Neutral Citation Number: [2023] EWCA Civ 191

Case No: CA-2022-001542, CA-2022-001552, CA-2022-001552-C, CA-2022-001542-C & CA-2022-001542-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Moulder
[2022] EWHC 1599 (Comm) & [2022] EWHC 2057 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before:

LORD JUSTICE MALES
LADY JUSTICE ANDREWS
and
LORD JUSTICE NUGEE

- -

Between:

DEUTSCHE BANK AG	**Respondent /Claimant**
- and -	
1)SEBASTIAN HOLDINGS INC	**Defendant**
2)ALEXANDER VIK	**Appellant**

- -
- -

Duncan Matthews KC, Rupert Hamilton & James Gardner (instructed by **Brecher LLP**) for the **Appellant**
Sonia Tolaney KC, James MacDonald KC & Andrew McLeod (instructed by **Freshfields Bruckhaus Deringer**) for the **Respondent**

Hearing dates: 7, 8 & 9 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. On 24th June 2022, following an 11 day trial, Mrs Justice Moulder found that the appellant, Mr Alexander Vik, was guilty of contempt of court in two respects. These were that (1) he had deliberately given false evidence at a hearing which he had been ordered to attend pursuant to CPR 71 in order to provide information as to the means of the defendant, Sebastian Holdings Inc ("SHI"); and (2) he had deliberately failed to produce documents which he had been ordered to produce. I shall refer to the order made by the judge which records these findings as "the Contempt Order".

2. On 15th July 2022, after a further one day hearing, Mrs Justice Moulder ordered that Mr Vik be committed to prison for a period of 20 months, that period being suspended until six months from the final determination of any appeal, on condition that Mr Vik complies with terms as to attendance at court for further examination and provision of specified documents in SHI's control. I shall refer to this order as "the Committal Order".

3. Mr Vik now appeals, contending that the findings of contempt were wrongly made and that in any event the sentence imposed was too severe. He has a right of appeal from the Committal Order, pursuant to section 13 of the Administration of Justice Act 1960, but a question arises whether he needs permission to appeal from the Contempt Order. However, as the parties had been proceeding on the basis that Mr Vik has a right of appeal from both orders, and as the question whether permission is needed arose only at a late stage when both parties were fully prepared for the appeal, it was convenient to hear the appeal without ruling on this question, while inviting argument on whether permission is needed. We are grateful for the parties' submissions, which have given us an opportunity to clarify the position.

Background

4. This is the latest round in complex proceedings which have now been under way for some 13 years. The following account is no more than a summary, but suffices for the purpose of this appeal.

5. SHI is a Turks & Caicos Islands offshore SPV which, at any rate until July 2015, was 100% owned and controlled by Mr Vik, a highly educated Monaco-domiciled ultra-high net worth individual with a background in and sophisticated understanding of financial markets and investments.

6. In 2009 the respondent, Deutsche Bank AG ("the Bank"), commenced an action in the Commercial Court against SHI for approximately US $250 million arising out of loss-making derivatives trading which SHI had carried out through the Bank. It is the Bank's case that Mr Vik became aware of SHI's liability to the Bank in October 2008 and, as a result, started to strip SHI of its assets in order to make it judgment proof. It is not disputed that very substantial transfers of assets were made by SHI, including US $730 million transferred in October 2008 to a company called C.M. Beatrice Inc ("Beatrice"), which was also owned and controlled by Mr Vik. Later in the same month, Mr Vik settled the shares in Beatrice into a trust, the CSCSNE Trust ("the Trust": the initials are those of his children). Mr Vik denies that this was asset stripping, contending that the assets transferred into the Trust were intended to be an

inheritance for his children and that sufficient assets remained in SHI to meet its potential liability to the Bank.

7. The trial of the action, which lasted 14 weeks, took place before Mr Justice Cooke in 2013, with judgment given on 8th November 2013 ([2013] EWHC 3463 (Comm)). Mr Justice Cooke found in favour of the Bank and gave judgment for US $243 million, together with an award of 85% of the Bank's costs to be assessed on the indemnity basis and an order for an interim payment of approximately £34.5 million. He dismissed a counterclaim for some US $8 billion advanced by SHI, finding that it had been brought in bad faith and was based on documents which had been fabricated by Mr Vik and his assistant Mr Per Johansson. In the course of his judgment, Mr Justice Cooke made damning findings about SHI's conduct of the proceedings and the credibility of Mr Vik.

8. The Bank then applied for a non-party costs order against Mr Vik, contending that he was personally responsible for SHI's dishonest conduct of the proceedings and that he had caused SHI to defend them and to bring its counterclaim for his sole benefit. It applied also for an order that SHI's appeal be made subject to conditions. Both applications were successful. Mr Vik paid the interim payment, but SHI's appeal was struck out as a result of its failure to pay the judgment sum into court as ordered by the Court of Appeal.

9. The Bank has made strenuous efforts to enforce the judgment in various jurisdictions, but so far with only limited success. The judgment debt, together with interest, now stands at over US $330 million.

10. One of the jurisdictions in which the Bank sought to enforce its judgment was Connecticut. The Bank brought proceedings seeking to pierce SHI's corporate veil and hold Mr Vik personally liable for the English judgment. This attempt failed. The Connecticut court held that the Bank had not established that, in transferring assets away from SHI, Mr Vik had acted with specific intent to deprive SHI of its ability to satisfy margin calls to the Bank. However, the Connecticut action was not an unqualified success for Mr Vik, as on some points his evidence to the Connecticut court was rejected as untrue.

The examination of Mr Vik under CPR 71

11. In July 2015 Mr Justice Teare made an order pursuant to CPR 71.2 against Mr Vik in his capacity as a director of SHI (the "Part 71 Order"). In summary, this order required Mr Vik to produce all documents in SHI's control relating to SHI's means of paying the judgment debt and to attend an examination before a judge to provide information about SHI's means and any other information needed to enforce the judgment. Within days of being served with the Part 71 Order, Mr Vik resigned as a director of SHI.

12. Mr Vik's jurisdictional challenge to the Part 71 Order was unsuccessful. On 14th October 2015 he disclosed 26 files of hard copy documents, principally bank statements, but no electronic documents. This was followed by further disclosure on 9th and 10th December 2015. On 27th November 2015 the Bank's solicitors provided a list of the topics intended to be covered at the examination.

13. Mr Vik's oral examination then took place on 11th December 2015 before Mr Justice Cooke. He was examined for one day by Ms Sonia Tolaney QC, counsel for the Bank. The parties have referred to this as "the XX Hearing" but I shall call it "the Part 71 hearing". One of the topics about which Mr Vik was asked, which was included within the list of topics provided in advance of the hearing, concerned the whereabouts of the US $730 million transferred from SHI to Beatrice and the Trust. Mr Vik's evidence was that he did not know what assets Beatrice or the Trust had, either in August 2015 (the date when he had resigned as Protector of the Trust) or in December 2015 (the date of the hearing). The Bank's case is that this evidence was deliberately untrue.

14. Another topic on the Bank's list about which Mr Vik was examined concerned SHI's interest in a biotechnology fund called Devon Park ("the Devon Park Interest"). In August 2014 SHI had assigned this interest to a recently incorporated off-the-shelf Panamanian corporation, Universal Logistics Matters SA ("Universal"), for no consideration. The administrative details of the transfer were dealt with by Mr Johansson, but Mr Vik was copied on communications relating to it and signed the transaction documents on behalf of SHI. Mr Vik's evidence was that the Devon Park Interest had been sold by SHI to a company called VBI Corporation ("VBI") which was owned by his father, Mr Erik Vik, pursuant to a Norwegian law Sale Agreement dated "as of September 26 2012" ("the 2012 Sale Agreement"). He said that following the sale, SHI held the Devon Park Interest on trust for VBI until 2014, when it was assigned by SHI to a third party (i.e. Universal) pursuant to an oral instruction given by VBI. Mr Vik said also that he had no connection with Universal and no ongoing involvement in SHI's affairs. The Bank's case is that this evidence was also deliberately untrue.

15. Another topic concerned a shareholding in a German hotel company, IFA Hotels & Touristik AG ("IFA"). SHI had lent or purported to lend these shares ("the IFA Shares") to Vik Beteiligung & Verwaltung GmbH ("Vik Beteiligung"), a company 50% owned by Mr Vik, in October 2008. However, following Vik Beteiligung's liquidation in July 2013, the IFA Shares were transferred into Mr Vik's personal ownership. In May 2014 they were assigned to Universal, apparently for no consideration. Mr Vik's evidence was that these shares also formed part of the assets sold by SHI to VBI under the 2012 Sale Agreement and that they were transferred to Universal in 2014 on VBI's oral instruction. Again, the Bank's case is that this evidence was deliberately untrue.

16. SHI also held interests in a number of private equity partnerships ("the Carlyle and Reiten partnerships"). Mr Vik's evidence at the Part 71 hearing was that SHI agreed in September 2008 to transfer its interests in the Carlyle partnerships to a company called Delagoa Bay Agency Company ("Delagoa") and in the Reiten partnerships to a company called Sarek Holdings Ltd ("Sarek"), as part of a strategy to divest its non-marketable trading securities. The Bank's case as initially advanced in its application to commit Mr Vik for contempt was that this evidence was also deliberately untrue, as no such agreements had been entered into until after September 2008 and deeds of assignment produced by Mr Vik in October 2015 which purported to record the transfer of SHI's interests in the Carlyle partnerships to Delagoa were not *bona fide* documents. However, this ground of contempt ("Ground (a)(iv)") was abandoned shortly before the committal hearing.

The committal application

17. The Bank contended that Mr Vik had lied in his evidence at the Part 71 hearing and indicated that it would make a committal application. In the event, because of unsuccessful jurisdictional objections made by Mr Vik, the committal application was not served until May 2019, although a draft had been provided to Mr Vik in spring 2016. Mr Vik complained that it was inadequately particularised, but this complaint was rejected by Mrs Justice Cockerill ([2020] EWHC 3536 (Comm)).

18. The hearing of the committal application finally took place before Mrs Justice Moulder in May 2022. In its final form, the Bank alleged that Mr Vik was guilty of contempt of court in failing to comply with the CPR 71 Order in two respects:

    (1) he had lied about his knowledge concerning (i) the funds and assets of Beatrice and the Trust, (ii) the Devon Park Interest, and (iii) the sale of the IFA Shares to VBI Corporation; and

    (2) he had deliberately failed to produce:

        (i) electronic documents relating to (a) the Devon Park Interest; (b) the IFA Shares; and (c) SHI's interests in the Carlyle and Reiten partnerships; and

        (ii) documents held by (a) various banks with which SHI had accounts and (b) Mr Johansson.

19. It should be noted that although Ground (a)(iv), alleging that Mr Vik had lied in his evidence about SHI's interests in the Carlyle and Reiten partnerships was abandoned, it remained a ground of complaint that he had failed to disclose electronic documents relating to these interests.

20. The hearing of the committal application took place over 11 days between 3rd and 19th May 2022. The Bank's case was supported by an affidavit of its solicitor, Mr Andrew Hart, dated 7th May 2019. Mr Vik had prepared a detailed affidavit in response, served in July 2021 but not formally deployed at that stage. He was not prepared to come within the jurisdiction, but at the conclusion of the Bank's case he elected to deploy his affidavit and was cross examined over a video link from France for four days by counsel for the Bank.

The judgment

21. The comprehensive judgment of Mrs Justice Moulder runs to 459 paragraphs and is over a hundred pages in length.

22. As the judge recorded, there was little or no dispute as to the relevant law. It was common ground that the burden lay on the Bank to prove the alleged contempts to the criminal standard. The judge directed herself by reference to the decision of this court in *JSC BTA v Ablyazov (No. 8)* [2012] EWCA Civ 1411, [2013] 1 WLR 1331 that:

> "51. … it is not true that every single aspect of a criminal case has to be proved to the criminal standard, although of course the elements of the offence must be.

> 52. It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case. … The matter is well put by Dawson J in *Shepherd v The Queen* (1990) 170 CLR 573, 579-580 (but also *passim*):
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> > 'the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact -- every piece of evidence -- relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, it is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately'."

23. Thus, in the case of the alleged lies, this meant that the Bank had to prove to the criminal standard that Mr Vik's evidence at the Part 71 hearing was not true, and that he made the statements in question knowing them not to be true or not honestly believing them to be true; while in the case of the alleged failures to produce documents, the Bank had to prove to the criminal standard that Mr Vik had deliberately failed to produce documents which he knew that he was required to produce.

24. Having set out the law, the judge turned to the facts and the evidence. She dealt first with the general credibility of Mr Vik's evidence that he had answered all questions put to him at the Part 71 hearing to the best of his ability and had given honest answers. I set out at [60] below the direction which she gave herself.

25. The judge did not find Mr Vik to be a credible witness. She found that his manner of giving evidence was not credible; that he had sought to avoid answering direct questions and had attempted to obfuscate; that most of the occasions in the course of his cross-examination when he professed to be confused or lost were not genuine; that when faced with contemporaneous documents adverse to his case he had given evidence which was clearly absurd and a lie, and had persisted in doing so; that contemporaneous documents obtained by the Bank since the Part 71 hearing could not be explained away, were not satisfactorily explained, and showed that Mr Vik's evidence at the Part 71 hearing was untrue; and that Mr Vik was a man who, on his own case, had demonstrated a readiness not to tell the truth in his business dealings. Over the course of the 58 paragraphs of the judgment in which she considered Mr Vik's credibility, the judge gave examples supporting each of these conclusions. Nevertheless her conclusion was not that she would reject Mr Vik's evidence out of

hand, but that, for all these reasons, she would approach his evidence with considerable caution as to whether he was telling the truth.

26. The judge then rejected a submission, not pursued on appeal, that the contempt proceedings had not been fair to Mr Vik, before turning to each of the contempt allegations. She considered in detail the evidence relating to each of these alleged contempts and the very full written and oral submissions of counsel, and concluded in each case that the contempt was proved to the criminal standard.

27. It is important to emphasise that these were findings of fact.

The appeal from the Contempt Order

28. As already indicated, Mr Vik seeks to appeal against these findings and a preliminary question arises whether he needs permission in order to do so.

Is permission needed?

29. Section 13(1) of the Administration of Justice Act 1960 as amended by the Access to Justice Act 1999 provides:

> "**Appeal in cases of contempt of court**
>
> (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings."

30. Section 13(2) provides that an appeal from the High Court lies to the Court of Appeal.

31. When the 1960 Act was first enacted, there was a general right of appeal from final orders. Subsequently, however, the law was changed by section 54 of the Access to Justice Act 1999 and rules of court made thereunder so that, in most cases, permission is now required for an appeal to the Court of Appeal. However, CPR 52.3(1)(a) preserves the right to appeal without permission from a committal order:

> "(1) An appellant or respondent requires permission to appeal —
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> (a) where the appeal is from a decision of a judge in the County Court or the High Court, or to the Court of Appeal from a decision of a judge in the family court, except where the appeal is against—
>
> (i) a committal order;
>
> (ii) a refusal to grant habeas corpus; or

> (iii) a secure accommodation order made under section 25 of the Children Act 1989 or section 119 of the Social Services and Well-being (Wales) Act 2014; or
>
> (b) as provided by Practice Directions 52A to 52E."

32. The common feature of the orders listed is that they result in deprivation of liberty.

33. This has led to a suggestion that a right to appeal without permission only lies from the order actually committing a contemnor to prison, with the consequence that an appeal from an order which goes no further than making findings of contempt cannot be appealed without permission. This raises questions when, as is often convenient, particularly in complex cases, allegations of contempt are dealt with in two stages. The first stage is to establish whether the alleged contempt has been committed, while the second is to determine the appropriate sanction if the contempt is proved. The question then arises whether a finding of contempt at the first stage can be appealed without permission, or whether that depends upon what decision about sanction is made at the second stage. If the two stages are separated in time, a further question is whether time is running for an appeal against the first order in the meanwhile.

34. In *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898, [2012] 1WLR 223 the appellant companies sought to appeal against an order finding them to be in contempt, at a time when the question of sanction had not yet been decided. They were given permission to appeal subject to conditions but, in order to avoid having to comply with those conditions, contended that they had a right to appeal without permission. It was held that permission was required: the natural meaning of the term "committal order" was an order committing a person to prison (or imposing a suspended sentence: *Wilkinson v Lord Chancellor's Department* [2003] EWCA Civ 95, [2003] 1 WLR 1254) and this did not extend to an order made against a company, which could not be sent to prison but could only be made subject to a financial sanction. This decision establishes, therefore, that the exception to the requirement for permission to appeal is limited to orders which commit a person to prison.

35. Although this gives some support to the suggestion that an order which merely makes findings of contempt is not a committal order, so that an appeal from it requires permission, it is important that in *Masri* no sanction had yet been imposed following the finding of contempt. Accordingly the case does not address the issue whether, once a finding of contempt *is* followed by committal to prison, an individual thus committed is entitled to appeal as of right against the committal on the ground that the contempt finding was wrongly made. That question did not arise in *Masri* and could not have done so, first because the contemnor was not an individual and therefore could not be committed to prison, and second because no sanction had yet been imposed.

36. In *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671 at [19] Lord Justice Coulson adverted to this issue, but did not decide it.

37. A similar issue arose in *Nambiar v Solitair Ltd* [2022] EWCA Civ 1135. The judge made an order recording his finding of contempt against Mr Nambiar, and later made an order committing him to prison. Mr Nambiar sought to appeal against his

committal on grounds which challenged the finding of contempt. He did so, however, without disclosing that he had already applied for permission to appeal against the finding of contempt, which had been refused (as it happens, by me). His appeal in those circumstances was held to be an abuse of process. However, Lady Justice Simler (with whom Lord Justice Popplewell and Lady Justice Carr agreed) gave some consideration to the question whether permission was needed. After citing *Masri* and other cases, she continued:

> "34. Accordingly, it is well established that the exception to the requirement for permission to appeal is strictly limited to orders which commit a party to prison. Mr Lewis' response to these authorities was to contend that the statement made by the judge at the end of his first judgment (see [132] set out at paragraph 9 above), that the custody threshold had been passed, was a sword of Damocles over the head of the appellant, as in *Wilkinson*, and the contempt decision should therefore be treated as a committal order with unfettered appeal rights. I do not accept this contention. First, this is not what the judge said. The judge merely expressed a provisional view for the benefit of Mr Nambiar, hedged with caveats because he had not heard submissions in mitigation. He passed no sentence, suspended or otherwise. Sentence was adjourned. Secondly, it is trite that appeals are against orders not judgments. The first order, made following the first judgment, was a contempt order. It made no committal order.
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> 35. It follows that Mr Nambiar's application for permission to appeal the contempt order, before any sanction had been imposed, was properly made, and properly treated by Males LJ as requiring permission. He required permission because the order he was challenging is not, on any view, a committal order.
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> 36. It is unnecessary for me to reach any firm conclusion on the question whether, in the absence of that application for permission to appeal, Mr Nambiar could have used his appeal as of right against the committal order of 17 March 2021 (imposing a suspended sentence of imprisonment) to challenge the underlying facts or findings that gave rise to the right to impose that penalty. My provisional view is that he would have been able to do so. However, this court has not heard argument on the question, still less argument from both sides. In any event, it is not what happened. The question that now arises is what is the consequence of having sought and been refused permission to appeal the contempt order. Can Mr Nambiar have an identical second appeal?"

38. The question arose again in *Business Mortgage Finance 4 Plc v Hussain* [2022] EWCA Civ 1264, [2023] 1 WLR 396. Again the allegation of contempt was dealt with in two stages, with an order making findings of contempt followed by committal to prison. The contemnor sought to appeal against both orders. There was no

argument about whether he needed permission to appeal against the first order, and the cases which I have discussed were not cited, but Lord Justice Nugee (with whom Lord Justices Arnold and Stuart-Smith agreed) expressed the view that he did not:

> "5. It was not suggested that Mr Hussain needed permission for the Sentencing Appeal. Although the parties seem to have assumed that Mr Hussain did need permission for the Liability Appeal, we expressed the view at the outset of the hearing that he did not need permission for that either. That was undoubtedly the view taken by Miles J who at the end of the Liability Judgment said that Mr Hussain had the right to appeal without permission (at [397]), and who made an Order dated 2 March 2022 on the handing down of that judgment which extended time for Mr Hussain 'to appeal against the finding of contempt … and any sanction' and (by way of contrast) for him 'to seek permission to appeal any other part of this order'. He repeated this view at the end of the Sentencing Judgment (at [74]) where he said that Mr Hussain was entitled to appeal 'the findings of contempt and the sentence' without permission.
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> 6. We did not hear any argument on the point but that seems to me to be right. By CPR r 52.3(1)(a)(i) a person committed to prison can appeal the committal order without permission and where, as must happen in a large number of cases, a judge makes findings of contempt and proceeds to commit the contemnor to prison on the same occasion, I consider that that entitles the contemnor to appeal, without needing permission, either the findings of contempt or the sentence or both. If that is right, it cannot make any difference that in a complex case like the present the findings of contempt are made first, and the sentencing is dealt with in a separate and subsequent hearing."

39. I agree with the provisional views expressed by Lady Justice Simler and Lord Justice Nugee. In a case where for convenience the issue of contempt is dealt with in two stages and an order making a finding of contempt is later followed by committal to prison (including a suspended sentence), the defendant has a right of appeal against the order for committal and no permission is required. The grounds of appeal in such a case are not limited to a contention that the sentence was too severe, but may include a contention that the finding of contempt was wrongly made. Either ground, if made out, means that the defendant should not have been committed.

40. It is the clear intention of Parliament that a person deprived of their liberty for contempt of court should have a right of appeal without needing permission. That has been criticised (e.g. *Thursfield v Thursfield* [2013] EWCA Civ 840 at [44] and [45] and *Al-Rawas* at [17] and [18]). It may also be anomalous, as permission is needed to appeal against conviction or sentence for even the most serious criminal offences, although the analogy is not exact as a criminal applicant has a right to renew an application refused on paper to an oral hearing. It is nevertheless what Parliament has enacted. To hold that, merely because the issue of contempt and the issue of sanction are separated in time, a defendant loses the right to challenge the finding of contempt would frustrate the legislative intention. It should make no difference whether the

finding of contempt and sentence are all dealt with in one hearing, one judgment and one order, or, for what are purely practical reasons, are split into two hearings, two judgments and two orders.

41. The position is different in the case of a corporate defendant which cannot be committed to prison, as in *Masri*. Such a defendant needs permission to appeal and there is no need to defer an application for permission until the sentence has been determined. The position may also be complicated if a defendant is guilty of an abuse of process, as in *Nambiar*, although it was important in that case that the abuse consisted of failure to disclose the previous unsuccessful application for permission to appeal against the finding of contempt.

42. That leaves the practical question, what is an individual defendant to do if he has been found to be in contempt, but has not yet been sentenced? *Masri* and *Nambiar* demonstrate that unless and until an order of committal is made, any appeal needs permission. So if the defendant seeks to appeal against the finding of contempt before sentence, permission will be needed. But if the defendant defers an appeal until after sentence and is then committed to prison, he will be entitled to challenge the committal on the ground that the finding of contempt was wrongly made. Of course, the defendant may not be committed to prison after all, but may be dealt with in some other way, for example by a fine. In such a case he will need permission to appeal, but should be entitled to seek permission to appeal against the imposition of the fine on the ground that the finding of contempt ought not to have been made. In that way, any problem that time has run for an appeal against the first order making the finding of contempt should be avoided. In case it be thought that any such problem remains, it can be overcome by making an order, as the judge did in this case, that the time for appealing the finding of contempt will not run until after the court has determined what sanction to impose. That may be the safest practical solution, although it has an element of "belt and braces".

43. I conclude, therefore, that Mr Vik does not need permission to challenge the findings of contempt set out in the Contempt Order, although he has to do so by way of an appeal against the Committal Order on the ground that the findings of contempt were wrongly made. I do not need to consider, therefore, whether I would have been prepared to grant permission if that had been necessary.

44. Of course, a right of appeal must be exercised in accordance with the rules and practice of the court, for example as to timely service of an appellant's notice. A right of appeal does not give an appellant a free hand, for example to argue points which are not included within the scope of grounds of appeal contained in an appellant's notice.

45. It is also worth noting that, as Lord Justice Coulson said in *Al-Rawas* at [34], it is necessary "to police contempt applications properly so as to ensure that the automatic right of appeal is not abused". However, that was a very strong case in which the issue was whether the appellants, who had abandoned their appeal at a late stage, and who did not participate in the proceedings, should be ordered to pay indemnity costs. The appellants had been found guilty of multiple contempts and had put forward hopeless grounds of appeal, predicated on the need for fresh evidence when they had never provided such evidence or indicated what it might say, and when they never had any intention of participating in any meaningful fashion in the appeal proceedings. The

appeal was, as Lord Justice Coulson described it, "a sham from start to finish". His reasoning (with which Lord Justices Arnold and Phillips agreed) was as follows:

> "25. At the end of the contempt hearings, Morris J found that the appellants' conduct had been out of the norm and ordered them to pay the respondents' costs on an indemnity basis. In my judgment, any consideration of the appellants' conduct of this appeal can only lead to the same conclusion. There are three principal reasons for that conclusion.
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> 26. First, I consider that the appellants have endeavoured to take advantage of the automatic right of appeal, referred to above, in order to prolong the proceedings and delay payment of the sums due. What is more, they have done this whilst in open defiance of numerous court orders. The automatic right to appeal is a rare exception to the usual rule that an appellant requires the permission to bring an appeal. This court must police that right carefully and be swift to mark its disapproval if it considers that its procedures are being abused. Awarding indemnity costs is one mechanism by which that can be achieved.
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> 27. Secondly, on a proper analysis of the matters put in issue in the grounds document, it can safely be concluded that the appeal was hopeless. …
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> .
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> 28. As to category (a), namely matters of fact already considered and rejected by Morris J, there can be no basis for seeking to reargue them in this court. To borrow the words of Lewison LJ in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5 at [114], the hearing in front of Morris J was not a dress rehearsal. It was the first and last night of the show. Findings of fact made by the judge below will not generally be reopened by this court. …
>
> 29. As to category (b), that is to say matters of fact and other arguments which were never raised before Morris J, the appellants' position is even more untenable. The hearing before Morris J was the time when all points, if they were relevant and had any merit, should have been raised. They were not. Some were not even in the material provided by the respondents after the end of the original hearing of the contempt applications, addressed by Morris J at [55]-[66] of the first contempt judgment. No excuse is offered as to why they were not, or why the appellants were choosing to address the detail only after the proceedings in the High Court had been concluded. It is an abuse of the process of this court to raise arguments for the first time on appeal, in circumstances where those arguments could and should have been raised before the judge below.

> 30. As to category (c), that is to say the matters which required fresh evidence, the appellants' conduct has been deliberately evasive. Although their solicitors suggested that they would adduce new evidence, when they were chased for it by the respondents in correspondence, the appellants' solicitors kept back-tracking and refused to engage in any sort of detailed analysis of what that evidence might be and when it would be provided.
>
> 31. It is for those reasons that I have concluded that the appellants never had any genuine intent to advance this appeal in a legitimate fashion. It was a sham from start to finish. Such conduct is a long way outside the norm, and it justifies an order for indemnity costs."

46. I do not disagree with any of this reasoning, but some caution is in order before elevating what was said in the particular factual context of that case into general propositions of law. For example, I would accept that it may be an abuse to raise arguments for the first time on appeal where those arguments could and should have been raised in the court below. But whether conduct is an abuse of process must always depend on all the circumstances of the particular case. That is how the point was put in *Business Mortgage Finance 4 Plc v Hussain* at [91] and in *Farrer & Co LLP v Meyer* [2022] EWCA Civ 706, P2-23] 1 WLR 396 at [40]. It is, after all, the common experience of this court that new points are sometimes raised on appeal, in which case it is necessary to consider whether it is consistent with the interests of justice to allow them to be argued. It is even more common for the focus of argument to change as a case proceeds on its appellate journey. That is not abusive.

47. Further, it is hard to see how, without more, it could be an abuse of process to advance arguments, whether on fact or law, which do not have a real prospect of success on appeal (i.e. for which permission would not be granted, or would be granted with conditions, if it were needed). That is precisely what Parliament has permitted a defendant to do by preserving a right of appeal without the need to obtain permission. Of course, other circumstances may indicate that the right of appeal is being abused, as in *Al-Rawas* where the appellants never intended to participate meaningfully in the appeal, and in such a case orders for indemnity costs or the imposition of conditions may well be appropriate.

The approach of the Court of Appeal

48. The appeal here is against the judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.

49. For example, in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:

> "67. … in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of

> relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a judge's findings of fact. Thus in *Walter Lilly & Co Ltd v Clin* [2021] EWCA Civ 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):

> "83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:
>
> (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show;
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;
>
> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;
>
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);
>
> (vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done. …
>
> …
>
> 85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:
>
> (i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

> (ii) Where the finding is infected by some identifiable error, such as a material error of law;
>
> (iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.
>
> 86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
>
> 87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

51. Another recent summary was given by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

52. Mr Duncan Matthews KC (who appeared for Mr Vik) suggested that the summary in *Walter Lilly* is more generous to an appellant and should be preferred, but I can discern no material distinction between them. They represent (as Lord Justice Lewison said) a well-trodden path, which it is unnecessary to traverse again. It need hardly be emphasised that "plainly wrong", "a decision … that no reasonable judge could have reached" and "rationally insupportable", different ways of expressing the same idea, set a very high hurdle for an appellant.

53. This approach to an appeal against findings of fact applies equally to an appeal against an order for committal for contempt, notwithstanding that the criminal standard of proof applies, as explained by Lord Justice Nugee in *Business Mortgage Finance 4 Plc v Hussain*:

> "98. … On such an appeal the question for the appeal court is whether the lower court was wrong (CPR r 52.21(3)(a)). Where an appeal is a pure factual appeal, there are numerous recent statements of the Supreme Court and this court as to the very limited circumstances in which an appellate court can properly interfere with a factual finding.
>
> 99. Mr Counsell expressly accepted that the same applies in an appeal against a finding of contempt. He drew our attention to two matters however: first, the requisite standard is that of proof beyond reasonable doubt, and second that there was here no oral evidence. Both these are true but I do not think they affect the principle. So far as there being no oral evidence is concerned, the limitations on the appellate court's ability to disturb findings of fact are not based solely on the advantage that a trial judge has of assessing witnesses who give oral evidence (although if there is oral evidence this may be an added reason). So far as the standard of proof is concerned, this means that the question is whether Miles J was 'wrong' to conclude that the case had been established beyond reasonable

> doubt. But in considering whether he was 'wrong' in that conclusion, I think the same applies as in any other factual appeal, namely that the appellant must point either to there being no evidence that would support the conclusion, or to some identifiable flaw in his assessment such as a gap in logic, a lack of consistency or a failure to take account of some factor which materially undermines the cogency of his conclusion. What cannot be done in practice is to invite the appellate court to review all the evidence below with a view to substituting its own view of the facts. Duplicating the role of the trial judge is not the function of the appellate court, and cannot be done: *FAGE (UK) Ltd v Chobani (UK) Ltd* [2014] EWCA Civ 5 at [114] per Lewison LJ."

54. These considerations apply with particular force when an appeal involves a challenge to the judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the judge has made so serious an error that her assessment must be set aside.

55. Mr Matthews submitted on behalf of Mr Vik that, in a case based on inferences, any material error made by the judge would undermine her conclusion as to Mr Vik's credibility. Developing the "net from which there is no escape" metaphor from *Ablyazov* at [52] which I have already cited, he submitted that if any material aspect of the judge's reasoning was shown to be unsound, the consequence would be that the net would not close and the inferences in question could not safely be drawn. However, it must be borne in mind that the judge's assessment of the credibility of a witness, particularly in a complex and document-heavy case where there has been extensive cross examination, will be based upon the cumulative effect of a whole range of factors, not all of which are easily articulated or readily discernible from a transcript. Even if an appellant is able to point to individual errors which the judge has made, for example that a particular piece of evidence has been misunderstood, that will not necessarily vitiate the judge's overall conclusion. Whether it does so will depend upon the importance of the error in question in the context of the case as a whole, including the nature and force of other factors for and against the judge's conclusion.

Was the judge's approach to the issue of Mr Vik's credibility wrong in law?

56. This appeal largely consists of a challenge to the judge's assessment of the credibility of Mr Vik as a witness, the contention being that the judge was wrong to reject his evidence seeking to refute the Bank's allegations in the case of each of the contempts alleged.

57. Mr Matthews' overarching submission was that the judge made three errors of principle in her approach to assessing Mr Vik's credibility which amount to legal error and which independently and cumulatively render her findings of contempt unsafe. He submitted that the judge was wrong to:

(1) give any weight, alternatively the weight she did, to adverse findings against Mr Vik (made to the civil standard) at an earlier stage in the proceedings in assessing the credibility of his evidence at the committal hearing;

(2) make adverse findings as to credibility by reference to allegations which had been expressly abandoned by the Bank, alternatively to attach the weight she did to such findings in assessing Mr Vik's general credibility;

(3) make adverse inferences as to credibility based on behaviour which was consistent with that of an ordinary honest witness under cross examination, thereby holding Mr Vik to an unrealistically high standard.

58. The submission that a judge has made errors of law in assessing the credibility of a witness is in principle a legitimate ground of challenge. Such errors are at least capable of undermining the judge's assessment. In my judgment, however, on any fair reading of the judgment there is no substance in any of these criticisms. I will address them in turn.

Adverse findings in earlier judgments

59. Mr Matthews submitted that the judge attached weight to the adverse findings made by Mr Justice Cooke in the trial of the Bank's claim against SHI in 2013 and that she was wrong to do so. He pointed out that the Bank's evidence and submissions were replete with recitations of findings from earlier judgments, in particular Mr Justice Cooke's findings of dishonesty and untruthfulness on the part of Mr Vik. He submitted that such prior judgments were not relevant evidence and that a court hearing a committal application must decide for itself the issues in dispute based on the evidence before it, with the opinion of another court or tribunal based on different evidence and in a different procedural context carrying little or no weight (*Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Ch 321, [2004] Ch 1 at [16] to [18]); and that the probative limitations of any earlier findings in civil proceedings were particularly acute in view of the penal nature of committal proceedings, the criminal standard of proof applicable and the need for a high standard of procedural fairness (*Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656 at [79]).

60. This criticism might have had some force if the judge had relied on the earlier findings of Mr Justice Cooke in making her assessment of the credibility of Mr Vik. It is clear, however, that the judge did precisely what Mr Matthews submitted that she should have done, that is to say she made up her mind about Mr Vik's credibility based on the evidence adduced in the committal proceedings. She directed herself as follows:

> "49. Mr Vik's evidence in his Affidavit is that he attended the XX Hearing as required, he answered all questions that were put to him and he gave honest answers. He also suggested in his Affidavit that the topics covered were vague and thus I infer, the questions said to be unclear to him, and that the topics covered a wide time period.

> 50. It is important to consider at the outset the extent to which, in determining whether the allegations against Mr Vik have been proved to the requisite standard, the Court can take into account its assessment of the overall credibility of Mr Vik in giving evidence to this Court.
>
> 51. It is clear on the authorities that on a committal application:
>
> i) The Court has to weigh up the reliability of the evidence of the alleged contemnor taking into account how far in the view of the Court his evidence is credible (*VIS Trading v Nazarov* [2016] EWHC 245 (QB) at [27]);
>
> ii) The Court should bear in mind that if the Court finds that Mr Vik has told lies on other occasions it does not necessarily mean that he has lied about everything (*Nazarov* at [30]).
>
> iii) The Court does not have to have direct evidence that Mr Vik was not telling the truth in any given respect but can draw inferences on the basis of all the evidence so long as the Court is sure to the criminal standard about the conclusions (*ibid*);
>
> iv) It is against that background of the overarching conclusions on credibility and reliability that the Court will consider the specific evidence in response to the individual allegations (*Nazarov* at [31]).
>
> 52. Therefore, although I consider below the individual allegations of contempt against Mr Vik, it is appropriate and important to form a view on his evidence to this Court in the round in order to assist in determining what weight the Court should give to his evidence in response to the detailed allegations.
>
> 53. Although I have been taken by the Bank to the findings of Cooke J, I accept the submission for Mr Vik that even if Mr Vik had told lies in the past, he may take a different view when faced with committal proceedings. I also accept that the standard of proof which governed the findings of Cooke J was the usual civil standard of proof and therefore this Court cannot take any findings of Cooke J as having been made to the criminal standard which applies in these committal proceedings. I approached Mr Vik's evidence to this Court therefore with an open mind and have formed an independent view based on his evidence to this Court."

61. Thus the judge was well aware that the case had to be proved to the criminal standard and that lies told on a previous occasion did not indicate that Mr Vik was telling lies in the committal proceedings. She was aware also that the findings of Mr Justice

Cooke had been made to the civil and not the criminal standard of proof. She said in terms that she approached Mr Vik's evidence with an open mind and formed her own independent view based on his evidence in the committal proceedings. I see no reason to doubt that she did what she said she had done.

62. Mr Matthews submitted, however, that despite the judge saying this, later paragraphs of the judgment showed that she had in fact relied on Mr Justice Cooke's findings in reaching her conclusion about Mr Vik's credibility. However, he was able to identify only one of all the many passages in the judgment where the judge rejected Mr Vik's evidence as demonstrating this. This was the judge's conclusion concerning the Devon Park Interest at [327] to [329]. In order to put these paragraphs in context it is necessary to quote the whole passage. There is a danger here, however, that when a judge has expressly said that she formed her own independent view, narrow textual analysis of the judgment with a view to casting doubt on this is the kind of exercise which appellate courts have deprecated and is likely to be unproductive. Be that as it may, however, this is what the judge said about the Devon Park Interest in the later paragraphs of her judgment:

> "325. It was submitted for Mr Vik that the Court:
>
> > 'could not reject as incredible the possibility that the information signed in documents, signed as they were by Mr Vik, was incorrect, but that the evidence that he is giving to the court in relation to the 2012 sale agreement is correct.' (transcript day 10, p77)
>
> 326. However, that submission ignores a number of matters:
>
> > i) the Court's assessment of the credibility of Mr Vik's evidence generally;
> >
> > ii) the motive for Mr Vik to lie in relation to the Sale Agreement because if it were found to be genuine, it would have removed assets from SHI and thus (potentially) put them out of reach of enforcement by the Bank; and in relation to his evidence to this Court, a way to avoid committal for contempt;
> >
> > iii) the belated disclosure of the Sale Agreement and the even later disclosure of the detailed schedule;
> >
> > iv) the absence of contemporaneous documents to support the existence of a sale to VBI, the evidence of payments not being probative in either direction;
> >
> > v) the terms of the AAA.
>
> 327. The Court is also entitled to have regard to the findings of Cooke J in support of the view that the Court has reached independently of Mr Vik's credibility. Cooke J found at [356] that:

> 'Mr Vik's evidence about these agreements however bears all the hallmarks of being fabricated in order to make a case and, even in the absence of evidence from Mr Meidal, I reject it.'

328. At [386] Cooke J found that Mr Vik had fabricated an agreement:

> 'I conclude that what Mr Vik has done is to seize upon the bank's failure to effect margin calculations, to seek to make capital of it and to fabricate an oral agreement with an individual who was once employed by DBS and who may now be sympathetic to his position but who was not, as he knew by the time of his statements, to be called as a witness by DBAG.' [emphasis added]

329. Whilst noting that Cooke J was not making findings to the criminal standard this Court is entitled to take into account that evidence in assessing the credibility of Mr Vik's evidence to this Court and the genuineness of the Sale Agreement. To repeat the quotation from *Shepherd* in *Ablyazov* (set out above):

> 'the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact-every piece of evidence-relied upon to prove an element by inference must itself be proved beyond reasonable doubt' [emphasis added]."

63. Two points are immediately notable. The first is that, as [326] makes clear, the judge's general assessment of Mr Vik's credibility was only one of a number of factors leading to her conclusion. The second is that even in this passage, the only example advanced as demonstrating reliance on previous findings, the judge expressly said at [327] that she reached her conclusion "independently of Mr Vik's credibility". Moreover, although she had regard to the findings made by Mr Justice Cooke, she noted expressly at [329] that those findings had not been made to the criminal standard of proof.

64. Mr Matthews sought to contrast what the judge said at [327] ("have regard to the findings of Cooke J *in support of* the view that the Court has reached independently") with the approach of Mrs Justice Whipple in *VIS Trading v Nazarov*:

> "28. I have reached this view [that the defendant was not a credible witness] independently. But I note that I find myself in a similar position to Leggatt J, who presided over the trial which underlies the present application, and concluded:
>
> > '18. Mr Nazarov's evidence was wholly unreliable. While some of his evidence was undoubtedly or probably true, and occasionally candid, other parts were palpably false …'"

65. Mr Matthews submitted that whereas Mrs Justice Whipple had merely "noted" that her conclusion was in accordance with that of the trial judge, Mrs Justice Moulder had gone (unacceptably) further, having regard to the findings of Mr Justice Cooke as *supporting* her conclusion. In my judgment, however, this is precisely the kind of narrow textual analysis of a judgment which should not be entertained.

66. A judge hearing a committal application must determine the application based on the evidence adduced, applying the criminal standard of proof. If it is necessary to assess the credibility of a witness, generally the alleged contemnor, that assessment must be undertaken by reference to the evidence adduced at the committal hearing. But I see no reason why a judge should not take note of, or have regard to, findings made by other judges at earlier stages of the litigation. Those will often form the background against which the committal application arises and it would be unrealistic to seek to determine the committal application in isolation from the circumstances in which it arises.

67. Finally on this topic, I would note that the judge's approach was entirely in accordance with the submissions made on behalf of Mr Vik in the court below. As the judge recorded at [39], it was accepted for Mr Vik that earlier judgments were admissible and it was a question of the weight to be given to them. Indeed, as the judge pointed out, Mr Vik expressly relied on the Connecticut judgment and sought to persuade the judge to give it weight as evidence in his favour:

> "41. It was therefore submitted for Mr Vik that the Court should give evidential weight to the Connecticut Judgment in excess of Cooke J's obiter comments."

68. The judge's view at [43] was that it was unnecessary for her to place reliance on either judgment in order to reach her findings on the contempt application.

69. In circumstances where it was expressly accepted below that the earlier judgments were admissible, and where Mr Vik expressly sought to rely on the Connecticut judgment in his favour, I am doubtful whether this current criticism of the judge is open to him in this court. If the judgments were admissible, as was common ground, the weight to be given to them was a matter for the judge. However, as I have concluded that the criticism is without substance it is unnecessary to pursue this point further.

Abandoned allegations

70. As I have explained, it was initially the Bank's case that Mr Vik had lied at the Part 71 hearing about the circumstances in which SHI had disposed of its interests in the Carlyle and Reiten partnerships, but this allegation of contempt (Ground (a)(iv)) was abandoned shortly before the committal hearing. By a letter dated 17th December 2021, the Bank's solicitors indicated that it had decided to "narrow the scope of the matters that Mr Vik and the Court will need to consider at the substantive hearing in May 2022". As a result, its application notice was amended to delete Ground (a)(iv).

71. Despite this, Mr Vik was cross examined at the committal hearing about these transactions and the judge took this evidence into account in forming her view of the general credibility of Mr Vik. She said:

> "79. Although the allegations of false statements in relation to the transfer of the private equity interests held by SHI in two Reiten funds and five Carlyle funds are no longer pursued by the Bank, questions were put in cross examination to Mr Vik about documents which have now been disclosed and it is relevant to the assessment of Mr Vik's general credibility to note his response to questions when faced with contemporaneous documentation which were adverse to his position."

72. She then set out Mr Vik's evidence, in which he denied having any interest in Sarek (the company to which the Reiten interests had been transferred), despite the fact that documents obtained by the Bank since the Part 71 hearing showed that: (1) Mr Vik had received information about the value of the Reiten interests in August 2009, after they had supposedly been disposed of; (2) Mr Johansson had confirmed that Mr Vik was the beneficial owner of a company, Christiana Holdings, which owned 25% of Sarek's shares; and (3) in December 2010 Mr Johansson, in his capacity as the acting secretary of Sarek, had certified that Mr Vik owned 100% of the outstanding common shares of Sarek. The judge described Mr Vik's evidence, in which he continued to deny having any interest in Sarek, as "wholly incredible" and "shown to be false by the documentation".

73. Turning to the deeds of transfer of the Carlyle partnership interests, the judge said:

> "86. … Whilst the particular documents at issue are not now the subject matter of the alleged false statements in these committal proceedings it is a matter which is relevant to the credibility of Mr Vik's evidence, in particular because in relation to certain of the specific allegations on this Committal Application the genuineness of other documents are [*sic*.] in issue."

74. She contrasted five purported deeds of transfer which Mr Vik had disclosed, which appeared to show that the transfers had been effected in September 2008, with documents which the Bank had obtained since the Part 71 hearing from the Carlyle and Reiten groups pursuant to a *Norwich Pharmacal* order, which made it clear that the transfers had not been effected until December 2009. Thus the documents obtained pursuant to the *Norwich Pharmacal* order included an "Execution Version" (Version 6) which was dated 2nd December 2009. They also showed that the documents disclosed by Mr Vik (Version 5) had been altered by the erasure of the typed date and the insertion in manuscript of the date of 26th September 2008. There were other differences also.

75. When asked about this, Mr Vik was unable to explain the differences, saying that they were nothing to do with him and that he signed "all kinds of things, but I had no knowledge of these things". He denied having deliberately disclosed a draft document to support his argument that the transfers had occurred in September 2008 and blamed Mr Johansson for giving him the wrong documents to disclose.

76. The judge described this evidence as "wholly implausible and there is no explanation for the manuscript amendments other than they must have been made deliberately".

She continued:

> "95. In the circumstances where the later versions have only come to light from third parties, I do not accept any explanation that Mr Vik was unaware of the fact that these documents which were disclosed by or on his behalf were not the final versions. I am sure that this was a deliberate attempt by Mr Vik to mislead by his disclosure and his evidence to this Court that he did not know anything about the different versions and merely disclosed what he was given by Mr Johansson is a deliberate lie. Whilst this allegation is not before the Court on this Application, it is highly relevant to the credibility of Mr Vik generally and to the plausibility of arguments put forward concerning Mr Vik's actions."

77. Mr Matthews submitted that it was unfair for Mr Vik to have been cross-examined about these matters when the Bank had expressly abandoned its allegations relating to the Carlyle and Reiten interests and he had not adduced any evidence about them, and for the same reasons that it was unfair and wrong in law for the judge to have made these findings as part of her assessment of Mr Vik's credibility.

78. I do not accept this submission. The cross examination was based on documents obtained from third parties which Mr Vik would have been expected to disclose himself. Quite apart from the question of false evidence at the Part 71 hearing, the allegation that Mr Vik had deliberately failed to disclose documents which ought to have been disclosed was itself an independent ground of the Bank's contempt case. The cross examination was plainly relevant to that issue. The judge was entitled to make use of Mr Vik's evidence in assessing his general credibility. When doing so, she was alive to the fact that Ground (a)(iv) had been abandoned as an allegation of false statements made at the Part 71 hearing.

79. The continuing relevance of these matters was clear from the Bank's skeleton argument for the committal hearing, which set out the Bank's position fairly under the heading of "Failure to disclose electronic documents":

> "Although DB no longer maintains an allegation that Mr Vik gave false evidence in connection with the transfers of the Partnership Interests at the Vik XX Hearing, they remain an important topic of investigation. Indeed, as noted above, they were specifically identified at [2] of the non-exhaustive schedule to the CPR 71 Order as matters in relation to which Mr Vik was required to give disclosure."

A footnote added:

> "The fact that DB is not pursuing an allegation of contempt in connection with Mr Vik's oral evidence about the Partnership Interests does not mean it accepts his evidence to be true."

80. In these circumstances there was no unfairness to Mr Vik. He was on notice of the Bank's case regarding these matters, which was set out in detail in Mr Hart's

affidavit, and he prepared a detailed affidavit in response, albeit that he did not deploy it. When the Bank deleted Ground (a)(iv), Mr Vik removed the section in which he dealt with this allegation, and it was this amended version of his affidavit which was deployed at the committal hearing. However, he was or ought to have been on notice that he was likely to be cross-examined about these matters and it cannot credibly be suggested that he was taken by surprise. He not only had the opportunity to consider in advance his response to Ground (a)(iv), but had set it out in detail in the initial version of his affidavit. In any event, counsel is entitled to cross-examine a witness on topics relevant to his credibility, with no obligation to give advance notice of the points on which such cross-examination will take place. Moreover, there was no objection to the cross-examination at the committal hearing, and if counsel chose not to address this topic in closing submissions, that was no doubt a deliberate forensic choice – and, I would add, not a surprising one in view of the difficulty of defending evidence which flew in the face of contemporary documents.

Mr Vik's new case

81. It is convenient to deal at this point with a new case advanced by Mr Matthews which is also concerned with the Carlyle documents. This new case was not mentioned in Mr Vik's appellant's notice or skeleton argument, but was advanced orally and assumed considerable prominence in Mr Matthews' submissions. As a result we directed that it should be put in writing. In essence, the new case was that the judge had fundamentally misunderstood the evidence concerning the Carlyle transfer deeds; that this misunderstanding vitiated the conclusions which she reached about Mr Vik's credibility as a result of this evidence; and that this in turn undermined her conclusions about Mr Vik's credibility generally.

82. The error which the judge is said to have made was in rejecting Mr Vik's evidence that he signed documents without reading them because he had failed to explain why he had signed both versions (Version 5 and Version 6) of the Carlyle transfer deeds. The relevant passage of the judgment is as follows:

> "91. Mr Vik denied in cross examination that he had deliberately disclosed a document to support his argument that the transfers had happened in September 2008. He sought to suggest that any fault lay with Mr Johansson:
>
> > 'Q. What you disclosed to this court as evidence of the partnership transfers pursuant to the CPR 71 order were drafts where somebody had handwritten in, conveniently, dates in September 2008, and that's all you disclosed pursuant to the Part 71 order.
> >
> > A. I disclosed what I was given by Mr Johansson. So that was what I was given." [emphasis added] (transcript day 7, p84)
>
> 92. Mr Vik's evidence was that he signs documents without reading them and merely disclosed what he was given by Mr Johansson. However, this evidence fails to provide a satisfactory explanation as to why (even if he does not read

> documents before he signs them) these 5 separate deeds were each signed twice by him (i.e. both versions 5 and 6). The explanation that the documents were given to him by Mr Johansson to disclose does not explain how Mr Vik came to sign five deeds twice."

83. It was not in fact put to Mr Vik by Ms Tolaney at the committal hearing, and was not the Bank's case, that Mr Vik had signed both Versions 5 and 6. It appears that this was the judge's own understanding of the documents. Mr Matthews was able to demonstrate that the judge was mistaken about this and Ms Tolaney did not suggest otherwise.

84. What in fact happened was that the Execution Version of the deed (Version 6) was not signed by Mr Vik at all. Instead it appears that the signature page of Version 5, which was signed by Mr Vik (his signature was purportedly witnessed by his wife but there is a question, which it is not possible to resolve, whether she actually witnessed his signature) was added to the Execution Version instead of the unsigned signature page of Version 6.

85. In the circumstances it is not surprising that the judge was under the impression that Mr Vik had signed both versions. Evidently she did not notice that the signature page of the Execution Version disclosed by Carlyle had a footer indicating that it was part of Version 5 rather than Version 6. In this she was mistaken. But I reject the submission that this mistake undermines the judge's conclusions about Mr Vik's credibility. It does not detract in any way from her fundamental point, which was that Mr Vik had deliberately attempted to mislead the court by disclosing what purported to be a concluded deed of transfer dating from September 2008, when in fact the transfer had not taken place until December 2009. Nor does it detract from the judge's valid point that the disclosed document had been deliberately altered in manuscript to create this impression. In any event, the evidence about the Carlyle deeds of transfer was only one of many factors in the judge's overall assessment of Mr Vik's credibility.

86. As this new case was not included in the grounds of appeal attached to Mr Vik's appellant's notice and emerged only in the course of oral submissions, Mr Vik would need permission to advance it, although in the event no application was made. No explanation has been provided why no notice of this case was given to the Bank. As I am satisfied that, despite the judge's error in thinking that Mr Vik had signed both Version 5 and Version 6, this was a peripheral matter which did not affect her essential reasoning, I would refuse permission.

Unrealistically high standard

87. Mr Matthews' third general criticism of the judge's approach was that she unjustifiably interpreted "the familiar and ordinary conduct of a witness under cross-examination about historic events as disingenuous and indicative of dishonesty". His submission was that honest witnesses would ordinarily wish to familiarise themselves with the terms of any documents shown to them, would seek to ensure that they had understood the question before answering, and would tell the court if they did not know or could not recall the answer to a question, rather than speculating what the answer might be. Here, Mr Vik was being asked about evidence which he had given

seven years ago, which was concerned with events several years before that. The Bank's evidence was substantial and the documentation was voluminous. It was therefore not surprising that Mr Vik did not have a good recollection of some matters and was not familiar with all of the documentation. Accordingly the judge had been unfair in rejecting evidence where Mr Vik had said that he did not remember, or that he did not understand the question, or where he was not familiar with some of the documents, or where his evidence at the committal hearing in 2022 did not precisely correspond with what he had said at the Part 71 hearing in 2015.

88. I would reject this criticism of the judge's approach. Any judge assessing the credibility of a witness would have in mind the matters on which Mr Matthews relied. It is, however, part of the judicial function to determine whether a witness's difficulties in answering questions are due to a genuine lack of recollection or understanding, or to unfamiliarity with the documents, or whether (as sometimes happens) they represent an attempt to obfuscate or evade the question. I see no reason to think that the judge overlooked the need to weigh both possibilities carefully before reaching her conclusion. Having done so, she was entitled to conclude that there were many occasions on which Mr Vik was being deliberately evasive or disingenuous in his evidence, and that this was relevant to his general credibility.

89. I would accept that some, but by no means all, of the examples which the judge gave do not strike the reader (or at any rate this reader) when considered in isolation on the transcript as particularly sinister. But that is not the point. It is well recognised that a transcript cannot recreate the atmosphere of a hearing. It was the judge, who was fully immersed in this case over 11 days and who heard Mr Vik give evidence over four days, who was best placed to make this assessment.

Conclusion on overall credibility

90. For these reasons I would reject the three general criticisms of the judge's approach to Mr Vik's credibility. The approach which she adopted involved no error of law or unfairness to Mr Vik. The conclusion which she reached, that Mr Vik was not a credible witness, was properly open to her. It is not for this court to make findings about Mr Vik's credibility as a witness and the material which we have been shown represents only a small part of the evidence at the trial. Nevertheless, on the basis that Mr Vik's legal team has presumably selected for this appeal the examples most favourable to him, for my part I see no reason to doubt the judge's conclusion.

91. The position, therefore, is that the Bank had established, through Mr Hart's evidence, a strong case that Mr Vik had told deliberate lies at the Part 71 hearing and had deliberately failed to produce documents which he had been ordered to produce. That evidence, together with the documents which the Bank had obtained from third parties since the Part 71 hearing, demonstrated the implausibility of some of the evidence which Mr Vik had given at the Part 71 hearing; and demonstrated also that documents which on the face of it ought to have been disclosed, and which the Bank had subsequently succeeded in obtaining from other sources, had not been disclosed. As a practical matter, it was therefore for Mr Vik in his evidence to raise sufficient doubt about the Bank's case to leave the judge unsure about it. The fact that his evidence generally at the committal hearing was not credible, for all the detailed reasons which the judge gave, meant that he faced an uphill task.

The specific complaints

92. In these circumstances I can – and in my view should – deal with the specific complaints about the judge's findings relatively shortly. We are not trying the case, but only reviewing the judge's findings.

Beatrice and the Trust

93. The first point is that the judge was wrong to find that Mr Vik was guilty of giving deliberately false evidence about his knowledge of, and ability to provide information about, the assets of Beatrice and the Trust. Mr Matthews submitted that the questions which Mr Vik had been asked at the Part 71 hearing were ambiguous. He submitted, as he submitted to the judge, that the questions were, and were reasonably capable of being understood as asking, whether Mr Vik knew *exactly* what assets Beatrice and the Trust held at the relevant times, as distinct from whether he had *any* information about those assets.

94. The judge rejected this submission. She set out extensive passages from the cross examination at the Part 71 hearing, concluding that:

> "122. … The answers given by Mr Vik which are alleged to be false must be interpreted in context. Once the questions are read in context it is apparent that the answers which are alleged to be false were in response to questions which were of a general nature concerning Mr Vik's knowledge of the assets in Beatrice and the Trust and it is wholly implausible that the distinction now being advanced for Mr Vik that the substance of his answers was that he had given answers about the asset class but could not provide the detail was how Mr Vik could reasonably have understood the questions or did understand the questions."

95. I agree with that assessment.

96. There is one question, however, to which Mr Vik's answer is alleged to have been a lie, which taken in isolation may be ambiguous. Mr Vik was asked, "What funds of SHI is it [i.e. Beatrice] still holding?" His answer was that he did not know. It was suggested that the question could mean either "What funds *belonging to* SHI is Beatrice still holding?" or "What funds *derived from* SHI is Beatrice still holding?" However, when the evidence at the Part 71 hearing is read in context, it is apparent that the latter meaning is correct. That is to say, the question was about what had happened to the assets transferred from SHI to Beatrice. It is apparent also that the question was understood by Mr Vik in this way.

97. Mr Matthews submitted next that the judge was not entitled to draw the inference that Mr Vik's evidence was deliberately untrue. He embarked on a highly detailed analysis of the judgment and the evidence, leading to the conclusion that each of the steps in the judge's reasoning was wrong and material, such that each error independently rendered the finding of contempt unsafe. I do not propose to follow that course. It invited us essentially to duplicate the role of the trial judge. Mr Matthews' analysis

did not come close to persuading me that the judge's conclusion was "plainly wrong", "rationally insupportable" or one which "no reasonable judge could have reached".

98. On the contrary, the cumulative effect of the various factors on which the judge relied provided a sound foundation for her conclusion. In outline, Mr Vik had a strong motive to keep himself informed about the Trust's assets which (he claimed) was intended as an inheritance for his children; he retained the power to amend or revoke the Trust at any time; he acted as "Protector" of the Trust, with the power to appoint and dismiss trustees; he chose to exercise that power by appointing trustees closely connected with him (including his wife and daughter) who had no apparent knowledge or experience to manage such valuable assets; he was entitled to approve in writing all proposed payments to beneficiaries of the Trust; and multi-million-dollar transfers took place between SHI and Beatrice over a four-year period after the Trust was settled, apparently for the purpose of Beatrice funding litigation on behalf of SHI, which could not have happened without Mr Vik having knowledge of the assets available to Beatrice.

The Devon Park Interest

99. The judge found that Mr Vik had told deliberate lies at the Part 71 hearing about the assignment of the Devon Park Interest from SHI to Universal. As noted at [14] above, his evidence had been, in summary, that SHI sold the Devon Park Interest to VBI in 2012 pursuant to the 2012 Sale Agreement, dated "as of September 2012", under which SHI had sold all its non-cash assets to VBI; but that instead of the Interest actually being transferred, SHI continued to hold it on trust for VBI until 2014, when it was transferred to Universal on VBI's oral instructions; and that at the date of the Part 71 hearing, Mr Vik had no connection with Universal and nothing to do with SHI any more.

100. The judge considered this issue in considerable detail over 137 paragraphs of her judgment. She found that the somewhat convoluted account given by Mr Vik was untrue. She found that the 2012 Sale Agreement was not a genuine agreement, that SHI did not sell the Devon Park Interest to VBI, and that it did not transfer it to Universal on VBI's instructions. Rather, the Devon Park Interest remained an asset of SHI until August 2014, when it was transferred directly from SHI to Universal pursuant to the terms of an Assignment and Assumption Agreement between SHI, Devon Park and Universal dated as of 29th August 2014 ("the AAA", a document which the Bank had obtained through litigation in New York), and Mr Vik continued during 2015 to have an ongoing interest in it following its transfer to Universal.

101. Mr Matthews took issue, once again, with every step in the judge's reasoning, although he concentrated much of his fire on this part of the case on the judge's conclusion that the 2012 Sale Agreement was not a *bona fide* agreement. The agreement was disclosed in April 2014, and was therefore clearly in existence by that date as a document, but there were ample grounds to suggest that it did not represent a genuine agreement between SHI and VBI, the company owned by Mr Vik's father. For example, there were no contemporary documents evidencing its coming into existence, either in 2012 or at any later time, and there was no evidence about how or by whom it had been produced. It is highly unlikely that it sprang into existence fully formed in the mind of its drafter. There were also oddities about the agreement, even allowing for a degree of informality in an agreement between Mr Vik and his father.

Thus, although it purported to be a sale of assets, the assets to be sold were not identified; although the assets (unidentified) were supposedly to be held on trust for VBI, the agreement was subject to Norwegian law which does not recognise the concept of a trust; the existence of a trust was inconsistent with the terms of the AAA, which stated expressly that SHI was the legal and beneficial owner of the Devon Park Interest; and the agreement was only disclosed, self-servingly, with a view to resisting the imposition of conditions in relation to SHI's appeal on the ground that SHI did not have assets available to satisfy any such conditions.

102. Further, the suggestion that Mr Vik had no connection with Universal, to whom the Devon Park Interest was transferred in 2014 pursuant to the AAA, was clearly untrue. The documents which the Bank had obtained via a subpoena issued in 2016 (i.e. after the Part 71 hearing) against Mr Johansson contradicted the account which Mr Vik had given. They demonstrated that Mr Vik had received a distribution notice for a distribution of US $2,503,664 from Devon Park in May 2015, followed by a further distribution notice for US $44 million in December 2015, to neither of which (on his case) he was entitled. As the judge put it:

> "245. The allegations by the Bank in relation to the Devon Park Interest are ones where the inferences to be drawn from the contemporaneous documentary evidence need to be weighed against the evidence of Mr Vik."

103. Mr Vik sought to escape from the contemporary documents by saying, for example, that he had understood the question whether he had a connection with Universal to be limited to whether he was the owner or a director of the company. The judge considered the context in which the question had been asked and concluded that this limited interpretation was not credible.

104. The judge's overall conclusion as to the Devon Park Interest was that:

> "332. In assessing the weight to be given to the documents concerning Devon Park which are discussed above and considering the explanations provided by Mr Vik, it is notable that the documents only came to light after Mr Vik gave evidence at the XX Hearing.
>
> 333. The evidence of Mr Vik is that the contemporaneous documents now before the Court which on their face are clearly contrary to the purported divestment by SHI to VBI of the beneficial interest were a product of mistake and/or of concealment by SHI of the true position from Devon Park for no good reason other than convenience.
>
> 334. For the reasons discussed above I prefer the evidence of the contemporaneous documents and the inferences which can be drawn from them. Whilst considering the submissions advanced by Mr Vik as to why a particular piece of evidence is not compelling or is open to a different rational or plausible explanation, the Court has to stand back and look at the totality of the 'coincidences, errors and misunderstandings'.

> 335. For the reasons discussed above I do not accept that read in context Mr Vik did not understand the questions that were put to him in this regard. Further he is a highly intelligent man who is fully abreast of the issues in this litigation.
>
> 336. The irresistible inference from the contemporaneous documents is that Mr Vik had a connection to Universal in December 2015 and that he had an economic interest in the Devon Park Interest at that time. …
>
> 341. Accordingly, I find that Mr Vik deliberately gave false evidence to the Court in relation to Devon Park as follows:
>
> Mr Vik knew at the date of the Vik XX Hearing that:
>
> i) The Sale Agreement was not a bona fide agreement entered into between SHI and VBI;
>
> ii) SHI did not sell the Devon Park Interest to VBI pursuant to the Sale Agreement, nor transfer it out of SHI on VBI's instructions pursuant to the terms of the Sale Agreement. Instead, the Devon Park Interest remained an asset owned by SHI until 29 August 2014, when it was transferred by SHI to Universal pursuant to the terms of the AAA.
>
> iii) Mr Vik continued as at the date of the Vik XX Hearing to have a connection to Universal, in that Mr Vik continued as at the date of the Vik XX Hearing to have at least a direct (alternatively indirect) economic interest in the Devon Park Interest; and
>
> iv) Mr Vik continued to have a connection and/or involvement with the affairs or former affairs of SHI, given his continuing interest in the Devon Park Interest."

105. It seems to me, despite Mr Matthews' submissions, that the judge's conclusions were unsurprising and almost inevitable. At all events, they were conclusions which she was entitled to reach, firmly based as they were on contemporary documents (or in some cases, the absence of contemporary documents which would clearly have existed if Mr Vik's account had been true). In particular, it is not surprising that the judge regarded the contemporary documents as far more reliable than the oral evidence of Mr Vik. The fact that the documents were only obtained after the Part 71 hearing, and even then from third parties and not from Mr Vik, was particularly damning.

The IFA Shares

106. To some extent the judge's conclusions concerning the IFA Shares followed on from her conclusions concerning the Devon Park Interest. The IFA Shares were also said by Mr Vik to have formed part of the assets sold to VBI pursuant to the 2012 Sale Agreement which were then held on trust for VBI by SHI until they were transferred

to Universal pursuant to an oral direction given in 2014. However, documents obtained by the Bank since the Part 71 hearing included documents filed with the German authorities concerning the ownership of the IFA Shares which stated that Mr Vik's share of voting rights in IFA was 29.09% and had "been held directly by Mr Vik since 29 July 2013". Mr Vik's evidence at the committal hearing was that he personally was the legal owner of the shares, but he held them on trust for VBI.

107. The judge pointed out that this was inconsistent with the suggestion that it was SHI which held the shares on trust for VBI pursuant to the 2012 Sale Agreement:

> "357. In my view there is ample material in relation to Devon Park to justify the conclusion on the bona fides of the Sale Agreement without the need to rely on the additional regulatory notifications in relation to IFA. However, there is additional material and the public filings in relation to the IFA Shares and the IFA annual report which on their face are totally inconsistent with Mr Vik's position that SHI/Mr Vik held the assets for VBI pursuant to the Sale Agreement.
>
> 358. As referred to above, Mr Vik's own evidence is that he held the IFA Shares personally from 2013 upon the liquidation of Vik Beteiligung. The notification that SHI ceased to have an interest in the IFA Shares in 2013 would appear to speak for itself and was not contradicted by Mr Vik in his evidence. Accordingly, the crux of the additional evidence in relation to the Sale Agreement and whether the IFA Shares were transferred to Universal on the instruction of VBI lie in the need to reconcile Mr Vik's evidence that he held the IFA Shares personally and not for SHI with the purported position under the Sale Agreement that the assets were held by SHI on trust for VBI and this evidence stands independently of the regulatory notifications."

108. The judge found at [363] that Mr Vik was unable to reconcile these points. Instead his evidence was "another example of Mr Vik trying to obfuscate when faced with evidence which is clearly inconsistent with his case". She concluded:

> "378. The evidence in relation to the IFA Shares and the inferences to be drawn have to be taken together with the evidence in relation to Devon Park and the conclusions of the Court on Devon Park. As was said in *Gulf Azov Shipping* [*Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 21]:
>
> > 'It is not right to consider individual heads of contempt in isolation. They are details on a broad canvas…'
>
> 379. For the reasons discussed above I am satisfied that Mr Vik's evidence as alleged by the Bank in relation to the IFA Shares was deliberately false. I find that Mr Vik knew at the date of the XX Hearing:

> i) The Sale Agreement was not a bona fide agreement entered into between SHI and VBI; and
>
> ii) SHI did not sell the IFA Shares to VBI pursuant to the Sale Agreement in 2012, nor transfer it out of SHI on VBI's instructions pursuant to the terms of the Sale Agreement in 2014.
>
> iii) Instead, Vik Beteiligung owned the IFA Shares until on or around 29 July 2013, when the IFA Shares were transferred from Vik Beteiligung to Mr Vik personally. Mr Vik subsequently transferred the shares to Universal in or around May 2014."

109. There was evidence to support these conclusions and the judge was entitled to reach them.

Electronic documents

110. The Part 71 Order made by Mr Justice Teare expressly required Mr Vik to "produce all documents in [SHI's] control which relate to [SHI's] means of paying the amount due" under the judgment of Mr Justice Cooke. However, Mr Vik did not produce a single electronic document. That is remarkable in the modern age when so much business communication is carried on by email. That electronic documents responsive to Mr Justice Teare's order had existed, as well as being common sense, was confirmed by the documents subsequently obtained by the Bank from third parties, including documents relating to the Devon Park Interest, the IFA Shares and the Carlyle and Reiten partnership interests. The documents thus obtained included emails, in some of which Mr Vik was the addressee, while in others he had been copied.

111. Mr Vik sought to explain the absence of electronic documents by saying that he had a long-standing policy of deleting emails. He accepted, however, that he had refrained from deleting emails during the period between October 2008 and July 2012 in view of the litigation, and also that he had kept some "important" emails. The judge observed that:

> "411. Given that on Mr Vik's evidence some emails were preserved, the stark overriding point is that there were no emails disclosed which were responsive to the Part 71 Order."

112. The judge rejected Mr Vik's explanation. Mr Matthews submitted that she had been wrong to do so, but it seems to me that it would have been surprising if she had reached any different conclusion.

Mr Johansson's documents

113. Since the Part 71 hearing the Bank had obtained documents from Mr Johansson pursuant to a subpoena in New York, which ought to have been disclosed pursuant to the Part 71 Order.

114. Mr Vik gave contradictory evidence about Mr Johansson's position. At one point during the Part 71 hearing he said that Mr Johansson had acted for SHI in providing documents responsive to the Part 71 Order, while at the committal hearing he suggested that he was no more than an external consultant. The judge found that Mr Johansson was working for SHI at the time of the response to the Part 71 Order and that it was not credible that he would have refused to hand over documents requested by Mr Vik. She found that Mr Vik's argument that he did not know of the existence of documents subsequently obtained from Mr Johansson was simply not credible. Some of the documents in question, notably those relating to Devon Park, were adverse to Mr Vik's position, which provided a motive for them to have been deliberately suppressed. All these findings were fully open to her on the evidence.

Other third party documents

115. A similar position applied in relation to documents held by banks which SHI had a right to obtain. Again Mr Vik had given contradictory evidence. The judge found that he had deliberately failed to ask for anything other than the bank statements which had been disclosed. I can see no basis on which that conclusion can be challenged. Mr Matthews suggested, somewhat faintly, that the judge did not apply the criminal standard of proof to this allegation, but there is nothing in the judgment to support this submission.

The applications to adduce further evidence

116. Mr Vik applied to adduce various items of further evidence, which were not before the judge. It is common ground that an application to adduce further evidence on appeal in contempt proceedings must be determined applying by analogy the principles contained in section 23(1) of the Criminal Appeal Act 1968. This provides:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice —
>
> …
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

117. The evidence which Mr Vik seeks to adduce is as follows:

(1) a memorandum from Norwegian lawyers, Kluge Advokatfirma DA, which, while acknowledging that "Norwegian law contains no concept of 'trust', per se, whereby the seller holds assets for the purchaser", suggests that an agreement governed by Norwegian law which provides for the seller to retain possession of assets after they have been sold would be valid and enforceable between the parties;

(2) a three page document, signed by Mr Vik as a director of SHI on 28th October 2013, created for the purpose of the litigation and which sets out a list of debts owing from SHI to VBI as at 30th September 2013, which (because they are not included) is said to refute the judge's suggestion that certain payments may have been made to SHI by way of loan;

(3) an extract from a transcript of a deposition of Mr Johansson in New York on 4th May 2017 in which he says that he made the manuscript amendments to Version 5 of the Carlyle transfer deeds and that Mr Vik executed the documents sometime after the summer of 2009;

(4) a heavily redacted email from SHI's New York attorneys, Zaroff & Zaroff, which shows that they were aware on 22nd July 2009 of the existence of the 2012 Sale Agreement, but which incidentally also demonstrates that Mr Vik was lying at the committal hearing when he said that he did not review the AAA but merely signed it: on the contrary, he asked the lawyers for advice about it and, although the content of the advice has been (quite properly) redacted, it is plain that he received that advice;

(5) an affirmation by Mr Manuel Blanco, the managing director of VBI, in which he says that he entered into the 2012 Sale Agreement on behalf of VBI.

118. I would not admit this evidence. It was all available to Mr Vik at the committal hearing. There has been no real explanation why it was not produced. It is of minimal probative value. It goes mainly to the question whether the 2012 Sale Agreement was a genuine agreement, but does not begin to answer the many serious questions to which that agreement gives rise.

The appeal from the Committal Order

119. So far as sentencing is concerned, the judge set out the guidance in the leading case of *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524, [2019] 4 WLR 65:

> "39. … The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of

> those identified by Popplewell J in *Asia Islamic Trade Finance Fund* …
>
> 40. Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in *Solodchenko* [*JSC BTA Bank v Solodchenko* (No. 2) [2011] EWCA Civ 1241] as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case … However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.
>
> 41. As the judge recognised, it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. …"

120. The judge observed that there were multiple breaches by Mr Vik. He had deliberately failed to provide documents, not just a few documents, but a wholesale failure to provide any electronic documents and to obtain documents from third parties, most notably Mr Johansson. He had lied to the court at the Part 71 hearing in several respects. The multiple nature of Mr Vik's breaches increased his culpability. It remained the position that the Bank had far from a complete picture of the assets which may be available to discharge the judgment debt and in some respects that prejudice was likely to be irremediable. Mr Vik had played a significant role in keeping the Bank out of its money since 2013. Culpability and harm were, therefore, both high.

121. Conversely, there was no significant mitigation and no remorse or apology. While there had been delay, Mr Vik was himself the primary cause of the delay. There was no evidence that he was suffering from ill health, such as to preclude a prison sentence. Although Mr Vik had indicated a willingness to cooperate, at any rate if his appeal failed, the judge had strong doubts whether this willingness was genuine on his part.

122. In these circumstances the judge concluded that the custody threshold had been passed, a point which had not been disputed, and that the harm and culpability of the contempt placed the offending towards the top of the range, bearing in mind the two-year maximum sentence. She concluded that:

> "70. Taking the contempt of failing to give information as the lead content, which is thus aggravated by the failure to produce documents, the shortest term that can be passed commensurate with the seriousness of the contempts is that Mr Vik should be committed to prison for 20 months for failing to give

> information at the cross-examination hearing and 10 months, concurrent, for failing to produce documents. …
>
> 72. I indicate that of the total sentence of 20 months, I regard 10 months as the punitive element for the historic contempt and 10 months as the coercive element to encourage future co-operation."

123. The judge then considered whether that sentence should be suspended, a balance which she regarded as difficult, and concluded that it should be on condition that Mr Vik complied with various conditions as to future co-operation.

124. Mr Matthews submitted that this sentence was too severe. He pointed to other cases in which shorter sentences had been imposed and submitted that the judge had failed to apply the principle that the sentence imposed should be the shortest possible sentence in the circumstances.

125. In my judgment these submissions were hopeless, at any rate on the basis (which I have now held to be correct) that the appeal against the findings of contempt should fail on all grounds. The sentences imposed in other cases are a very uncertain guide, as has often been pointed out, while it is manifest from the passage of the judge's judgment which I have set out that she had well in mind the principle that the sentence imposed should be the shortest possible sentence which is commensurate with the seriousness of the contempts committed.

Disposal

126. I would dismiss the appeal. The judge was fully entitled to find that Mr Vik was guilty of contempt of court and to impose the sentence which she imposed.

Lady Justice Andrews:

127. I agree. I would just like to add a few words of my own on the topic of permission to appeal in cases of committal for contempt, which has the potential to engender unnecessary procedural complexity and, as the case of *Nambiar* v *Solitair Ltd* illustrates, can lead to unfortunate results for someone who seeks permission to appeal which, in the event, turns out to be unnecessary. Hopefully the observations of Males LJ in paras 29 to 43 above and my observations in this short concurring judgment will help to avoid a repetition of the peculiar circumstances that led to the outcome in that case.

128. Section 54 of the Access to Justice Act preserves the unfettered right of appeal against a committal order. That is an order committing someone to prison for contempt (even if that order is suspended). It is well settled that orders of an ancillary nature, even if they happen to be included in the committal order, cannot be appealed without permission. Nor can orders which pass a lesser sentence, such as a fine.

129. I agree that it should be open to a person whose liberty is at stake, when appealing against a sentence of imprisonment for contempt, to argue that they were not in contempt of court. The language of s.13(1) of the 1960 Act appears to me to be wide enough to encompass this. It follows that the unfettered right of appeal conferred by

s.54 of the Access to Justice Act 1999 cannot be confined to those appeals, or aspects of appeals, which put in issue the question whether the appellant's behaviour crossed the custody threshold, or which challenge the length of the sentence imposed.

130. If that is so, it would be invidious if the right to appeal against the findings of contempt were to depend on the happenstance of whether the judge took the sensible course of directing a further hearing at which matters of mitigation and sentence would be considered. Indeed that might be the fairest thing for the judge to do, especially given the practical difficulties encountered by persons charged with contempt in finding lawyers who are willing to represent them, notwithstanding that Legal Aid is available. It is not unusual for the lawyers to be instructed only at the sentencing stage. When appealing against a committal order, the appellant must be entitled to challenge the findings that he was in contempt, irrespective of whether those findings were made at an earlier hearing and were recorded in an earlier order. The specific acts of contempt must, of course, be recorded in the committal order itself: see Arlidge, Eady & Smith on Contempt of Court, 5th Edn, para 15-73.

131. An order which records findings of contempt but which does not commit someone to prison is not a committal order, therefore, permission is required to appeal against such an order. That could pose a conundrum for the prospective appellant who wishes to challenge those findings, if they are not sure whether the behaviour concerned is likely to be viewed as crossing the custody threshold. However, in agreement with Lord Justice Males, I consider that the answer lies in asking the judge to direct that the time for appealing shall not run until after the sentence is determined. Where the alleged contemnor is an individual, an extension of time should normally be granted, as Moulder J did in the present case. Different considerations may apply to companies, as illustrated by the case of *Masri*.

132. The extension of time for appealing would mean that if, following the sentencing hearing, any sanction is imposed which is less than a committal order, that person will still be able to seek the permission of the judge or of this Court to appeal against either or both the findings of contempt and the sanction. If a committal order is made, the individual will be entitled to appeal against that order as of right, including against the findings of contempt, and there is no risk of their becoming disadvantaged by the outcome of an earlier application for permission to appeal against the order made following the earlier hearing. They will not need to appeal against that order as well. If they confine themselves to appealing against the committal order, it will not be open to their opponent to contend that they should have sought permission to appeal against the earlier order, or that a failure to do so creates some kind of bar to their challenging the findings of contempt.

Lord Justice Nugee:

133. I agree with both judgments.