time of the next meeting then no action will be taken. It will be a repeat performance of (2) ABOVE. Procedo will have only one representative attending and the mater will have to be adjourned.

> Therefore, no steps have been taken towards the injunction and none will be taken for as long as that injunction endures.
>
> … if…the date for an adjourned meeting has to be fixed…by the board…your clients will torpedo it. And the moment that injunction is lifted, Procedo does not want to have to wait 35 days to set a date for the constitutional aspects to become extant. But even then Procedo understands it shall be required to re-invoke the mechanism to vote for your clients removal, but of course at least it the constitutional aspects are in place, they can resign beforehand.
>
> This noted, to repeat: the constitutional mechanism so as to tally with your client's eventual removal will only come into play upon the injunction being lifted, in respect of which matters are reserved fully. And even then, absent their resignation, a separate procedure will *then* be required to actually remove them…"
>
> (emphasis in original)

35. This suffers from similar difficulties of comprehensibility, but seems to make a number of points:

    i) The meeting on 9 April was only inquorate because of the absence of a second representative of Procedo; the implication being that a quorate meeting could be held and the resolution passed at any time if Procedo chose to send two representatives, whether or not the other shareholders attended.

    ii) Procedo intended of its own volition to refrain from providing a quorum as long as the injunction was in force. The applicants were presumably expected to accept this as sufficient assurance that the resolution would not be passed while the injunction was in force.

    iii) If and when the injunction was discharged, Procedo wanted to proceed to hold the meeting and pass the resolution without delay, and certainly without any delay entailed in convening a new meeting.

    iv) It was now being said that even if the resolution was passed, a further unspecified procedure would have to be followed in order actually to remove any directors.

36. On 23 April and in response to the threatened committal application Mr Baytug sent a long email (p 482). It included the following:

> " … What Procedo wishes to know, as this is an order you drafted, is what is a 'step'? We are not here to second guess you again… We still do not know what the issue is. Procedo wishes to remove your clients as directors. It is no secret. Would its merely *stating* that count? Or how about an advert?...if during its convened meeting Procedo stated that… would that comport (sic) as a 'step'? Is exercising its *freedom of speech* caught by your order… "

(emphasis in original)

The email went on to reiterate the contentions that the resolution could not infringe the injunction because of the "judicial fetter" wording and that Procedo's voluntarily refraining from providing a quorum for any meeting meant that no "step" had been taken. It emphasised that "Procedo needs to act quickly when the injunction is lifted".

37. Based on this correspondence, Mr Giret made a number of submissions. First, he said that it shows the genuine belief of Mr Baytug, and through him the two individual respondents, that actions did not amount to steps seeking the removal of the directors until removal actually took place, or at least genuine doubt as to whether that was the case. I do not accept that there was any such genuine belief or doubt. What this correspondence shows, in my view, is that despite having the point clearly put by the applicants' solicitor that the injunction extended to formal steps such as proposing a resolution and convening a meeting, Mr Baytug continued to maintain the contrary by a combination of flat denial and evasion of the plain words of the order, culminating in his preposterous attempted diversion into a discussion of hypothetical interference with free speech.

38. Second, Mr Giret submitted that the proposed resolution would in fact have been ineffective by itself to remove any director, even once the injunction had been discharged, and that Procedo always understood this to be so and intended that it would have to be followed up by some separate procedure, which he referred to as a s 164 Companies Act 2006 procedure, in order actually to remove any director. The resolution he said was thus no more than a statement of Procedo's intention, and not a step towards anything. I do not accept that this represents either the actual effect of the resolution, if it had been passed, or Procedo's subjective understanding or intention of its effect. It is true that Mr Baytug's confusing and contradictory correspondence makes a number of assertions, but these show more a changing of position over time than any consistent intention on its behalf:

i) Procedo began by asserting that the "judicial fetter" wording meant that the resolution could be passed but would have the effect of removing directors only once the injunction had been lifted. There was no reference at that stage to any subsequent procedure being necessary. That interpretation is in any event far from clear, and its vagueness coupled with the contradiction with the remaining wording gave ample scope for Procedo to put forward any other interpretation as and when it might have suited it to do so. But it is clear from its own correspondence that Procedo considered that the resolution would itself operate to remove the three directors, albeit that such effect would be suspended until the injunction was discharged.

ii) Procedo plainly considered that passing the resolution conferred some advantage on it in connection with its intended removal of directors, as it was so anxious to maintain in existence what it considered to be a meeting validly called with a resolution validly proposed as business that could be transacted whenever the meeting proceeded. It was a change of position to say that actually putting the resolution to a vote would be deferred until the injunction was lifted, but Procedo sought to claim for itself the sole discretion as to when that should be, by maintaining that it could provide a quorum for a meeting and was only refraining at its discretion from doing so. It said in terms that this would enable the resolution to be passed more quickly once it considered itself

free to proceed, and so must have intended the resolution to have some effect on being passed.

iii) It was only later that the suggestion was made that some additional resolution or procedure might be necessary to achieve removal, but that makes no sense, because

a) The wording of the resolution itself, if one assumes that any effect of the "judicial fetter" wording has expired, explicitly provides that "upon passing", the board shall consist of only two named directors, and it would therefore be a resolution of the shareholders necessarily implying the removal of all other directors.

b) The resolution also makes a reference to provisions of the shareholders agreement. It is unclear precisely what this was intended to mean, but it seems most likely it was intended to be a basis for arguing that it amounted to a variation of that agreement and so overriding provisions that the claimants rely on as binding the shareholders to maintain the board structure provided for by that agreement, ie a majority of directors nominated by the claimants. Such a variation, arguably disposing of an obstacle to the valid removal of directors, would itself be a step seeking removal of those directors, and so in breach of the injunction.

c) If Procedo thought that some further resolution explicitly removing the directors was required, passing this resolution was not a necessary precursor to it and would have had no point at all. That plainly was not its view.

39. For these reasons the proposed resolution was not, on any reasonable construction of its terms, simply an expression of intention on Procedo's part to take action in future to remove directors and I reject the suggestion that Procedo's directors themselves subjectively thought or intended that would be its only effect.

40. An alternative submission was that the resolution was merely a method of gauging the mood of a meeting as to whether directors should be removed, to be followed if it was approved by a separate procedure for removal. That is simply untenable; there is nothing whatever in the language of the resolution that seeks the views of members on a future course of action (in any event Procedo knew perfectly well that the other shareholders were opposed to the removal of their nominated directors) and for the reasons above I reject the suggestion that Procedo set out intending any two stage process.

41. Mr Giret's submissions raise the question whether, if the resolution would otherwise have had the effect of removing any director (either immediately it was passed or at some later date when the injunction was lifted) it would be deprived of that effect, or otherwise open to challenge, by reason that special notice of the intention to move the resolution had not been given as required by s 168(2) Companies Act 2006. There may have been other potential challenges to the procedural effectiveness of the mechanism Procedo adopted, for instance in purporting to introduce the proposed variation without advance notice at a meeting the applicants did not attend on the basis that it was an "amendment" to the business notified for that meeting.

42. I was not addressed on any such procedural issues, and do not need to go in to them, for the simple reason that even if the actions that Procedo took were actually or arguably procedurally ineffective, their intended effect was either to remove directors or to be part of a process leading to such removal, and they were thus steps "seeking" such removal, even if they turned out to be ineffective in law to achieve the result they sought.

43. A further strand of argument evident from the correspondence is that although the applicants' solicitor called on the respondents to withdraw the resolution they were justified in refusing to do so because they had no power either to withdraw the resolution or to prevent it from proceeding to a vote. Further, it was said that once the meeting had been adjourned sine die, as it was on 30 April, any breach of the injunction had been cured, or any prejudice to the applicants from any such breach had been brought to an end. Mr Giret submitted that I did not need to determine whether these arguments were correct in law, but I should accept that they were the respondents' genuinely held belief and so either excused them from culpability or mitigated that culpability.

44. The first point is based on a combination of arguments culled from different sources. First I was referred to the statement in *Company Meetings and Resolutions* (Kosmin and Roberts) at para 12.39 that directors have no power at common law to cancel a meeting of members once it has been properly called, and in the absence of provision in the Articles, no power to postpone or adjourn such a meeting. Mr Giret referred to authority in relation to an application for an administration order, which by statute may be made by "the directors", and holding that once the directors as a board had resolved to make such an application it was the duty of each of them to carry that in to effect, so that an application to court made by only one of them was nevertheless to be treated as made by the directors as a whole. From that it was extrapolated that once a meeting had been convened each directors had a duty to ensure that it took place.

45. All that however is nothing to the point. This was a resolution proposed by a shareholder, and Procedo as shareholder could at any time have withdrawn it from consideration or, to the extent necessary, consented to the chairman of the inquorate meeting bringing it to a close, rather than adjourning, in order that it did not remain an outstanding item of business. That is what Procedo was asked to do, in order to remove any risk that the resolution would be passed, but it repeatedly refused to do so precisely in order to maintain its ability in future to proceed quickly with the resolution if it so chose. It sought to justify this with specious reasoning, which Mr Baytug maintained despite the fallacies being pointed out to him; see for example his letter of 24 April (p 496).

46. The argument that adjournment cured any breach was founded on *Northern Counties v Jackson & Steeple* [1974] 1 WLR 1133. The facts of that case are somewhat convoluted, but insofar as relevant were that a company had been ordered to convene a members' meeting in order to approve a resolution for issue of shares. The directors convened a meeting, but sent a circular to shareholders that effectively invited them to vote against the required resolution (the non compliant meeting). The court ordered that the non compliant meeting should not take place or should be adjourned sine die, and that the company should now convene a fresh meeting with a new circular complying with the court's order. From this it was suggested that adjourning sine die a meeting that was potentially convened in contempt of court cured the contempt, or was a matter of best practice that the respondents thought they were following.

47. This reasoning is in my view similarly specious. The adjournment ordered in the *Northern Counties* case was part of a package of measures designed to prevent or suspend consideration of the non- compliant resolutions while compliant resolutions could be properly put before the members. It could not conceivably be presented, as Mr Baytug sought to do, as a universal cure for any contempt arising from calling a meeting. Most obviously, the order made in *Northern Counties* ensured that the non compliant resolution would not come back before members and would be overtaken by voting on the compliant resolution. In contrast here Procedo sought to keep its resolution available to be restored at any time of its own choosing.

48. Lastly Mr Giret submitted that no prejudice had in fact been caused to the applicants by any steps that had been taken so far, and the undertaking to adjourn meant there could be no such prejudice in future. I do not accept that; the resolution at present remains extant and could if Procedo are correct be passed at any time. Its passing would or could be substantially disadvantageous to the applicants, for the reasons given above, and I have no doubt that is exactly why Procedo is so determined to keep it available. Given the hostility of Procedo's position and its apparent willingness to change tack as and when deemed convenient, any assurance it has offered about future use of the weapon it considers it has created is of little or no comfort to the applicants.

Conclusion and sanction

49. For these reasons, none of the matters argued by Procedo in correspondence or submitted on its behalf by Mr Giret absolve the respondents from culpability for the breaches I have found, nor do they provide any material mitigation. I am in no doubt that these breaches were committed wilfully, in the sense that the respondents intended to take all the steps that they did, and knew all of the facts that made those steps contrary to the court's order. I am not persuaded that they acted in any genuine belief that they were not in breach of the order; the documentary evidence strongly suggests that they had no such belief but that they took these actions intending to seek to justify and maintain them by the sort of arguments referred to above, without any genuine belief in the merit of those arguments. Mr Giret described their actions as "sailing close to the wind". That is I think the highest that it can be put for the respondents, and it is appropriate to say that, as Mr Grant submitted, a respondent who takes such a course takes a very great risk in doing so. Over time the respondents have modified their position and arguments, but they have never withdrawn their proposed resolution entirely. Even now, I was not offered any undertaking that they would do so, and for so long as the resolution remains in any sense available to be proceeded with, the respondents continue to be in contempt of the injunction.

50. On the question what sanction should be imposed, the court has power to order an individual respondent to be committed to prison for a period up to two years, and/or it may impose a fine of an unlimited amount, and/or order the sequestration (confiscation) of assets of the person in default. The punishment imposed serves two purposes; partly to mark the seriousness of the breach that has occurred and partly where necessary to seek to ensure compliance with the court's order in future.

51. The breaches I have found are serious, and as I have indicated I am in no doubt they were committed wilfully. They were ultimately directed to securing for the respondents a very valuable commercial advantage to the prejudice of the claimants, given the value of the interests at stake in the underlying dispute. I bear in mind that although the applicants would say these actions were part of a great number of

illegitimate manoeuvres on the respondents part, none of the other matters has so far been the subject of contempt proceedings, so I approach this as a first offence and consider it separately from any of those other allegations.

52. In my judgment, the appropriate sanction for the matters proved is a fine, of a single amount in respect of all the breaches committed by each respondent, and taking account of all the submissions made and the matters recorded above I impose fines of £25,000 each on the two individual respondents and in addition £100,000 on Procedo.

53. In relation to future compliance, I have noted above that the respondents remain in breach of the injunction. If any future application is made, either in relation to such continued breach or any fresh breaches, the respondents should be in no doubt that the court will take an appropriately serious view of any continued or further breach that may be found.

54. I will fix a date for this judgment to be deemed handed down, without attendance, and invite counsel to agree the order resulting. If there are matters arising that cannot be agreed, I will deal with them on the basis of written submissions, which should be brief and filed no later than 12 noon on the working day before handing down.

Postscript

55. I record that in response to the draft judgment, Mr Baytug sent an email direct to the court setting out many objections to it and asking that "findings" the respondents disagreed with be "expunged" or alternatively that some 20 or so points he asserted be "recorded" in the judgment, and that if this did not happen I should give reasons why not. This goes well beyond the permissible scope of suggested editorial corrections to a draft judgment. If the matters mentioned are to be pursued it must be by seeking permission to appeal.

56. Late in the evening on the day before handing down, Mr Lygren sent an email, sent direct to my judicial address, with a witness statement attached and an exhibit of 174 pages, requesting that the court should not determine the sanction to be imposed without a further hearing he referred to as an "assessment hearing" at which he would "walk [me] through" the material sent. There was no request for any such further hearing at the hearing on 21 October, when of course the respondents had the opportunity through leading counsel to make (and did make) any appropriate submissions as to sanction. Further, the witness statement now provided (for which there was no permission) did not address the order breached or the actions of the respondents that gave rise to the application before me, nor did it provide any apology for the breaches found or proposals for remedy or discharge of contempt. Instead it sought to comment on the merits or otherwise of the claimants' position in the underlying proceedings. At best, from the respondents' perspective, these matters are irrelevant to sanction. If these submissions were to be considered as seeking to justify the breaches found, it could be materially adverse to the respondents' interests for them to be taken into account. I accordingly declined to hold any such further hearing.

57. At the hearing, the applicants sought their costs on the indemnity basis, supported by a schedule totalling £98,625, without VAT. Mr Giret did not oppose an order against his clients, though he objected to the indemnity basis and had not had the opportunity to consider the schedule. I indicated to the parties that I would consider any written submissions on costs, to be filed before the handing down. I received a short note from Mr Grant for the applicants, but no submissions on behalf of the respondents.

58. I consider an order on the indemnity basis is justified by the conduct of the respondents, as noted above, since HHJ Worster's order was made. The sums claimed are large, but in my view justified by the respondents litigation conduct; so for example making it necessary to take overseas advice on matters of service, which the respondents have in the past sought to dispute by raising extensive objections based on contentions as to local law, and to incur the cost of translation of documents into German, which the respondents have in the past insisted upon notwithstanding they are evidently able to read communicate and produce their own documents in English. The only adjustments I make to that schedule are in respect of the cost of attendance by three solicitor fee earners at the hearing, for which I allow 3.7 hours at the rate for the Grade C fee earner in place of the amounts claimed. The reduction is £5,977 and the resulting assessed amount is £92,648.