Neutral Citation Number: [2025] EWCA Civ 933

Case No: CA-2025-000010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
STEPHEN HOUSEMAN KC (SITTING AS DEPUTY HIGH COURT JUDGE)
CL-2021-000666

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2025

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between:

GLAS SAS (LONDON BRANCH)	**Claimant/ Respondent**
- and –	
(1) EUROPEAN TOPSOHO S.À R.L.	**First Defendant**
(2) DYNAMIC TREASURE GROUP LIMITED	**Second Defendant**
(3) CHENRAN QIU	**Third Defendant**
(4) WUHU RUYI XINBO INVESTMENT PARTNERSHIP ENTERPRISE (LIMITED PARTNERSHIP)	**Fourth Defendant/ Appellant**

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Niall McCulloch and Christopher Pask (instructed by **Archer, Evrard & Sigurdsson LLP**) for the **Appellant**

Alex Barden (instructed by **Jenner & Block London LLP**) for the **Respondent**

Hearing date: 11 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 24 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction and factual background

1. This is an appeal by Wuhu Ruyi Xinbo Investment Partnership Enterprise (Limited Partnership) ("Xinbo") against an order of Stephen Houseman KC (sitting as a Deputy High Court Judge) ("the judge") dated 13 December 2024, made in proceedings in which Xinbo had been joined as the fourth defendant.

2. The judge's order barred Xinbo from defending the proceedings unless it met certain conditions by 4pm on 21 January 2025. In addition to filing its defence, these conditions were a) procuring that the second defendant, Dynamic Treasure Group Limited ("Dynamic"), comply with an order made by Robin Knowles J on 12 July 2024 that it transfer certain shares (the "Transfer Condition"), and b) paying €10m into court (the "Payment Condition"). Xinbo challenges the judge's decision to impose both the Transfer Condition and the Payment Condition and further claims that the judge failed to give any or any adequate reasons for doing so.

3. Permission to appeal was refused by the judge but was granted by Snowden LJ, who also stayed the judge's order pending determination of the appeal.

4. In outline, the factual background is as follows. The claimant (and respondent to the appeal), GLAS SAS, is the Trustee in respect of €250m of exchangeable bonds (the "Bonds") issued by the first defendant, European Topsoho S.à R.L. ("ETS"), in September 2018. ETS is a Luxembourg incorporated company that at the material times was part of the Shandong Ruyi group, a Chinese industrial group. The third defendant, Chenran Qiu, is the daughter of Shandong Ruyi's chairman and was a manager of ETS.

5. Xinbo is a PRC established limited partnership that is majority owned by the Shandong Ruyi group. Dynamic is a BVI incorporated company which was established and originally owned by Ms Qiu. It remained controlled by her until it became an indirect subsidiary of Xinbo in May 2023. The Trustee believes that Dynamic's current sole director is a Shandong Ruyi group executive.

6. At the time the Bonds were issued ETS's main asset was a majority shareholding in SMCP S.A., a French listed company. Approximately 70% of the shareholding was pledged to the Trustee (the "Pledged Shares") as security under the Bonds, while the remainder was unpledged (the "Unpledged Shares").

7. The Bonds matured in September 2021, but ETS defaulted. The value of the Pledged Shares did not cover the outstanding amount due under the Bonds. The Trustee served a petition for ETS's bankruptcy. Shortly thereafter, in October 2021, Ms Qiu caused ETS to transfer the Unpledged Shares to Dynamic for €1, purportedly pursuant to a Share Sale Agreement ("SSA"). Dynamic converted the Unpledged Shares into bearer form and deposited them with JP Morgan in Singapore.

8. The rationale put forward for the transfer is that Dynamic received the Unpledged Shares as the nominee of Xinbo, and that Xinbo was entitled to the shares as security for a debt owed by the Shandong Ruyi group, guaranteed by ETS and secured by a pledge over ETS's entire shareholding in SMCP. The guarantee and pledge are said to have been

given pursuant to an agreement entered into in July 2018 (the "2018 Agreement"), shortly before the issue of the Bonds.

9. The Trustee commenced proceedings in this jurisdiction against ETS, Dynamic and Ms Qiu in November 2021 and obtained a freezing order against ETS and Dynamic. As well as a debt claim against ETS, the Trustee made a claim against ETS and Dynamic under section 423 of the Insolvency Act 1986 for an order reversing the transfer of the Unpledged Shares to Dynamic, and a claim against all the defendants in unlawful means conspiracy. Freezing orders were also obtained in Singapore and the BVI. Summary judgment was obtained against ETS for its debt claim under the Bonds in October 2022. ETS was declared bankrupt and a curator was appointed by the Luxembourg court in February 2023. After investigation, the curator concluded that ETS's defence should be withdrawn.

10. In January 2023 an arbitration award was made in Xinbo's favour in Beihai, purportedly pursuant to the 2018 Agreement (as amended by a later memorandum which changed the arbitration venue), but apparently without substantive argument. Xinbo initially took steps to enforce the arbitration award in England and Singapore, but the English proceedings were never served and the Singapore proceedings were struck out in July 2024 for failure to comply with an order for disclosure of documents relevant to the validity of the award.

11. In November 2023 Dynamic and Ms Qiu became active in the proceedings for the first time. This occurred shortly before the hearing date of the Trustee's application for summary judgment in respect of the outstanding claims. Following a hearing on 18 January 2024, Bright J handed down a reserved judgment on 26 January ([2024] EWHC 83 (Comm), the "Bright J judgment"). By his order dated 2 February 2024 (the "Bright J order"), Bright J refused to allow a jurisdiction challenge out of time and granted permission to defend the proceedings on condition that each of Dynamic and Ms Qiu pay €9m into court by 15 March 2024. He also set a deadline of 22 March for any application to join Xinbo to the proceedings. Dynamic made such an application, but the payments into court were not made and costs orders were also not met. Males LJ refused applications by Dynamic and Ms Qiu for permission to appeal.

12. On 12 July 2024 Robin Knowles J granted the Trustee's further application for partial summary judgment against ETS and Dynamic by ordering the return of the Unpledged Shares to ETS by 26 July 2024. His order (the "Knowles J order") reserved for trial the question of whether, and if so what, further relief should be granted. Dynamic's application for permission to appeal against this order was refused by Males LJ. The Knowles J order has not been complied with.

13. Xinbo was ultimately joined to the proceedings by a consent order of Andrew Baker J dated 5 September 2024. That order set a deadline of 7 October for Xinbo's defence. The deadline was not met and on 16 October the Trustee applied for conditions to be imposed on Xinbo's ability to defend the proceedings. On 24 October Xinbo in turn applied for a retrospective extension of the deadline for filing its defence. By an order dated 25 October, Robin Knowles J made directions in relation to both applications and also required Xinbo to serve its defence in draft by 15 November (which it duly did). It is worth noting that, as well as directing that the two applications should be listed together, the order specified a hearing length of half a day.

14. The applications were heard by the judge on 13 December 2024 in the Commercial Court Friday list, a list reserved for shorter applications of up to 2.5 hours (that is, half a day). The transcript of the hearing indicates that its total length was around 1 hour 10 minutes, well short of the time estimate.

15. Paragraph 1 of the judge's order imposed the conditions already referred to on Xinbo's ability to defend the proceedings. Paragraph 2 provided that any application by Xinbo in relation to compliance with the conditions should be made by 21 January 2025, "supported by written evidence demonstrating the reasons why it says it cannot comply".

16. For the reasons that follow, I have concluded that the judge erred in failing to provide adequate reasoning, but that there is no need to set aside the judge's order. The consequence is that I would dismiss the appeal.

The judgment

17. The judge gave a short ex tempore ruling. The transcript of it adds a post-script that it was:

> "…intended to be read and understood in the context of the discussion during the hearing itself. Elements of the reasoning can be gleaned from that discussion. This enabled my ruling to be short, but it is not self-contained…"

18. The ruling itself is more conveniently set out in full rather than summarised:

> "1. I am going to order these conditions -- well, subject to what we are going to discuss next. I am not going to give a ruling beyond indicating what I did at the outset: that having read the Judgment of Mr Justice Bright and the Judgment and the Order of Mr Justice Robin Knowles and having taken on board that fact pattern and that behavioural profile, and in the circumstances summarised in paragraphs 4 and 5 of the Claimant's skeleton argument, notwithstanding all the points that I have heard in response, I am persuaded that it is in the interest of justice and in furtherance of the overriding objective that there are conditions attached to D4's ability to defend this claim in circumstances where it eventually agreed to be joined to this action on terms where it would file a defence within the timeframe that it obviously considered was achievable, and then proceeded instantly to fail to do so, and therefore comes to the Court seeking an indulgence and relief from sanctions entirely of its own making.
> 2. As eloquent and articulate as Mr McCulloch was both in writing and orally in seeking to dissuade me from taking this course, I have to say there is an air of surreality about the position taken by D4 in conjunction with D2 in terms of the corporate reality behind the scene on the defendants' side; and I express - and I think I am free to express - some scepticism about some of the technicality that I have heard in terms of invocation of separate corporate personality and absence of de facto control.
> 3. I say no more than that, and therefore, even though it is the case that there is no monetary claim made by the claimant against D4 and even though it is the case that D4 has not behaved procedurally for as long as or in the same qualitative way as D2 has, I am nevertheless persuaded that it is in the interest of justice that D4 posts security and undertakes, through conditions-- and

> maybe 'undertakes' is the wrong word, but has conditions imposed upon its ability to substantively defend these proceedings.
> 4. I do that so as to protect the dignity of the court process in circumstances where there is evidence on the face of the record here that its dignity is not being respected. What I propose to do, therefore, subject to detail-- I have in mind either 17 or 24 January as the compliance backstop. I am going to stick with the absolute language of 'procure' for the bringing-- the return, I should say, or the restitution of the Unpledged Shares, consistent with the logic and indeed the letter of Mr Justice Robin Knowles' Order against the other defendants.
> 5. I am going to order €10 million, and not just because it is not 18 and it is not 9, but it strikes me as a round figure, and there is nothing that really turns on that, but that is just how it strikes me. I am going to reserve over to the CMC the condition as to procuring-- or rather paying the cost orders of others, because that is not a procuring. That is just a paying. I am going to say no more about that, but that can come back before the judge at the CMC, as can any application to 'top up' the 10 million, as can any application made by D4 in the meantime, with evidence to explain why it is not in a position to comply with the primary order I have made as to procuring the restoration or restitution or repatriation of the Unpledged Shares.
> 6. That is something within the time frame we are talking about, which is either four or five weeks from now and, therefore, two or three weeks ahead of the scheduled CMC, which I consider to be fair for D4 to operate within. So if it says, with evidence, it cannot do this, then it has to explain why, and that can all be reserved to the CMC judge, and if you need to revise the estimate for the CMC in light of what I am reserving to the CMC judge, who as you know will not be me, then you will have to do so, but I would want all that recording in the Order as well."

19. Paragraphs 4 and 5 of the Trustee's skeleton argument, referred to in paragraph 1 of the ruling, set out a summary of the facts and procedural history, including Bright J's assessment of the factual account being put forward by way of defence as "extremely unimpressive". The reference to costs orders in paragraph 5 of the ruling is to the Trustee's attempt to secure additional conditions that Xinbo satisfy previous costs orders made against Dynamic.

Relevant legal principles

20. Mr McCulloch, for Xinbo, correctly accepted that this was a case management decision involving the exercise of discretion, with which an appellate court will not lightly interfere. It will do so only if there has been an error of law, a failure to take relevant factors into account or a taking into account of irrelevant factors, or where the decision was otherwise "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree": Lewison LJ in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51], approved by Lord Neuberger in *Global Torch Ltd v Apex Global Management Ltd (No. 2)* [2014] UKSC 64, [2014] 1 WLR 4495 at [13].

21. However, it is also the case that a failure to give any, or adequate, reasons may itself be a ground for appeal: *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377. As Henry LJ explained in that case at pp.381-

382, the duty to give reasons is a function of due process. Fairness requires that the parties, and especially the losing party, should be left in no doubt as to why they have won or lost. The extent of what is required will depend on the subject matter.

22. That principle was affirmed by Lord Phillips MR, giving the judgment of the court, in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] EWCA Civ 605, [2002] 1 WLR 2409 ("*English v Emery*") at [15]-[21]. As he said at [16]:

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."

23. While he made clear that there is no duty to address every argument, Lord Phillips also explained at [18] that:

> "… it is necessary to have regard to the practical requirements of our appellate system. A judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment".

24. He went on at [19]:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision…"

25. In *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 ("*Simetra*") Males LJ provided the following additional guidance at [46], in the context of a challenge based on inadequately reasoned findings of fact:

> "Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of 'the building blocks of the reasoned judicial process' by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving

> reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

26. In *English v Emery* the court also recommended at [25] that, where there is a challenge based on an inadequacy of reasoning, the judge should be given an opportunity to provide additional reasons. That was reiterated by Munby LJ in *Re A (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205, [2012] 1 WLR 595 at [16], where he said that it was the responsibility of the advocate to draw the judge's attention to any material omission from the judgment, including any perceived lack of reasons. That appears not to have been done in this case, the application for permission to the judge being confined to an argument that the judge's conclusion was wrong.

Discussion: failure to give adequate reasons

27. The Trustee sought to defend the judge's decision on the basis that, in context, his reasons were sufficient. It was a ruling on a short application in the Friday Commercial Court list. It could reasonably be inferred that the judge had in mind the points that had just been argued before him. The judge had made it clear that the ruling was not "self-contained", and had expressly referred to the decisions of Bright J and Robin Knowles J as well as the Trustee's skeleton argument. There was no complaint about lack of reasoning at the time because the judge's fundamental reasoning was well understood.

28. I fully appreciate the significant challenges faced by judges dealing with a busy interim applications list. I would add that the practical problems are often increased by unrealistically low time estimates by the parties (albeit that that does not seem to have been a problem in this case). A robust approach is often required, and reasoning will almost inevitably be more compressed than in other circumstances. Summaries of background facts and uncontroversial legal principles may need to be omitted, or at least significantly trimmed.

29. However, there is a minimum level of reasoning that is required. The critical elements of the judge's decision-making must be recorded, such that the parties understand why the decision was reached. I would add to this that, for obvious reasons, it is usually especially important that the losing party understands why their case was not accepted. Further, the judge should bear in mind that a judgment must be understandable not just to the parties but to an appeal court. The reasons must be "sufficiently apparent to enable the appeal court to uphold the judgment": *English v Emery* at [18].

30. In this case I am unable to accept that the judge's decision contained adequate reasoning. While some elements can be discerned there is simply not enough there to explain the result to the parties or this court. In particular, and even taking account of the transcript of the hearing (which I have read), there is very little engagement with Xinbo's case as the losing party, beyond references to "surreality" and "scepticism". The references to the judgments of Bright J and Robin Knowles J do not plug the gap without further explanation. For example, although the judge referred to Xinbo's procedural behaviour as not being as poor as Dynamic's, he did not really explain <u>why</u> it was nevertheless in the interests of justice to require a payment into court, or one that was higher than had been required by Bright J from Dynamic, or to impose an additional condition relating to

the return of the Unpledged Shares, effectively stipulating for the satisfaction of Robin Knowles J's later summary judgment. The reference to the need to protect the "dignity of the court process" provides a hint, but it is not enough and it does not address Xinbo's arguments.

31. In these circumstances I have concluded that the judge erred in failing to provide adequate reasoning. However, that is not the end of the matter. Neither party suggested that we are not equipped to reach our own conclusions. We heard a full day's argument, which is considerably more than the judge, and have been taken through the background and the parties' cases in detail. A remittal would involve further delay and unnecessary expense. This is a case where we can and should reach our own decision.

32. Before leaving the topic of inadequate reasoning, I will draw together some threads from the authorities and comment on how they may be applied in the context of an interim application or case management decision such as this. These points should come as no surprise to experienced judges, but they may assist those at earlier stages of their judicial careers:

    a) A judgment or ruling given in an applications list such as the Friday Commercial Court list, or at a case management hearing where there may be a multiplicity of issues to address in a limited time, is unlikely to be, and need not be, a polished product like a reserved judgment.

    b) What is required will depend on the context. However, summaries of background facts and uncontroversial legal principles may be omitted in appropriate cases, or at least significantly trimmed. If a judge is able to do so, preparation of notes in advance will assist him or her to include the minimum required to make the judgment understandable. If essential, cross-references to skeleton arguments or other documents can be made, although it is preferable for these to be "read in" to the transcript, or for the approved transcript to include the information referred to (see further below).

    c) As Males LJ explained in *Simetra*, the best approach is to identify the issue or issues, refer to any relevant evidence (again by cross-reference if needed) and then give the core reasons for the judge's conclusions. Again, the issues and relevant evidence may well be capable of being noted in advance. If the judge has formed a provisional view, it may also be possible to reflect that in a tentative draft, but that will of course require careful review in the light of oral argument. If necessary, the judge should rise (or send the parties out) to allow enough time for that review. This applies whatever the time pressure may be. Even 10 minutes might make all the difference. Alternatively, if necessary and provided that the judge is sure as to the outcome, a decision could be announced with reasons to follow. In other cases judgment might have to be reserved, however unpalatable that is.

    d) As a rule of thumb, it will usually be more important in practice to focus on the reasons why the losing party's case is being rejected rather than the (positive) attractions of the winning party's case. That approach is not only transparently fair and should minimise the chance of an appeal being made, or at least permission to appeal being granted, but it also helps to ensure rigour. Accepting the winning party's arguments "for the reasons they give" (or equivalent) will usually not suffice without saying something specific about the losing party's case.

e) Importantly, counsel should immediately point out if they consider that reasoning is inadequate. It is regrettable that this was not done in this case. A failure to do so cannot prevent an appeal being made, but it is conduct that might be taken into account by the appellate court in determining the appropriate order for costs, since raising the issue might have resulted in an unnecessary appeal being avoided.

f) A judge also has scope to perfect a transcript of a judgment when he or she is asked to approve it. Ex post facto justifications are of course not appropriate, but amendments are possible to ensure that the approved transcript clearly conveys what the judge intended to say, in a way that is understandable both to the parties and to an appeal court. This is not limited to correcting obvious errors or infelicities. For example, the content of cross-references that have not been read in to the transcript could be expanded, and reasoning can be clarified. The structure, or order in which text appears, can also be altered if required to improve clarity. If further reasoning was in the judge's mind but was omitted in error, a post-script could be added explaining that.

Xinbo's case

33. Putting to one side inadequacy of reasoning, Xinbo's primary arguments against the imposition of conditions on its ability to defend the proceedings can be summarised as follows:

a) Xinbo is a separate legal entity from Dynamic that had only recently been joined to the proceedings. Dynamic is also not wholly owned by Xinbo; Xinbo's effective indirect interest in Dynamic is 51.79% (through two other companies). In any event the shareholding connection between Xinbo and Dynamic is irrelevant, as is the similarity of their defences.

b) The Trustee had not claimed relief against Xinbo, whether by "piercing the corporate veil" or otherwise, in relation to the Unpledged Shares and had not sought monetary relief.

c) The Trustee consented to Xinbo's joinder and the filing of its defence on an unconditional basis at a time when all the relevant breaches of the Bright J order and the Knowles J order persisted.

d) Therefore, to the extent that the rationale for the conditions was that the Bright J order or the Knowles J order would otherwise be subverted, that was wrong in principle since no relief was sought against Xinbo in relation to the Unpledged Shares and it was inconsistent with the Trustee's consent to Xinbo's participation in the proceedings.

e) The extent of Xinbo's default, a delay of six weeks in filing a defence, was not comparable to Dynamic's lengthy delay of around 2.5 years before engaging in the proceedings and defaults in complying with the information requirements in the freezing order, such that, to the extent that the rationale for the imposition of conditions was delay, the conditions imposed by the judge were highly disproportionate. The Trustee's application was opportunistic and used delay as a fig leaf.

f) The proper purpose of a condition would be to regulate Xinbo's future conduct, not to provide a "back door" to enforcement of orders against others. The Transfer Condition amounted to a grant of mandatory injunctive relief.

g) It was also unclear whether Xinbo could comply with the Transfer Condition. There was a freezing order in Singapore to which Xinbo was not a party. It was also not a signatory on the JP Morgan account. Further, Xinbo's indirect ownership of Dynamic raised questions about whether it could compel Dynamic to comply. BVI lawyers might need to be instructed and, potentially, proceedings instituted in that jurisdiction.

Discussion: remaking the decision

34. A fundamental problem with Xinbo's arguments is that they do not engage with its own case and that of Dynamic. Xinbo maintains that the Unpledged Shares were transferred to, and are held by, Dynamic as nominee for Xinbo. Before it was prevented from defending the proceedings Dynamic's case was the same, and there is no hint that its position has changed. In circumstances where Xinbo is asking the court to accept that defence it is not realistically open to it to raise arguments that are fundamentally inconsistent with it. If, as not only Xinbo but Dynamic itself have consistently maintained, Dynamic is indeed Xinbo's nominee then the fact that it is a separate legal entity, or indeed not 100% owned, is nothing to the point. On its own case, Xinbo arranged for valuable shares to be transferred to Dynamic to hold for Xinbo as its nominee. To suggest, when convenient to Xinbo to do so, that it might not now be entirely straightforward to ensure that those shares are dealt with at its direction is both inconsistent with its defence and, frankly, unreal. In legal terminology Xinbo's actions might be described as approbation and reprobation. In more everyday language, what Xinbo is doing is attempting to have the proverbial cake and eat it.

35. The emphasis now placed on the fact that Xinbo has only recently joined the proceedings does not reflect the full picture. Xinbo has funded Dynamic's participation in the proceedings and they have shared the same legal representatives. That, together with their common assertion that Dynamic acts as Xinbo's nominee, is very strongly indicative that their interests are fully aligned. This is further underlined by the fact that the witness evidence that Dynamic has filed in the proceedings is from Xinbo employees.

36. It must follow that Xinbo must have been, at the very least, content for Dynamic not to comply with the Bright J order or the Knowles J order. In particular, Bright J had reasonably inferred that funding for the payment into court to meet the condition imposed on Dynamic would come from Xinbo, noting that Dynamic's Counsel had not suggested otherwise (see the Bright J judgment at [129]). And it must be assumed that it would have been up to Xinbo to decide whether to instruct its nominee to transfer the Unpledged Shares pursuant to the Knowles J order. It chose not to do so.

37. In reality, all the evidence points to Xinbo having participated in the proceedings via Dynamic as its proxy ever since Dynamic first became active in them in November 2023. Put another way. Dynamic is not acting in any sense independently in these proceedings, but instead has danced (or not) to Xinbo's tune throughout.

38. The argument that the Trustee had not sought relief against Xinbo is without merit. At the time that Xinbo was joined to the proceedings the particulars of claim alleged that

Xinbo was party to an unlawful means conspiracy but had (unsurprisingly) not been amended to reflect its joinder. They have now been amended by consent, and claim both monetary relief from Xinbo and relief in respect of the Unpledged Shares. In any event it is obvious that the Trustee was all along disputing the validity of Xinbo's claim to the Unpledged Shares and seeking their return to ETS.

39. It is true that the Trustee did not seek to impose conditions on Xinbo's joinder, but a witness statement by its solicitor produced in response to the joinder application had foreshadowed that the Trustee reserved the right to apply for the imposition of conditions on Xinbo's ability to defend the proceedings, noting that the joinder application appeared likely to be an attempt to subvert the Bright J order by allowing Xinbo to continue to advance the defences previously advanced by Dynamic. The Trustee's later application for conditions to be imposed can hardly have come as a surprise.

40. It is also true that Xinbo's own procedural delay, while serious, is significantly less material that Dynamic's own procedural defaults. The Trustee's application for conditions also followed very shortly after Xinbo failed to meet the deadline to file its defence. However, it was clearly not based simply on the existence of that default. It was supported by a 28 page witness statement which provided a detailed summary of the proceedings and relied on Xinbo's failure to file a defence as consistent with a broader pattern of behaviour exhibited by Xinbo, Dynamic and Ms Qiu throughout the proceedings. Bright J described Dynamic's delay in engaging in the proceedings, and then choosing to engage shortly before the Trustee's summary judgment application was to be determined, as causing significant disruption.

41. It is clearly not the case that the Transfer Condition amounts to a mandatory injunction. It is not an order to transfer the Unpledged Shares. It is a condition of Xinbo's ability to defend the proceedings. Xinbo has a choice as to whether to comply.

42. Given that the Trustee is obviously keen for the Unpledged Shares to be returned to ETS, the need for a variation to the Singapore freezing order is also not a proper objection. Under its terms the order can be varied by agreement. Alternatively a consent order could doubtless be obtained. I understand that the BVI freezing order has already been varied to allow for the transfer.

43. As regards other practical difficulties suggested by Xinbo, the burden is on Xinbo to show that it would be unable to comply with the conditions (*Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC* [2019] EWCA Civ 119, [2019] Costs LR 497 at [46]). It has adduced no evidence to that effect. Any such evidence would also have to be assessed against the backdrop of Xinbo's case that it chose Dynamic as its nominee to hold valuable shares.

44. In the circumstances, any residual concern about Xinbo's ability to comply with the Transfer Condition is sufficiently addressed by paragraph 2 of the judge's order, which contemplated that Xinbo could make an application explaining why it said it could not comply (see [15] above).

45. What I have said so far addresses Xinbo's specific objections, but it is not sufficient to explain why the conditions imposed by the judge are appropriate.

46. CPR rule 3.1(3) provides:

> "When the court makes an order, it may –
> (a) make it subject to conditions, including a condition to pay a sum of money into court; and
> (b) specify the consequence of failure to comply with the order or a condition."

It is also worth noting rule 24.6, which would have been of particular relevance to Bright J since he was considering a summary judgment application:

> "24.6 When the court determines a summary judgment application it may…
> (c) make its order subject to conditions in accordance with rule 3.1(3)."

47. In *Huscroft v P&O Ferries Ltd* [2010] EWCA Civ 1483, [2011] 1 WLR 939 ("*Huscroft*"), Moore-Bick LJ, with whom Sedley and Elias LJJ agreed, observed at [17] that, while there are no hard and fast rules, the court's power to impose conditions under CPR rule 3.1(3) is intended to enable the court to exercise a degree of control over the future conduct of litigation. Further, what rule 3.1(3) permits is the making of an order "subject to conditions" (and specifying the consequence of a failure to comply), rather than the imposition of conditions on a freestanding basis. As Moore-Bick LJ explained at [18], the right way to exercise the power is to express the relevant order as being subject to a condition. That also has the advantage of requiring the court to focus attention on whether the condition (and any sanction) "is a proper price for the party to pay for the relief being granted".

48. In addition, while the power to attach a condition to an order is not limited to cases where there are repeated failures to comply or litigation is not being conducted in good faith:

> "…before exercising the power given by rule 3.1(3) the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose having regard to the order to which it is to be attached." ([19])

49. Reflecting Moore-Bick LJ's guidance at [18], the form of the order in this case should strictly have been to grant relief from sanctions for the failure to file a defence subject to conditions, and the judge should have addressed the purpose of imposing the conditions and whether they were a proportionate and effective means of achieving that purpose, or in other words whether they were a "proper price to pay" for that relief.

50. *Huscroft* was considered in *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119, [2016] 1 WLR 3598 ("*Deutsche Bank*"). Giving a judgment of the court (with Christopher Clarke and Sales LJJ), Longmore LJ reiterated at [78] that a condition imposed under rule 3.1(3) must attach to an order which the court is proposing to make. Further, rule 3.1(3) cannot be used to circumvent the requirements of other specific rules (such as those governing the provision of security for costs), but beyond that there is no special rule and the judge must be guided by the overriding objective ([80] and [81]). In *Deutsche Bank* the court ordered a substantial payment into court as a condition of setting aside an order for summary judgment.

51. On the face of it, the Payment Condition and Transfer Condition would not be justified by a six week delay in filing a defence. However, in the particular circumstances of this case it was appropriate to take account of the broader procedural history relating to

Dynamic. Xinbo had previously been conducting the litigation via Dynamic and was now seeking to continue doing so itself, circumventing the inconvenient fact that Dynamic had been barred from defending the proceedings. Dynamic's earlier delays and default can properly be attributed to Xinbo. It is true that Xinbo's own delay in filing its defence provided an opportunity for conditions to be imposed, but that delay needed to be considered in a broader context.

52. While Xinbo was not itself a party when the earlier delays and defaults occurred (and it was also not a party to the freezing order pursuant to which asset disclosure was required) Dynamic was, as I have said, effectively Xinbo's proxy throughout. To allow Xinbo to escape responsibility for delays and defaults by relying on not having been formally joined as a party at the time would, as the judge indicated, undermine the dignity of the court process. Indeed, I would go so far as to say that denying any responsibility for them is indicative of Xinbo not conducting the litigation in good faith.

53. Further, and as discussed below, the condition imposed by the Bright J order reflected the weaknesses of a defence that has now been adopted by Xinbo.

54. The purpose of imposing conditions in this case is accordingly clear. In circumstances where Bright J concluded that Dynamic's ability to defend the proceedings should be subject to a condition, Xinbo has clearly been directing Dynamic's actions (and inaction) in the proceedings and therefore must bear responsibility for Dynamic's delays and defaults, and Xinbo's own defence shares the same weaknesses as Dynamic's, Xinbo should not have unconditional leave to defend the proceedings.

55. The next question is whether the conditions imposed by the judge represent a proportionate and effective means of achieving that purpose. They clearly have the potential to be effective, because if they are not met then Xinbo will not be able to mount a defence to the claim against it, so the real question is whether they are proportionate.

56. Dealing first with the Payment Condition, the reasons why Bright J considered it appropriate to impose a condition that Dynamic and Ms Qiu each pay €9m into court are apparent from his careful judgment. While he was not prepared to grant summary judgment against them, he concluded that their case was weak and took account of their decision not to engage for a very significant period, such that they required the indulgence of significant extensions. In the circumstances they needed to "show that they are now in earnest by putting their money where their mouth is" (Bright J judgment at [127]). As Bright J explained at [131] and [132], the total sum of €18m was an estimate of the Trustee's outstanding claim in damages on the assumptions that the Trustee succeeded in its primary case for the return of the Unpledged Shares and that the shares were rapidly returned, and ignoring any claim for loss in the value of the shares and for interest and costs, so that it was "in some respects a very conservative figure". The order to pay €9m each reflected the judge's view that it would not be right to require each of Dynamic and Ms Qiu to pay the full amount.

57. Bright J summarised the "significant difficulties" with Dynamic's case, and that of Ms Qiu, at [104] to [107]. It is uncontroversial that Xinbo's defence is essentially the same. The difficulties to which he referred included that:

    a) the 2018 Agreement appeared not to have been approved by ETS in the manner prescribed by its constitution, there appeared to be no trace of it in its records, it

was not registered in France as the Trustee's evidence stated was required and it was unclear why a pledge of 100% of ETS's shareholding in SMCP would have been given, a shareholding which was of significantly greater value than the debt said to have been secured;

b) a notice dated 8 October 2021 pursuant to which the Unpledged Shares were said to have been transferred was sent to Ms Qiu and not ETS and, rather than specifying Dynamic, left the choice of transferee to ETS and required that transferee to pledge the shares to Xinbo (rather than hold them as its nominee);

c) a notice dated 9 October 2021 which was addressed to ETS and did require a transfer to Dynamic was not in fact sent to ETS in Luxembourg and contained a BNP Paris account number which Dynamic did not have until a later date; and

d) the SSA was purportedly signed on behalf of Dynamic by persons who had provided a joint affidavit that they had not done so, there was no evidence that shed light on how it came into existence, and as far as ETS was concerned it appeared to have similar constitutional difficulties to the 2018 Agreement.

58. It was obviously proportionate for Bright J to impose the condition that he did. Because he was considering a summary judgment application he would have done so pursuant to CPR rule 24.6, but that does no more than cross-refer to the general rule in rule 3.1(3) (see on that point *Deutsche Bank* at [73], although that concerned an earlier version of the rules and a Practice Direction that has since been revoked). The cases put forward by Dynamic and Ms Qiu were weak and there had been significant delays and defaults. Xinbo's defence suffers from the same weaknesses, and since the Bright J order this has been further underlined by the striking out of the proceedings Xinbo brought in Singapore to enforce the Beihai arbitration award (see [10] above).

59. Bright J arrived at a figure of €18m as a conservative estimate of the Trustee's damages claim on assumptions that included the rapid return of the Unpledged Shares. That assumption has proved false, and we were told that the value of the SMCP shares has also fallen significantly since the transfer to Dynamic, not assisted by the current uncertainty over the ownership of part of what was previously a majority stake held by ETS. In my view it would have been open to the judge to have adopted the same total figure as Bright J, that is €18m (which was also the figure sought by the Trustee in its application), rather than mirroring the €9m ordered to be paid by Dynamic, but it was also open to the judge to select a different figure.

60. Although the judge's choice of €10m is not well expressed, it is appropriate to give some weight to that choice and, in the absence of any cross-appeal by the Trustee seeking a higher figure, I would adopt the €10m figure reflected in the judge's order. If any justification was required for this sum being higher than that ordered to be paid by Dynamic, the passage of time since the Bright J order and the associated continued uncertainty over the Unpledged Shares, together with increased concerns over the SMCP share price, would supply it. But the real point is that it is "earnest money" rather than a precise pre-estimate of loss. Further, in the event that Dynamic or Ms Qiu belatedly chose to make payments into court the figure could obviously be revisited, but it must now be extremely unlikely that they will do so.

61. This leaves the Transfer Condition. That condition was of course not included in the Bright J order. Rather, it reflects the Knowles J order granting partial summary judgment against ETS and Dynamic by ordering the return of the Unpledged Shares to ETS. In the case of Dynamic, that summary judgment was granted in circumstances where it had been barred from defending the claim due to its failure to meet the condition in the Bright J order.

62. I was initially concerned as to whether the effect of including the Transfer Condition might be to amount to partial summary judgment against Xinbo, in circumstances where Bright J had previously refused to grant summary judgment on the merits. However, I am satisfied that the concern is misplaced.

63. The Knowles J order was limited to summary judgment for the return of the Unpledged Shares to a specified securities account held by ETS. It explicitly left open the question of whether, and if so what, further relief should be granted. Robin Knowles J's ex tempore judgment ([2024] EWCA Civ 1841 (Comm)) also expressly contemplated at [16] not only that Xinbo might join the proceedings, but that what would happen to the Unpledged Shares following their re-transfer to ETS was a matter to be decided subsequently. He made it clear at [17] that what he was deciding was:

> "…the validity of the disposal for €1 to the second defendant. That is effectively to be reversed and that, it seems to me, is not inappropriate to resolve at this point, even though other issues lie ahead."

64. In other words, the transfer required to be made pursuant to the Knowles J order reflects the invalidity of the transfer of the Unpledged Shares to Dynamic, and thus its lack of entitlement to them, but does not determine that Xinbo has no claim to those shares. Subject to satisfying the conditions, therefore, Xinbo remains able to defend the proceedings, and indeed to pursue the Part 20 claim it has included in its defence in which it seeks to establish its entitlement to the Unpledged Shares and an order for their transfer to it. Further, ETS's curator (who is supervised by the Luxembourg court) is obviously aware of Xinbo's claim and has been active in this litigation, and it has not been suggested that Xinbo is prevented from taking whatever additional steps might be required to assert its claim to the Unpledged Shares in the Luxembourg insolvency proceedings. It is also worth noting that, although at one stage Dynamic argued that Xinbo would refuse to participate in the proceedings if the Unpledged Shares were ordered to be returned to ETS, Xinbo subsequently decided to participate despite the Knowles J order and has not sought to appeal on the basis that the effect of complying with the order would be to deprive it of the ability to defend any part of the claim against it.

65. In the circumstances I am satisfied that the Transfer Condition is an appropriate, and proportionate, condition to impose on the court's permission to Xinbo to defend the proceedings. Like the Payment Condition, it reflects the fact that Dynamic is Xinbo's proxy and Xinbo must be seen as, in effect, responsible for its defaults. These include Dynamic's contumelious failure to transfer the Unpledged Shares pursuant to the Knowles J order.

Conclusion and closing remarks

66. In conclusion, the judge erred in failing to provide adequate reasoning, but I would leave his order undisturbed such that the appeal is dismissed.

67. I would add the observation that if, as it had intimated, the Trustee wished to reserve the right to apply for the imposition of conditions on Xinbo's ability to defend the proceedings, the preferable course would have been to seek to have those conditions applied to the joinder. That approach would have both complied with CPR rule 3.1(3) and more obviously reflected the purpose of imposing the conditions, namely that Xinbo should not be permitted to mount a weak defence to the proceedings without taking responsibility for failures by its proxy Dynamic, by providing its own "earnest money" and remediating Dynamic's breach of the order to transfer the Unpledged Shares.

68. However, I reject Xinbo's argument that, having given its unconditional consent to the joinder, it was not open to the Trustee to seek conditions at a later stage, including once Xinbo added its own default and needed to seek relief from sanctions. This is well illustrated by the fact that, if there had been no default, the Trustee could have sought a conditional order as an alternative to a claim for summary judgment, as contemplated by CPR rule 24.6. In any event, the fact that the Trustee did not request conditions at the optimum time cannot tie the hands of the court.

Lord Justice Snowden:

69. I agree.

Lord Justice Underhill:

70. I agree that this appeal should be disposed of in the manner proposed by Falk LJ and for the reasons that she so clearly explains. I wish to associate myself in particular with the guidance that she offers in para. 32 for judges having to give reasons for their decisions in a busy list, sometimes on applications which are far from straightforward. It is entirely appropriate that they should do so succinctly; but there are, as she shows, a variety of techniques by which, particularly with some pre-hearing preparation, that can be achieved without compromising the need for adequate reasons.