Neutral Citation Number: [2024] EWCA Civ 33

Case No: CA-2023-000323

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
MRS JUSTICE COCKERILL
[2023] EWHC 135 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2024

Before :

LORD JUSTICE SINGH
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE SNOWDEN

- -

Between :

ADM INTERNATIONAL SARL	**Claimant/ Respondent**
- and -	
(1) GRAIN HOUSE INTERNATIONAL S.A. (FORMERLY KNOWN AS COMPAGNIE AGRICOLE DE COMMERCIALISATION ET DE CONDITIONNEMENT DES CEREALES ET DE LEGUMEINEUSES S.A.) **(2) ELHACHMI BOUTGUERAY**	**Defendant/ Appellant**

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Bob Moxon Browne KC and **George Hilton**
(instructed by **Sterling Stamp Law Ltd**) for the **Appellant**
Lawrence Akka KC and **Patrick Dunn-Walsh**
(instructed by **Squire Patton Boggs (UK) LLP**) for the **Respondent**

Hearing dates: 27 June, 20 December 2023

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Approved Judgment

This judgment was handed down remotely at 2:00 pm on 25 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell :

Introduction

1. This is an appeal by the first appellant ('GHI') and the second appellant, GHI's CEO ('Mr Boutgueray'), against a decision of Cockerill J that (1) both were in contempt of court in four respects; (2) GHI should pay a fine of £75,000; and (3) Mr Boutgueray be committed to prison for a total of 12 months. The appeal is against the findings of contempt and against the sentence imposed.

The factual and procedural background

2. The Judge set out a clear summary of the background at [2]-[34] of her judgment. I have gratefully drawn on it in the summary which I give, but have expanded it to take into account matters relevant to the way the appeal was argued.

3. ADM is a Swiss company which buys, processes and sells agricultural products. It is a subsidiary of the Archer Daniels Midland Company, an American Company which is listed in the Fortune 500.

4. GHI is a Moroccan company which claims to be a leader in the importation of cereals into Morocco. Mr Boutgueray has at all material times been a director and the CEO of GHI, and Chairman of its parent company. His brother Mr Brahim Boutgueray was another director of GHI, against whom contempt proceedings were also pursued before Cockerill J. She found that he was not in contempt and there is no appeal from that finding. I need say no more about him.

5. Between 2014 and 2016 ADM had entered into several contracts with GHI for the sale of various agricultural commodities. Following disputes the parties entered into a written instalment payment agreement, which was governed by English law and contained a clause providing for disputes to be resolved by GAFTA arbitration. GHI paid the first instalment due to ADM under the payment schedule on 19 October 2017, but failed thereafter to make any further payments of the instalments when they fell due. On 8 December 2017, ADM commenced a GAFTA arbitration against GHI for breach of the instalment agreement. GHI did not participate in the arbitration. On 17 July 2018, the GAFTA Tribunal published an award against GHI for US$3,423,711.14 plus interest and EUR 152,058.07 plus interest, together with £7,865.00 in arbitration fees and expenses. On the same date a copy of the award was sent to GHI by email and courier at its Morocco address. There is a 30 day period under the GAFTA Arbitration Rules for appealing to the GAFTA Board of Appeal. GHI did not appeal. Nor did GHI make any application to the High Court to challenge the award on any of the permitted grounds provided for in the Arbitration Act 1996. GHI was subsequently posted as a defaulter by GAFTA.

6. On 23 January 2019, the Casablanca Commercial Court gave ADM permission to enforce the award in Morocco. That Order included an order for provisional enforcement notwithstanding any appeal.

7. On 30 January 2019 Bryan J made an order under s.66 Arbitration Act 1996 giving ADM permission to enforce the award against GHI as if it were a judgment of the court.

8. At a hearing on 22 March 2019, Waksman J granted an asset disclosure order in aid of enforcement of the award, requiring GHI to serve an affidavit from a director or proper officer disclosing details of its worldwide assets above certain financial values within 14 days of service of the order ("the ADO"). The application was made on notice to GHI, which was duly served with the application by a bailiff in Morocco. GHI did not attend the hearing or communicate with ADM's solicitors about it. The information required to be provided on affidavit was identified in paragraph 1 of the ADO as follows:

 "(a) all of [GHI's] bank, building society or similar accounts with a balance exceeding US$50,000, wherever they may be in the world, whether in its own name or not and whether solely or jointly owned, giving the name(s) in which such account is held, the name of the bank, building society or other entity, the address of the branch at which the account is held, the number of the account, and the balance of the account;

 (b) all other assets located outside Morocco exceeding US$50,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets;

 (c) all other assets located in Morocco exceeding US$75,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and, details of all such assets."

9. The ADO included an order granting permission for it to be served out of the jurisdiction in Morocco. The ADO, endorsed with a penal notice, was duly served at GHI's offices in Morocco, but only after what ADM characterises as attempts to frustrate service, including making a criminal complaint against the first bailiff instructed to perform service. Service occurred by a bailiff at the fourth attempt in accordance with Moroccan law, including a covering letter summarising the disclosure required and drawing attention to the penal notice. GHI subsequently asserted that it had not been "duly notified", but that assertion was untenable and has not been maintained.

10. No affidavit was served within 14 days, or indeed, as will appear, for almost two years. The ADO ordered GHI to pay costs assessed in the sum of £55,000. Those costs have not been paid.

11. In the week commencing 13 May 2019 ADM's solicitors, Holman Fenwick & Willan LLP ('HFW') received a letter by courier signed by GHI's CEO (i.e. Mr Boutgueray, although no name was given and the signature was illegible) stating that GHI was in the process of instructing solicitors in England but it was taking some time for regulatory reasons, and asking for HFW's patience. HFW responded granting a short extension of the time for compliance to 24 May 2019. An email response said that "as part of the declaration to the High Court we have mandated Taylor Fladgate LLP to assist us with this reporting transaction. Our lawyer team has asked us [for] many documents that we are preparing in order to become one of their clients", and went on to seek an extension of the deadline to 7 June 2019. No extension was granted by HFW and there was no compliance with the ADO by 24 May (or indeed 7 June).

12. At a without notice hearing on 5 June 2019 Teare J granted ADM a worldwide freezing order against GHI's assets up to the sum of US$4 million in value until a return date. He gave permission for the order to be served out of the jurisdiction and by email to the

email address of Mr Boutgueray, at which it was duly served endorsed with a penal notice.

13. On 21 June 2019, at the return date hearing, Moulder J continued Teare J's order granting ADM a final worldwide freezing order on substantially the same terms. I shall refer to the order made by Teare J and continued by Moulder J as 'the WFO' which is the definition used in the committal application. The WFO ordered that GHI pay costs assessed at £67,000. Again GHI did not attend the hearing, of which it was on notice, and the costs have not been paid.

14. Paragraph 4(2) of the WFO prohibits GHI from in any way disposing of, dealing with or diminishing the value of any of its assets outside England and Wales up to a value of US$4 million; paragraph 7(2) provides that if the total unencumbered value of GHI's assets in England and Wales does not exceed US$4 million GHI must not dispose of deal with or remove them; and that if GHI has other assets outside England and Wales, it may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of its assets whether in or outside England and Wales remains above US$4 million. The WFO was in standard terms for a post-judgment freezing order in accordance with Appendix 11 to the Commercial Court Guide, subject to two points which should be noted. First, as is usual for a post-judgment freezing order, but unlike a pre-judgment freezing order, it did not make an exception for trading in the ordinary course of business (save for the preservation of perishable assets): see Gee on *Commercial Injunctions* 7th Edn 3-024 to 027. On the contrary paragraph 6 made clear that the prohibition applied to agricultural products and their proceeds, cargoes and any money standing to the credit of bank accounts. Secondly, the WFO did not have the standard paragraph for the provision of information which is included in order to enable the freezing order to be policed (see Gee at 23-006 and the cases and seminal article of Lawrence Collins, as he then was, cited at footnote 27). This was no doubt because the ADO had already been granted and served this function.

15. In November 2019, HFW received correspondence from Sterling Stamp Law Ltd ('Sterling Stamp'), a firm of English solicitors who are now on the record for GHI and Mr Boutgueray. Stirling Stamp said they were acting on behalf of GHI and attached a "Statement of Case/Defence" document, which was filed in the Commercial Court. It purported to be in support of an application to discharge the WFO and for losses caused by the WFO, although no such application had been made. Two matters may be noted. First it is clear that by this stage GHI had access to and had received legal advice from English solicitors. Secondly, that legal advice must have extended to the ADO. That follows from the fact that GHI was fully aware of the ADO, as is apparent from its earlier correspondence. Indeed the "Statement of Case/Defence" referred to the ADO; it was in this document that the untenable suggestion was made that it was not "duly notified" of the ADO, although the document also asserts that it was served on GHI on 3 April 2019. In taking advice in relation to the WFO and an application to discharge it, it is unrealistic to suppose that GHI did not also obtain advice in relation to the ADO, and in particular whether to comply with it, ignore it, or make an application to discharge it. The document filed made no suggestion that the ADO should be set aside. But nor was there any attempt to comply with it.

16. ADM then applied to the court for an order striking out the "Statement of Case/Defence" and requiring GHI to file a CPR-compliant application seeking any relief to which it considered it was entitled in a procedurally correct manner. This application was served

on Sterling Stamp by email on 2 December 2019 and by courier on 3 December 2019. On 6 December 2019, Cockerill J struck out the Statement of Case/Defence document and ordered GHI to issue a CPR compliant application to set aside the WFO, if it sought to do so, by 20 January 2020. GHI was ordered to pay £44,000 in costs. No such application to set aside the WFO was made. The costs order was not paid.

17. On 17 December 2019, the Casablanca Commercial Court cancelled the Moroccan enforcement order. ADM appealed to the Moroccan Cour de Cassation.

18. On 17 August 2020, ADM issued a committal application against GHI and Mr Boutgueray for failure to comply with the ADO ('the First Committal Application'). By an order of 23 October 2020 Butcher J dispensed with the requirement for the ADO to be personally served pursuant to CPR Rule 81.8(2)(a) and 81.24(2)(a), and granted permission for service out and by alternative means of the First Committal Application. Following service, on 14 December 2020 the First Committal Application was listed for hearing on 19 February 2021.

19. On 12 February 2021, a week before the hearing of the First Committal Application, GHI served Mr Boutgueray's first affidavit, sworn on 11 February 2021. It did not address the First Committal Application or explain the breach of the ADO but purported for the first time to comply with the ADO. In relation to the disclosure of bank accounts and similar required by paragraph 1(a) of the order (where the threshold was US$50,000), it stated that there were none outside Morocco, and gave details of accounts at the Casablanca branch of 7 banks, all of which were said to be overdrawn at the date of the ADO and the date of the affidavit, save one where there was a credit of a negligible amount. The affidavit also said that GHI benefitted from banking facilities with several banks, which were not identified. As to paragraph 1(b) of the ADO, the affidavit stated that GHI had no assets outside Morocco exceeding US$50,000. As to paragraph 1(c), which concerned assets within Morocco in excess of US$75,000, it listed 8 properties, with values attributed to each (being the same value as at the date of the ADO and as at the date of the affidavit). Some values were precise to the dirham, some no more precise that 2.5 million dirhams. The total was the equivalent of about US$43 million. None gave addresses for the properties, and the description of their nature (e.g. "land", "construction" "retail"), and location only in general terms, made any checking on their existence, ownership or true value in most cases impossible without further details.

20. In the light of the last minute disclosure, ADM agreed to adjourn the committal hearing listed for the following week. On 2 March 2021 the application was relisted to be heard on 14 May 2021.

21. Meanwhile on 17 February 2021 HFW wrote to Sterling Stamp pointing out that Mr Boutgueray's first affidavit did not identify whether the values attributed to the properties in Morocco were unencumbered values. GHI was asked to clarify the position, and if the properties were encumbered, to give details of any mortgages charges or similar and to state the unencumbered value and give details of any mortgages, charges or similar. There was no response.

22. To address various deficiencies in the disclosure ADM issued a disclosure application on 29 April 2021 (the 'Further Disclosure Application'). The application was supported by an affidavit of Ms Pritchard dated 21 April 2021 which, amongst other things, said that if the value of the Moroccan properties which Mr Boutgueray identified was not the

unencumbered value, that would involve a breach of the ADO, which required the unencumbered value to be given.

23. On 7 May 2021, (a week before the relisted committal hearing) GHI served two further affidavits sworn by Mr Boutgueray, his second affidavit dated 21 April 2021 and his third dated 26 April 2021 (entitled First Affidavit).

24. Mr Boutgueray's second affidavit addressed particular aspects of the further disclosure which ADM had sought. His third affidavit addressed the contempt application. It began with an apology for the events leading up to the application, and assured the Court that GHI intended no disrespect in failing to comply with the ADO. It asserted that because GHI is based in Morocco and had no knowledge of the English legal system, he and GHI did not understand what was requested when receiving emails from HFW; that they believed that the Award was unenforceable for procedural irregularities, which was said to be confirmed by the Casablanca Court of Appeal decision; and that because "forum hopping" was not allowed, he did not believe the Award was enforceable in England. They were comforted in their conclusion that the Award was not enforceable in England by the fact that GHI had no assets here. He said that he and GHI did not believe that "[ADM] was entitled to obtain the [WFO] and the [ADO] or that they were obliged to respond to them." This latter assertion does not sit happily with the steps taken with the benefit of legal advice in 2019 culminating in the Statement of Case/Defence document purportedly in support of an application to discharge the WFO. He said that although GHI's position was that he believed that the ADO and WFO should not have been obtained because the Award was procedurally irregular, he now understood that GHI had no choice but to comply with them and that they had now taken steps to do so. He asserted that now that GHI fully understood its obligations, it had sought fully to comply with them. It ended with a further apology.

25. The second affidavit, addressing further disclosure, made something of a mockery of the apology and assertion of late compliance. In relation to credit facilities, it stated that none had been contracted after 23 March 2019, and gave no details of them. In relation to the request for details of any mortgages on the properties in Morocco, it addressed only charges imposed after 23 March 2019. It revealed preservation orders extant on 6 of the 8 properties, with the encumbrances identified as totalling about US$5m. As will be seen, this was seriously inaccurate. Nevertheless para 29 of the third affidavit treated this as compliance with paragraph 1(c) of the ADO, thereby treating that paragraph as requiring disclosure of unencumbered values.

26. Once again as a result of the late service of this evidence, the parties agreed that the committal hearing could not proceed the following week, but disagreed about the terms of an order. Accordingly, the listing on 21 May 2021 was used as a directions hearing. GHI was represented by counsel, Mr Hilton, instructed by Sterling Stamp. In respect of the First Committal Application, Calver J ordered it to be adjourned, and that unless relisted by 24 June 2021, it be dismissed with costs reserved. He also confirmed that ADM would not be prevented from bringing fresh committal proceedings in due course in its place. In respect of the Further Disclosure Application he ordered GHI to serve any evidence on which it wished to rely by 11 June 2021. He ordered GHI to pay 50% of the costs of the hearing summarily assessed at £10,000. Those costs remain unpaid.

27. On 10 June 2021 GHI served Mr Boutgueray's fourth affidavit, dated 3 June 2021, in response to the Further Disclosure Application. As with his first and second affidavits

it gave partial but inadequate disclosure. In relation to the 8 properties in Morocco, it gave the registration details ('*titre foncier*'). It identified credit facilities which were current at the end of May 2021 with 6 banks. In all but one case the debit balance was said to exceed the amount of the facility, the exception being one where a credit equivalent to some US$2,500 remained available.

28. ADM did not seek to relist the First Committal Application before 24 June 2021 and accordingly it stood dismissed in accordance with Calver J's order.

29. On 2 July 2021 the Further Disclosure Application was heard by Cockerill J. Again GHI was represented by Counsel. Cockerill J made a further disclosure order ("the FDO") on that date, requiring GHI to serve an affidavit from a director or proper officer by 23 July 2021 disclosing the source of payment of its legal expenses; and in respect of the credit facilities referred to in Mr Boutgueray's first and fourth affidavits (1) the terms of each credit facility, with copies of any relevant contractual or other documentation setting out those terms and (2) periodic statements of account showing transactions affecting each facility from June 2019 to date. GHI was ordered to pay costs of £20,000. It has not done so.

30. ADM granted a two week extension for compliance with the FDO. GHI did not comply. On 13 August 2021, a week after the expiry of the extension, Sterling Stamp served Mr Boutgueray's fifth affidavit in purported compliance with the FDO. The terms of the credit facilities had significant parts redacted. Monthly bank statements were mostly provided, but did not include:

    (1) May or June 2021 statements for the Arab Bank facility;

    (2) September and December 2019 and June and September 2020 statements for the Banque Centre Populaire facility;

    (3) April 2021 statements for the Credit du Maroc facility;

    (4) July 2021 statements for any of the facilities.

    Some of these absences were explained as being because there were no banking activities on those accounts during those periods.

31. ADM's solicitors, now Squire Patton Boggs ('SPB'), to whom the team from HFW had moved, wrote pointing out these deficiencies on 3 September 2021. Sterling Stamp responded that the letter had been shared with their clients and they were awaiting a response. Two months passed without any reply.

32. On 5 November 2021 SPB wrote pressing for the provision of the information. In the meantime SPB had obtained the official certificates of title filed with the relevant Moroccan property registries in relation to the 8 properties disclosed in Mr Boutgueray's first affidavit. These revealed that far from being encumbered only to the limited extent revealed in Mr Boutgueray's second affidavit, they were encumbered by mortgages, preventive seizures and expropriations to an extent which exceeded their stated value (and in one case the *titre foncier* given was erroneous). SPB's letter gave the details and asked for an explanation for the failure to disclose these encumbrances. The letter also pointed out that GHI had asserted that it was entitled to trade notwithstanding the WFO

on the basis that it owned real estate worth "well in excess" of US$4m (in an email of 16 February 2021); and that as a result of the information about the encumbered value of the properties, the trading appeared to be in breach of the WFO. The letter sought details of all dispositions of, dealings with, or diminutions in value of assets up to US$4 million since the WFO was made.

33. On 12 November 2021, Sterling Stamp responded by email with (a) unredacted copies of the credit facilities save in the case of Société Générale; (b) some but not all of the missing bank statements and (c) an explanation for failure to disclose the encumbrances on the properties. The explanation was, in effect, that (i) GHI did not think that charges registered before the date of the ADO had to be disclosed and (ii) GHI had been unaware of the precautionary seizures because they did not require the defendant or the title holder to be summoned. Again this explanation assumed that GHI understood the disclosure required by paragraph 1(c) of the Order to relate to unencumbered values and to require details of encumbrances. The email did not address the allegations of breach of the WFO or provide any of the details requested of dealing etc with assets. It concluded that GHI was preparing a claim to be brought in Morocco for "compensation for all the losses sustained as a result of the Arbitration Award that was cancelled by the Casablanca Court of Appeal."

34. On 17 February 2022 ADM issued the contempt application with which this appeal is concerned ('the Second Contempt Application'), supported by the 7th Affidavit of Ms Pritchard. The alleged contempts were framed as follows:

> **Contempt l**: In breach of paragraph 2 of the FDO GHI impermissibly supplied, on 12 August 2021, redacted copies of the credit facilities ordered to be provided; and (ii) as of today's date, has failed entirely to provide an unredacted copy of its credit facility with Société Générale.
>
> **Contempt 2**: In breach of paragraph 2 of the FDO, GHI's disclosure of bank account statements on 2 August 2021 omitted to provide
>
> (1) statements for Arab Bank for the months April and May 2021;
>
> (2) statements for Banque Populaire for September and December 2019;
>
> (3) any statements, for any bank, in respect of August 2021.
>
> **Contempt 3**: In breach of paragraph 1(c) of the ADO, GHI failed to disclose the following encumbrances on the following properties held by GHI inside Morocco:
>
> [Details were then set out of 19 separate encumbrances on 6 of the properties in the form of mortgages, preventative seizures and in one case an expropriation order.]
>
> **Contempt 4:** In breach of paragraph 4 of the WFO, GHI has dealt with or disposed of its assets up to the value of US$4m, and none of the exceptions set out under paragraph 8 of the Order is applicable. In particular:
>
> > (1) GHI admits that it has continued to trade but purports to justify this on the basis that it has real property worth in excess of US$4m.

(2) GHI's real property assets (its only substantial assets disclosed) are in fact worth substantially below US$4m, when subject to accurate valuation and when account is taken of encumbrances attaching to them.

Contempt 5: Mr Boutgueray is liable to be punished in his capacity as a director or other officer of GHI, because in relation to each of GHI's contempts alleged above:

(i) he knew of the relevant Court Orders; and

(ii) he either aided or abetted the First Defendant's breaches of the Court's order, or wilfully failed to take reasonable steps to ensure obedience to the terms of the Order.

35. On 12 March 2022, GHI served its evidence in response to the Second Contempt Application. It comprised an affidavit of Mr Adbellatif Oumary sworn on that date, who deposed that he was GHI's group legal officer and in charge of gathering and disclosing information on its behalf in accordance with the court orders. He said that GHI and Mr Boutgueray held a genuine belief that "[ADM] was not entitled to obtain the [WFO] and the [ADO] or that it (sic) was obliged to respond to them." This latter assertion again sits uneasily with the steps taken to set aside the WFO 2019 and is flatly inconsistent with the terms of para 27 of Mr Boutgueray's third affidavit of 21 April 2021 which recorded that he now understood that GHI was bound to comply and had taken steps to do so.

36. Mr Oumary said that in relation to the credit facilities, the redactions had been made to protect GHI's confidential information. The missing Société Générale facility had been requested from Société Générale but not yet received. I find this a surprising explanation for non-disclosure given that GHI had itself disclosed the facility in a redacted form. In relation to the missing bank statements, their omission had been an oversight. In relation to the encumbrances on the properties, it was asserted that the ADO only required disclosure of encumbrances imposed after the date of the order. In relation to the undisclosed precautionary orders imposed after that date, the explanation was that GHI was unaware of them, and that when making disclosure it had used extracts from the land registry titles extracted at the date of the ADO. This seems an improbable suggestion given that there was no purported compliance with the ADO until Mr Boutgueray's first affidavit in February 2021, and no information about encumbrances until his second affidavit in April 2021; it is therefore difficult to see any reason for extracting title records in March 2019, if, as asserted, GHI did not then think that it had to comply with the ADO and did not do so.

37. The Second Committal Application was listed for hearing for half a day on 6 May 2022. On the day before, 5 May 2022, yet further material was provided by GHI, including in particular the unredacted Société Générale credit facility.

38. Also on 5 May 2022, Andrew Baker J ordered that the hearing on 6 May 2022 be vacated. The hearing was then re-listed for 16 January 2023.

39. Meanwhile on 19 May 2022, the Morocco Cour de Cassation ruled in ADM's favour, quashing the Court of Appeal's decision and ordering a rehearing.

The contempt hearings

40. The contempt hearing took place before Cockerill J on 16 January 2023. GHI and Mr Boutgueray were represented by counsel, Mr Hilton. Mr Boutgueray did not attend, even remotely. Submissions were completed that day. At the conclusion of the hearing, the Judge indicated that she would provide her judgment on liability in draft to the parties, which would include her provisional views on sentencing so as to enable sentencing to be addressed in a further hearing on 26 January 2023, following which the judgment would be handed down in final form.

41. That draft judgment was circulated to the parties on 20 January 2023, including a provisional intimation that a sentence of 18 months imprisonment might be appropriate in Mr Boutgueray's case.

42. On 24 January 2023, two days before the sentence hearing, Mr Boutgueray swore a sixth affidavit, which was served on ADM on 25 January 2023. It had hundreds of pages of exhibits, including unpublished accounts, balance sheets and auditors' certificates, much untranslated from the original Arabic or French "due to the tight timeline/deadlines". Mr Moxon Browne KC, who appeared for GHI and Mr Boutgueray for the first time at the sentencing hearing the next day, described the material as not complete and still deficient. Cockerill J described it as 'an unfocussed mass of material'. The affidavit contained an apology to the court "for the events leading up to [the] application". It said that in the "earlier stage of the proceedings" he and GHI failed to understand what was requested from them, were confused, and distracted by the fact that ADM had already started enforcement proceedings in Morocco before launching proceedings in England; and that initially they had thought they were doing the right thing by adhering to the requirements of the Moroccan jurisdiction. It asserted that he and GHI did not intentionally aim to disrespect the judicial system in England, "jurisdiction to which we submitted ourselves voluntarily and in which we have the utmost faith and consideration". It is impossible to square this with the conduct described above and with the continuing failure to comply with any of the many costs orders made by the court. It asserted that the unencumbered value of the properties in Morocco was of the order of US$10 million.

43. The sentencing hearing took place before Cockerill J on 26 January, for a little over an hour at 9.15 am. The Judge rejected an application by the appellants to adjourn the sentencing hearing to permit further material to be deployed. The evidence of Mr Boutgueray in his sixth affidavit was relied on by way of mitigation in support of a submission that steps were now well under way, although incomplete, to purge the contempts. The Judge finalised and handed down her judgment later that day.

The Judgment

44. The Judge's findings were as follows.

45. In relation to Contempt 1 (supplying redacted copies of the credit facilities ordered to be provided; and failing to provide an unredacted copy of its credit facility with Société Générale), she held that the contempts were proved. The facility letters were required to be provided in unredacted form, whereas they had been "redacted to remove absolutely all material information." The contempts had since been purged by supply of the unredacted versions of the facilities, in the case of the Société Générale facility only after issue of the committal application. The Judge held that had this contempt stood alone

she would "by a small margin" have concluded that she was not sure that the breach was deliberate. Since it was "technical, historic and purged" it would therefore attract no penalty other than in costs.

46. As to Contempt 2 (failure to supply some of the bank statements), the Judge held that save for the August Statements which did not fall within the terms of the FDO, the failure to provide the other statements amounted to contempt. She accepted that if this contempt were taken alone she would not have been sure that the breach was deliberate, which she described as a charitable view. She came back to this question in the context of Contempt 3 and said that the case for it being a deliberate breach was strengthened by her conclusion in relation to Contempt 3 that GHI had access to legal advice and either ignored it, or chose not to take it, which resulted in a deliberate rather than technical breach of the order. However, as in the case of Contempt 1, she imposed no separate penalty for this contempt.

47. As to Contempt 3 (failure to disclose 19 encumbrances on 6 properties which rendered their beneficial value to GHI as virtually zero):

    (1) On the evidence advanced at the hearing, GHI did not argue that the encumbrances did not exist, nor that their effect on the unencumbered value of the property was otherwise than to reduce it to near zero. Rather, Mr Hilton argued that there was no obligation to disclose encumbrances because the "value" which paragraph 1(c) of the ADO required, was market value irrespective of encumbrances, not unencumbered value. The requirement for "details" did not therefore include a requirement for details of any encumbrances.

    (2) The Judge rejected this construction. Her essential reasoning was that the purpose of an asset disclosure order is to identify assets against which the judgment can be enforced, and for those purposes only unencumbered value can be relevant. "There would be no point in that context knowing the locations of [worthless] assets with a [meaningless] valuation of US$4 million." She drew support for that conclusion from a decision of Murray J in *Aspinall's Club Ltd v Lim* [2019] EWHC 2379 (QB).

    (3) The Judge said that the explanations which had been given in the evidence for failing to disclose the encumbrances were not such as to prevent her being sure that the breaches were deliberate.

    (4) She described the breach as serious, and not purged by GHI, but that the prejudice was limited because the true position was now known to ADM as a result of its own inquiries.

48. As to Contempt 4 (breach of the WFO by trading):

    (1) the Judge held that it was clear both from GHI's own skeleton argument, and debit entries in the bank statements, that GHI had been regularly trading. It was also clear that it treated this as permissible under the terms of the WFO by reason of the assertion in the 2021 email that GHI's disclosure established that it had real property assets in Morocco with an unencumbered value in excess of

US$4m. This was now shown to be untrue as a result of the information unearthed by ADM as to the true extent of the encumbrances.

(2) Mr Hilton submitted that the Judge could not be sure that there were no assets in Morocco worth US$4m or more, because the disclosure required only assets in excess of $75,000 in value, and there might be a total of US$4 million in value made up by a large number of assets which, because individually worth less than US$75,000, did not fall to be disclosed. This had to be advanced as a theoretical possibility, because there was no evidence from GHI to that effect. The Judge described this as an ambitious submission in the absence of any evidence of the existence of such assets other than a broad assertion, in paragraph 23 of Mr Boutgueray's third affidavit, that it had assets "well in excess" of US$4 million. The Judge said that she was sure on the evidence that there had been a deliberate and continuing breach of the WFO.

49. As to Contempt 5, in respect of Mr Boutgueray's liability for contempts committed by GHI, the Judge referred to the judgment of Beatson LJ in *Dar Al Arkan Real Estate Development v Al-Refai* [2014] EWCA Civ 715 [2015] 1 WLR 135 at [35] in support of the proposition that it was necessary to show that he knew of and was responsible for the company's breach. She concluded that his position and conduct were such that he fulfilled that test.

50. As to sentence, the Judge referred to Contempts 3 and 4 as deliberate and substantial, and Contempt 4 as continuing. She imposed a fine of £75,000 on GHI collectively for the four Contempts, without identifying separate penalties for them individually. In respect of Mr Boutgueray she committed him to prison for 12 months for contempt 3, for 6 months for contempt 4, to run concurrently, and to no separate penalty in respect of Contempts 1 and 2.

The Appeal

The law

51. A person to whom a court order is addressed is guilty of a contempt of court if they breach the court order, in accordance with principles which are helpfully summarised by Christopher Clarke J in *Masri v Consolidated Contractors Intl Co SAL & Ors* [2011] EWHC 1024 (Comm) at [144]-[147]. Third parties who have notice of a court order may also be guilty of contempt if they do something which is a wilful interference with the administration of justice: *Seaward v Paterson* [1897] 1 Ch 545, 555-6, *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 218-9. The former is often described as a civil contempt and the latter a criminal contempt. Although these labels are controversial and in some circumstances misleading, it is convenient to adopt them for the purposes of the issues which arises in this case. A criminal contempt is committed if the third party aids and abets a breach of the court order. It provides the mechanism whereby, for example, freezing orders are made effective against foreign defendants with money in English bank accounts: notice to the bank puts the bank at risk of committing a criminal contempt if it facilitates transfer of the funds, and so the account is effectively frozen.

52. The principal difference between civil and criminal contempt in the present context is the mental element involved in establishing the contempt, as Lord Oliver explained in *Attorney-General v Times Newspapers* at pp. 217-218. For a civil contempt the position

was accurately summarised by Briggs J in *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch) at [32]: "The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order." By contrast, for a criminal contempt by a third party what is required is a wilful interference in the administration of justice, which in the case of a court order requires an intention that it be breached.

53. Directors and officers of a corporation have been treated as a special category where the order is made against the corporation. At least since 1860 and at least until 2020 they could be treated as responsible as civil contemnors for breach of an order made against the corporation where they were culpably responsible for the corporation's failure to comply with the order in accordance with principles laid down in *Attorney General of Tuvalu v Philatelic Distribution Corp Ltd* [1990] 1 WLR 926 and *Dar Al Arkan v Refai*. An issue arises in relation to Contempt 5 as to whether the principle pre-dated 1860, and whether it survived a revision to the Civil Procedure Rules in 2020.

Contempt 1

54. There were two strands to Mr Moxon Browne's submission:

    (1) the Judge was wrong to treat the redactions in the credit facilities when first disclosed as having removed "absolutely all material information";

    (2) the Judge was right to treat the breaches as technical and historic, because they had been purged by the time of the hearing; and to have found, albeit by a narrow margin, that there was no deliberate intention to breach the orders; in those circumstances the Court ought not to have found the contempts proved because pursuit of them at the hearing was an abuse, relying on *Sectorguard* at [47].

55. The difficulty with the first of these submissions is that there was no evidential support for it in the material put before us. We were not provided with the credit facilities in either their redacted or unredacted forms. The only material before us casting light on the extent and significance of the redactions is to be found in the transcript of the hearing below, which records Mr Akka's submissions about them. In short there is nothing there, or elsewhere, to cast any doubt on the Judge's conclusion on the point.

56. As to the second strand, what Briggs J said in *Sectorguard* at [47] was this:

> "Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court's order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them,

so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them."

57. I would readily associate myself with those views. Moreover, I would accept Mr Moxon Browne's submission that although they are expressed in terms of case management powers, the abuse jurisdiction can be used at the committal hearing itself, in an appropriate case, to decline to find contempt even where, as here, there has been no prior application to dismiss the committal proceedings for abuse.

58. However, the principle has no application in the current case. When the committal proceedings were commenced GHI was still in breach of the ADO in having failed to supply an unredacted copy of the Société Générale facility. That breach, and its past breaches in relation to all the facilities, formed part of a pattern of behaviour relied on in support of arguments that the other breaches were deliberate; and as relevant to the appropriate sanction for GHI's conduct as a whole. In that context there was nothing abusive about proceeding with that contempt and asking the Judge to adjudicate upon it. Had it stood alone the position might have been different, but it did not stand alone.

Contempt 2

59. Mr Moxon Browne did not develop his arguments orally but relied on the same point he had made in relation to Contempt 1, that the contempt was technical and so ought not to have been determined. This complaint fails for similar reasons. The breach by failure to disclose bank accounts was in the end determined to be deliberate, and was part of a pattern of conduct properly relied on by ADM in support of the more serious alleged breaches in Contempt 3 and 4 and as relevant to sentence. There was nothing abusive about pursuing it.

Contempt 3

60. Mr Moxon Browne distilled his argument into three propositions which can be summarised as two arguments:

    (1) The word "value" in paragraph 1(c) of the ADO on its proper construction referred to the market value, not the unencumbered value, of the asset in question. This was, he submitted, its natural meaning, and supported by the contrast with the wording in the WFO, where the permission to dispose of or deal with assets was expressed to apply only insofar as "the unencumbered value" of the assets remained above US$4 million.

    (2) Alternatively, the ADO was ambiguous and Mr Boutgueray understood the order to refer to market value. The submission was that a person cannot be guilty of contempt where an order is capable of two alternative constructions and the defendant's conduct is only a breach on one of the two constructions, relying on *Redwing v Redwing Forest Products Ltd* [1947] RPC 67, 71 and *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695. This principle was said to apply whatever construction the defendant in fact puts upon it; alternatively, at least where he acts on one of those constructions which is held to be erroneous.

61. Mr Akka KC argued that the Judge had been right to construe "value" as meaning unencumbered value for the reasons she gave. As a matter of law, if an order was ambiguous, it nevertheless had to be construed, and if a person's conduct breached the order, properly construed, a contempt was established. If a person acted in an honest but mistaken belief as to its meaning that might be taken into account in determining sanction. That did not arise on the facts of this case because even if, contrary to his primary submission, the word value was ambiguous, GHI and Mr Boutgueray did not understand it to mean market value, but rather interpreted it as meaning unencumbered value.

What does "value" mean in paragraph 1(c) of the ADO?

62. On this issue I take a different view from that of the Judge. I have concluded that the appellants are correct in their submission that it means market value rather than unencumbered value, by reference to a number of considerations which point to that conclusion.

63. First, as a matter of ordinary language, reference simply to the value of real property would normally be understood to mean market value. If a person were asked to give the value of their house, they would naturally respond with an estimate of what it could be sold for, not what equity they held after taking account of a mortgage.

64. Secondly, there is a well-recognised principle that because a person is exposed to criminal sanctions for breach of an order, and in the context of freezing orders because they can have a potentially draconian effect, such orders should be "strictly construed": see *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64 [2015] 1 WLR 4754 at [19]. That principle is easy to apply to an injunction intended to have a restrictive effect; it dictates a construction of the order which gives it the less restrictive effect. It is not so obviously applicable to the present context where the choice is simply whether the 'value' which has to be disclosed means one thing rather than another. However, if ADM's construction were correct, it would require more onerous disclosure than would be required by the appellants' construction: identification of the unencumbered value would involve both the market value and details and valuation of the encumbrances, the last of which might well involve considerable research because assets may be charged to secure borrowings which change from day to day. The principle of strict construction does therefore apply to add weight to the appellants' construction as being the least onerous.

65. Thirdly, paragraph 1(a) of the ADO requires disclosure of the "balance" on bank accounts. It is well known that corporate bank accounts in credit are often charged, for example as part of a floating charge to secure borrowings. Paragraph 1(a) of the ADO is therefore unequivocally concerned with gross value of the relevant asset, not the unencumbered value. That strongly suggests that paragraph 1(c) is also to be construed in this way, because they all serve the same purpose and are part of a single disclosure order contained in one paragraph, of which they are sub-paragraphs.

66. Fourthly, and most importantly, the appellants' construction gives greater effect to the purpose of the ADO, which is the context in which it must be construed. The words of the order must be given their ordinary meaning, but the purpose for which orders are made will influence that meaning: *JSC BTA Bank v Ablyazov (No 10)* [2013] EWCA Civ 928 [2014] 1 WLR 1414 (in the Court of Appeal) at [37]; *Michael Wilson & Partners*

Ltd v Emmott [2015] EWCA Civ 1028 at [22]. The relevant purpose of the ADO is, as the Judge said, aimed at assisting in enforcement of the judgment obtained against GHI.

67. For those purposes, a claimant would normally wish to know both the market value and the extent of any alleged encumbrances, but, as Mr Akka accepted, this order cannot be construed as requiring both. The question is whether a claimant's purpose in getting disclosure of assets to assist in enforcement is better served by knowing in the first instance *only* the market value or by knowing *only* the unencumbered value.

68. The answer, to my mind, is the former. If unencumbered value is the correct construction, the assets may not fall to be disclosed at all, if that unencumbered value falls below the US$75,000 threshold. That, on ADM's case, is the position in respect of all the properties which Mr Boutgueray identified, because the encumbrances reduce their value to GHI to below the threshold. Yet a judgment creditor in ADM's position would want to know about the properties so as to be able to investigate the extent of GHI's beneficial interest. Encumbrances may change value on a daily basis with fluctuations in levels of borrowing, and may disappear entirely if the borrowing they secure is repaid or restructured by the provision of other security. Disclosure of value only has to be made at the snapshot of time required by the terms of the court order; it is not subject to constant updating. Yet unencumbered value may change so as to bring the unencumbered value of a valuable asset above the monetary threshold for disclosure and something of real value as a target for enforcement. Moreover there is often room for dispute about the existence or validity of alleged encumbrances, and it is a common experience that recalcitrant debtors assert that valuable property which they are apparently enjoying is in fact beneficially that of someone else. If a defendant maintained that a very valuable house registered in their own name had been beneficially transferred to another, on ADM's construction of the order it would not fall to be disclosed; yet a judgment creditor in its position would want to know of the existence of a house with a large market value against which enforcement might potentially be available upon inquiry into the position as to beneficial ownership. Moreover different properties may each be charged to secure a single debt. If value means unencumbered value, then because it would be for the creditor to choose which property or properties to enforce against, the debtor could not know which specific property or properties should be treated as being encumbered with the debt. At least arguably all would fall below the threshold, and none would need to be disclosed. That would be a bizarre result, because the security could only be enforced up to the amount due, and if the overall position is considered, there would be substantial unencumbered value to GHI against which enforcement would be available.

69. These considerations can be illustrated by posing hypothetical examples and applying the rival construction arguments. So, for example, if GHI owned a piece of real property worth US$4 million, which was fully charged to secure borrowing in excess of that amount, on ADM's case it would not fall to be disclosed, even though it might the following day become wholly unencumbered by repayment or restructuring of the borrowing so as to represent US$4m worth of available assets against which ADM could enforce. To take another example, GHI might own a number of properties worth more than the US$75,000 threshold, and they might all be charged to secure the same borrowing. So if, for example, there were ten properties worth US$100,000 each, and each were charged to secure borrowing of US$50,000, on ADM's construction none would have to be disclosed (as Mr Akka confirmed in argument) because each individually would have an unencumbered value below the threshold. Yet the position

would be that if only ADM knew about them, they would provide US$950,000 worth of available assets against which to enforce. Suppose, yet again, that GHI owned a property worth US$5 million currently subject to a charge of US$4,920,000. On ADM's construction all it would be told would be that there was a property with a value of US$80,000. That would not reveal what it would want to know, which was that there was ownership of a very valuable property which might be available in due course for enforcement.

70. I am unable to agree with the Judge's conclusion that there would be no point, on ADM's construction, in "knowing the locations of [worthless] assets with a [meaningless] value of $4m." That would not be a meaningless value if the encumbrance were removed shortly after disclosure, and the asset would not be worthless. Moreover, knowledge of an asset worth US$4 million which was said to be fully encumbered would enable ADM to investigate both the validity of the alleged encumbrance and its continuing size or existence. If the order means unencumbered value, ADM never learns of such a property. If, on the other hand, it means market value, that would not of itself require disclosure of encumbrances; but it would be open to ADM to make its own inquiries, to make further requests for information, and, if appropriate, to seek a further order.

71. What this illustrates is that in a well-drawn disclosure order what might properly be required expressly is *both* gross value *and* any encumbrances or beneficial interests of others which are said to reduce that value to a lesser one in which the defendant has a beneficial interest, which is the target of enforcement (subject to care being taken to ensure that what is required by way of disclosure is proportionate and not oppressive). But where only one is asked for, as here, it is the market value, not unencumbered value, which provides the claimant with most assistance in the first instance, because it identifies all substantial assets which might ultimately be available for enforcement; and any encumbrances or beneficial interests of others can be investigated and monitored thereafter, if necessary through further orders.

72. *Aspinall's v Lim* does not cast doubt on this conclusion. That decision concerned what was meant by the words "up to the value of" in the restraining part of a freezing order in the terms of the standard wording in Appendix 11 to the Commercial Court Guide, which by a subsequent paragraph had the equivalent of what is in the WFO in this case, namely an express reference to the "unencumbered value" of such assets. Murray J endorsed the view expressed in Gee on *Commercial Injunctions* (now in the 7th edn at 21-036) and applied by Ms Joanna Smith QC in *PJSC Commercial Privatbank v Komoloisky* [2018] EWHC 482 (Ch) at [36] to [38], that "value" there meant unencumbered value, because what was to be frozen was what was intended to be available for execution of a judgment in due course. I would endorse the correctness of that decision, although it would be desirable to amend the standard form to refer to unencumbered value to remove any room for doubt in the mind of a defendant without access to legal advice. The rationale does not apply, however, where what is being sought is disclosure for the purposes of policing a freezing order, or a disclosure order in aid of execution, at least where there is no equivalent to the WFO wording expressly referring in another part to unencumbered assets.

The ambiguity principle

73. That is sufficient to dispose of the appeal on Contempt 3 in favour of GHI and Mr Boutgueray: on the true construction of the ADO there was no obligation to identify more

than market value and therefore no breach in failing to disclose encumbrances. That makes it unnecessary to determine Mr Moxon Browne's alternative submission based on the ADO requiring information as to unencumbered values, but being ambiguous. However because it raises a point of law which has been fully argued I will address it.

74. In *Redwing*, Jenkins J was concerned with an application in a passing off action in which undertakings had been given by the defendant company. The plaintiffs sought an order for sequestration alleging breach of the undertakings. There was evidence from the defendant's manager that he had acted in accordance with his understanding of what was allowed or prohibited by the undertakings. Jenkins J held that on the true construction of the undertakings there had been no breach. He went on to remark, obiter, as follows at p. 71:

> "I cannot say I think that the undertakings contained in the order were clearly drawn and I cannot say I regard the questions of construction involved in them as entirely easy questions, but, in my judgment, a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken his undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."

75. In *Hadkinson*, the relevant passage relied on was obiter, this court having concluded that upon the true construction of the order, Mr Hadkinson was not in breach of it. Mummery LJ, with whose judgment Nourse and Pill LJJ agreed, said at p. 1705:

> "Even if Mr. Hadkinson had committed breaches of the freezing order, was it correct in all the circumstances to treat him as in contempt of court? This is a question of mixed law and fact. The basic principle in the civil law of contempt is that, although there is an obligation to comply strictly with the terms of an order, the court will only punish a person for contempt of court upon adequate proof that the terms of the order are clear and unambiguous and that he has broken those terms: *Iberian Trust Ltd. v. Founders Trust and Investment Co. Ltd*. [1932] 2 K.B. 87, 95, recently applied in *Reg. v. City of London Magistrates' Court, Ex parte Green* [1997] 3 All E.R. 551, 558G."

76. Mummery LJ also cited a passage of the judgment of Ipp J in the decision of the Supreme Court of Western Australia in *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59 at p 69, where Ipp J had identified that there were two reasonably possible constructions of the word asset in the court order in that case, and had said "contempt of court is not established if, on the proper construction of an ambiguous court order, it is revealed that the order has been breached by the defendant."

77. In *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028 this court was concerned with whether conduct came within the exception in a freezing order as amounting to dealing with assets "in the ordinary and proper course of business." The Court concluded that it did, such that there was no breach of the order. Lewison LJ, with whom Gloster and Black LJJ agreed, said at [22]:

> "It has been frequently said that such an order must be "strictly construed" and that if there are two possible interpretations of it a defendant who acts in accordance with one possible interpretation should not be held to be in contempt: *Redwing Ltd*

v Redwing Forest Products Ltd (1947) 64 RPC 67; *JSC BTA Bank v Ablyazov (No 10)* at [37]."

[The reference to *Ablyazov* is to the passage about strict construction which was approved at [19] of Lord Clarke's judgment in the Supreme Court cited above].

78. The more extreme form of the argument advanced by Mr Moxon Browne was that where there is ambiguity, the conduct of the defendant cannot be treated as a breach of the order, if it is conduct which would be in accordance with an arguable but erroneous construction of the order, whatever the defendant's own understanding and intention about the order. In that form it would plainly lead to absurd results. A defendant could with impunity deliberately flout an order which on its true construction restrained him from doing X, where he understood it to mean X, merely on the grounds that it was arguable, but wrong, that it meant Y, which was not his understanding.

79. The more realistic form of the argument, based on the defendant's own understanding of the meaning of the order, might appear at first sight to derive some support from the passages cited above. However the true principle, in my view, is that where the court decides what the order means, and upon that construction the defendant's conduct breaches the order, the defendant is in contempt. That is the principled consequence of the relevant ingredients of civil contempt, as summarised in *Masri*, and in particular that the defendant need not intend to breach the order; all that need be established is that the defendant intended to carry out the conduct in question and that such conduct amounts to a breach of the order, objectively construed. Subjective understanding or intention in relation to the meaning of the order is logically irrelevant to the existence of a civil contempt because there is no requirement of an intention to breach it.

80. This is consistent with the many statements to be found in the authorities about the importance of avoiding ambiguity in court orders. For example in *A-G v. Punch Ltd* [2003] 1 AC 1046 Lord Nicholls said at [35]:

> "An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute."

81. It is because a defendant will be in contempt if he fails to comply with an ambiguous court order that an ambiguous order puts him "at risk of being in contempt."

82. However, subjective understanding is relevant to the sentence to be imposed for any contempt. Where a defendant acts in accordance with an erroneous understanding of the order, that is less culpable than a deliberate breach. And where the understanding is a reasonable one because it is one of two reasonable constructions of an ambiguous order, the usual position is that he should not be punished for contempt, to use the language of Mummery LJ in *Hadkinson*.

83. That may also mean that in an appropriate case he should not be held to be in contempt. That is not because his breach does not amount to a contempt, but by application of the

abuse jurisdiction referred to by Briggs J in *Sectorguard*. When Jenkins J said in *Redwing* that a defendant in that position "should not be held to be in contempt" he is to be taken to mean that where the claimant has no prospect of making a court sure that the defendant acted otherwise than in accordance with a subjective interpretation of the order which is a reasonable one in the face of an ambiguity, it will usually be an abuse to pursue the allegation of contempt, notwithstanding that the contempt exists upon what the claimant contends is the true construction of the order.

84. I should make clear that had I do not consider that this principle could have assisted GHI or Mr Boutgueray in this case. Nowhere is it said in their evidence that they understood the order to require disclosure of market value only, and their evidence is inconsistent with such an understanding, in particular paragraph 29 of Mr Boutgueray's third affidavit and paragraph 23 of Mr Boutgueray's sixth affidavit. GHI and Mr Boutgueray never took issue with the statement in Ms Pritchard's affidavit of 21 April 2021 that the order required unencumbered value and that a failure to disclose encumbrances and their value was a breach of the order. Rather, details of encumbrances were disclosed in Mr Boutgueray's second affidavit, albeit misleadingly Although that followed requests in correspondence, it is clear from the whole history which I have recounted that GHI and Mr Boutgueray were concerned to comply with the ADO to the least extent possible. Had they thought that there was no obligation to disclose encumbrances, they would have said so and refused to do so.

Contempt 4

85. Mr Moxon Browne accepted that GHI had been trading. He also accepted that the Judge had been entitled to be sure that the disclosed properties in Morocco had an unencumbered value of virtually nothing by reason of the undisclosed encumbrances attested to by ADM. However, he submitted that ADM had failed to prove that GHI did not have assets in Morocco worth US$4m or more. He said that the asset disclosure given did not establish the absence of such assets, even if the unencumbered value of the properties was zero or virtually zero, because Mr Boutgueray said in paragraph 23 of his third affidavit that "[ADM]'s assets far exceed the value of the Award and the amount that ADM has sought to freeze pursuant to the WFO". He submitted that ADM must have known from GHI's published accounts that it had assets vastly exceeding US$4m. In this respect he relied upon the material exhibited to the sixth affidavit of Mr Boutgueray, as well as Ms Pritchard's first affidavit.

86. I cannot accept this submission, which was not advanced before the Judge. The sixth affidavit was not before the Judge prior to her findings of contempt and only fell to be taken into account to the extent appropriate for the purpose of sanction. In that context it was only relied on as an indication that steps were being taken to purge the contempt, albeit they were incomplete and would need further work and explanation. None of the material exhibited to Mr Boutgueray's affidavit has been put before us, and the affidavit itself is only in evidence in this court because it was in evidence before the Judge for the purpose of sentencing, not for the determination of the contempts. It would require a fresh evidence application if it were to be relied on in the appeal against the findings of contempt. No such application was made, and it would not be able to satisfy the first limb of *Ladd v Marshall* [1954] 1 WLR 1489 as evidence which could not with reasonable diligence have been available at the hearing when contempt was being determined. Moreover, Mr Moxon Browne referred to it below as containing

unpublished accounts, such that there is no warrant for suggesting that it was available to, let alone known to, ADM.

87. Ms Pritchard's first affidavit was sworn in support of the original application for the ADO which came before Waksman J. It revealed what had theretofore been discovered about GHI's assets. That included a statutory auditors' report for the period ending 31 December 2017. Ms Pritchard deposed that the report appeared to show fixed assets to a value of about £18.2 million, "investments" to a value of about £187.1 million, an inventory of goods worth about £25.3 million and receivables worth about £90 million. Ms Pritchard made the point that this included some £15 million said to be in bank accounts, something which was impossible to reconcile with the lack of funds in the Moroccan bank accounts which had been the subject of enforcement attempts there; and that there was no detail of where any of these assets were to be found.

88. That referred to the position in 2017. The Judge was concerned to identify the position between 5 June 2019 when the WFO was first made and 17 February 2022 when the Second Committal Application was made, because it was over the whole of this period that Contempt 4 charged GHI with trading in breach of the WFO. The historical position was of little evidential value in relation to the period in question.

89. The bare assertion in paragraph 23 of Mr Boutgueray's third affidavit of assets "far exceeding" US$4 million was of no worth without any supporting detail of corroborative evidence.

90. Most importantly, the Judge cannot be criticised for proceeding on the basis of all the evidence before her, including the disclosure made by GHI that its only assets in Morocco were the properties disclosed in Mr Boutgueray's second affidavit, his third affidavit saying that it had no assets outside Morocco, and ADM's unchallenged evidence that the unencumbered value of the properties in Morocco which had been disclosed was virtually zero. Mr Moxon Browne's submission amounts to saying that she should have disregarded that evidence and assumed it to be false by reference to a worthless unparticularised assertion in the third affidavit of unidentified assets. It is self-evident that she was not obliged or indeed entitled to make such an assumption contrary to the evidence, and it was no doubt for this reason that this was not a point taken by Mr Hilton before the Judge.

91. Mr Moxon Browne also maintained the point which Mr Hilton had made to the Judge about the possibility of there being numerous assets below the threshold amounting in total to more than US$4 million. Like the Judge, I can see no force in this point. It would require more than 50 individual assets of almost US$75,000 (and many more if of lower value). No example has been posited of what a cereals trading company with GHI's profile might possess of that kind. Nowhere in the evidence was it suggested on behalf of GHI that such assets existed, and had they done so, GHI could have been expected to have advanced such evidence. That is not to reverse the burden of proof, as Mr Moxon Browne submitted, but merely to observe that what is a theoretical and highly improbable possibility can be ignored if it is not the subject matter of any evidence where evidence could be expected. As Whipple J observed in *VIS Trading Co Ltd v Nazarov* [20115] EWHC 3327 (QB) [2016] 4 WLR 1 at [31], in an appropriate case it may be fair to draw an adverse inference from silence where a matter is in dispute in contempt proceedings and a defendant can reasonably be expected to supply evidence if it exists; that does not

involve reversing the burden of proof, provided that it is borne in mind that silence alone cannot establish guilt.

92. Accordingly I would dismiss the appeal from the finding of contempt in respect of Contempt 4.

Contempt 5

93. In *Tuvalu* this court considered what had to be established for directors and officers to be treated as responsible, for the purposes of civil contempt, for failure by the corporation to comply with an order against it. Cockerill J applied those principles to the allegation of contempt by Mr Boutgueray, including the mental element appropriate for civil contempt. Mr Moxon Browne does not submit that if civil contempt was applicable to Mr Boutgueray, she misapplied the test for civil contempt or reached an erroneous conclusion on the evidence. Rather, he submitted that what he described as the anomalous position of directors' liability for civil contempt rested on a power in CPR 84.1(3) which was removed by the revision to the Civil Procedure Rules in October 2020, leaving directors in the same position as any other third party to an order, namely susceptible to criminal contempt only, with the required mental element of an intention that the order should be breached. Since the Judge had not found Mr Boutgueray to have the *mens rea* for criminal contempt, the consequence would be that the findings of contempt against him cannot stand.

Is the point open to Mr Boutgueray on the appeal?

94. This point was not advanced before the Judge, before whom it was common ground that Mr Boutgueray was exposed to civil contempt of the order made against GHI in accordance with the *Tuvalu* principles, if fulfilled. The change of position on the appeal is said to have been prompted by Mr Boutgueray's legal advisers becoming aware of the decision of Foxton J in *Olympic Council of Asia v Novans Jets LLP* [2023] EWHC 276 (Comm) which postdated the Judgment, in which this point was addressed (and rejected). Mr Akka objected to the point being taken, relying on the principles generally applicable in civil appeals to new points of law not raised below, as set out in *Pittalis v Grant* [1989] QB 605 at p 611, *Singh v Dass* [2019] EWCA Civ 360 at [15]-18] and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 [2019] 4 WLR 146 at [23]-[28]. In particular, he submitted that had the point been taken below, the case would have been run differently before Cockerill J; and/or ADM could not be adequately protected in costs in the light of GHI's failure to pay costs orders to date.

95. The court has a general discretion as to whether to allow new points of law to be taken on appeal, the ultimate test being whether it is in the interests of justice, applying the principles identified in the cases cited above. That will depend upon an analysis of all the relevant factors, which include the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken, especially where it would have required additional evidence.

96. In my view, applying those principles the interests of justice are clearly in favour of allowing the point to be taken. The most important considerations are that this is not a case in which there would have been any different evidence had the point been taken below; it is doubtful whether if it had been taken below the course of the hearing would

have been any different; it is doubtful that if the point is allowed to be taken and is a good one, that would result in any positive award of costs, whether of the appeal or hearing below, in ADM's favour (as opposed to depriving GHI/Mr Boutgueray of any award of costs in their favour); and, to my mind most importantly the nature of the proceedings.

97. Committal proceedings are criminal in nature because they seek the imposition of criminal sanctions. Mr Boutgueray's liberty is potentially at stake. It is therefore appropriate to take account of the principles applicable to whether a point of law can be taken for the first time on an appeal against conviction in criminal cases. In that context the law is clear that where the indictment charges an offence not known to the law, the court will quash the conviction: *R v Bhagwan* [1972] AC 60; *R v C* [2005] EWCA Crim 2827 (2006) 1 Cr. App. R. 20. This is the case even if the point was not taken at trial and the appellant pleaded guilty: *R v Whitehouse* [1977] Q.B. 868 (1977) 65 Cr. App. R. 33. As Lord Bingam CJ stated in *R v Graham* (1997) 1 Cr. App. R. 302, at p. 309E:

> "…if it is clear as a matter of law that the particulars of the offence specified in the indictment cannot, even if established, support a conviction for the offence of which the defendant is accused, a conviction of such an offence must be regarded as unsafe."

98. Those principles can readily be transposed to the present context, because if Mr Moxon Browne's submissions are correct, Contempt 5, as interpreted by the parties before the Judge and the Judge herself, contains particulars of a contempt which is not known to the law.

Is the point sound?

99. In *Olympic Council of Asia v Novans,* Foxton J concluded that the principle that directors and officers can be liable for civil contempt in respect of orders made against the corporation, which he termed 'the Body Corporate Provision', was unaffected by the repeal in 2020 of CPR 81.4(3). Mr Moxon Browne submits that the decision is wrong. I have concluded that it is right, for similar but broader reasons.

100. The parties traced the statutory sources back to the Common Law Procedure Act 1860 ('the 1860 Act') which provided in section 33:

> "XXXIII Mode of enforcing Writs of Injunction against Corporations.
>
> Writs of Injunction against a Corporation may be enforced either by Attachment against the Directors or Other Officers thereof, as in the Case of a mandamus, or by a writ of Sequestration against their Property and Effects, to be issued in such Form and tested and returnable in like Manner as Writs of Sequestration issuing out of the Court of Chancery."

101. It is, however, necessary to delve further back. I have been much assisted in that task by the scholarly research and analysis contained in a draft article prepared extra-judicially by Sir David Foxton since his decision in *Novans*. It is awaiting publication.

The law of contempt

102. The Court's inherent jurisdiction to punish disobedience to its orders as a contempt of court is of very long standing, and had been recognised and applied for many centuries before the 1860 Act. In *Jennison v Baker* [1972] 2 QB 52, Salmon LJ observed at p. 61:

> "The inherent power of the judges of the High Court to commit for contempt of court has existed from time immemorial."

103. In *Attorney-General v Times Newspapers Ltd* Lord Oliver explained that it was a fundamental aspect of the efficient administration of justice. He said at p. 216:

> "My Lords, the inherent jurisdiction of the superior courts of record to ensure the effective administration of justice by punishing contempt of court has been developed by the common law over centuries. It is as essential as it is ancient, for unless litigants can be assured that the rights which it is the duty of the courts to protect can be fairly determined and effectively protected and enforced the system of justice necessarily ceases to command confidence and an essential foundation of the structure of civilised society is undermined."

Means of enforcement: attachment, committal, sequestration

104. As is apparent from the terms of s. 33 of the 1860 Act, the relevant remedies for enforcing court orders at that time included attachment and sequestration.

105. The writ of attachment, addressed to the sheriff, was a form of process in existence as early as the thirteenth century to secure the attendance of a party before justices for felonies and breaches of the peace. It was available in two forms, per *corpus suum* (arrest) and *per vadium et salvos plegios* (by security and sureties): Bracton *De Legibus et Consuetudibus Angli* Folio 149. The former was for arrest of the person; the latter required the sheriff to seize goods by way of security for appearance: *Blackstone's Commentaries on the Laws of England* Book 3 p.280. By Blackstone's time attachment was a form of process to compel attendance in civil suits in the courts of King's Bench and Common Pleas (*ibid* at p284). The form *per corpus suum* came to be the usual form and in due course the form *per vadium* fell into abeyance.

106. The writ of attachment was also used in cases of contempts and remained as a mechanism for enforcing certain types of court order after it had been abolished as a means of compelling attendance: *Harvey v Harvey* (1884) 26 Ch D 644, 653. This aspect of its use appears to have taken place mostly in the courts of equity, where the remedy of specific performance was most readily available, and where the power of the Chancellor to punish for contempt was clearly established before the position at common law: Sir William Holdsworth *A History of English Law* vol 1 p. 458. It remained the mechanism for arrest for failure to obey court orders in the mid-nineteenth century (*Harvey v Harvey,* 653), including for non-payment of money orders, although by 1860 money orders in the Court of Chancery had the effect of judgments at common law and were subject to the same processes of execution, such as *fieri facias*; and imprisonment of debtors for non-payment was soon to be heavily restricted by the Debtors Act 1869. So at the time of the fusion of common law and equity, a writ of attachment was described in the first Order 42, scheduled to the Supreme Court of Judicature Act 1875 as "… a writ directed to the sheriff commanding him to attach the person against whom it is issued and have him

before the court to answer his contempt." By reason of its original purpose, a writ of attachment could be issued by a party without any court order.

107. Attendance could also be achieved by a writ of committal which was executed by the tipstaff who brought the prisoner to the Court Prison at Holloway. Unlike attachment, this required an order of the court. The distinction between cases in which attachment and committal was the appropriate remedy was addressed in a memorandum by Mr Registrar Lavie, reported as a note to *In Re Evans, Evans v Noton* [1893] 1 Ch 252, 259, who said that the well-established position prior to the Judicature Acts was that a man was committed for doing what he ought not to do and attached for not doing what he was ordered to do.

108. These were means of bringing contemnors before the court and to act coercively to encourage compliance, but were not addressed to the sanctions imposed where the contemnor was found to be in contempt. These included committal to prison; or the imposition of fines. Imprisonment and fine were supplemented by the writ of sequestration, which came into use at least as early as the seventeenth century, if not earlier. The writ involved seizure of the respondent's personal estate and the rents, income and profit from their real estate. It could be imposed in addition to imprisonment (*Pope v Ward* (1785) 1 Cox Eq Cas 194, 29 ER 1125). By the early nineteenth century it had become a common sanction for corporations who failed to comply with court orders (see *Agar v The Regent's Canal Company* (1815) 19 Ves Jr 379, 380, 34 ER 558). The processes involved are described in Halsburys Laws of England 4th edn Reissue 7(1) at [218]-[222]. It is essentially coercive in its effect rather than by way of execution, operating in rem against the relevant assets in order to encourage compliance with the order.

Enforcement against bodies corporate before 1860

109. Two forms of body corporate with separate legal personality were known to the law from the earliest times, namely corporations aggregate and corporations sole. The latter presented no difficulty with personal forms of enforcement because the corporation was constituted by a single individual, against whom the remedies of attachment and sequestration could be levied, and a successor was bound to respond to a writ of sequestration levied against their predecessor. Corporations aggregate presented greater challenges. It was well established that they could not be the subject of a writ of attachment which was a personal remedy available only against natural persons: *Morgan v The Corpn of Carmarthen* (1673) 3 Keb 350, 84 ER 760; *London v Lynn* (1789) 1 H Bl 206, 209; *United Company of Merchants of England Trading to the East Indies v Kynaston* (1832) Bli 153, 163, 4 ER 561, *R v J G Hammond & Co Ltd* [1914] 2 KB 866, 867.

110. However the writ of mandamus came to be used to seek to achieve the same objective. A prerogative writ of mandamus, addressed to a sheriff, would lie against the members or officers of a corporation to secure performance of their obligations towards the corporation. These were often incorporated by charter, and later private Act of Parliament, and sometimes, but by no means always, were addressed to those carrying out what we would now describe as public functions: see for example *R v The Mayor of Hereford* (1705) 2 Salk 701, 91 ER 593, in which an order of mandamus was directed to the mayor to admit a person to the office of town clerk; and *R v The Mayor, Sheriffs, citizens and Commonalty of the City of Norwich* (1830) 1 B & Ad 809, 109 ER 802 in

which the writ of mandamus was directed to the mayor, sheriffs and entire citizenry of Norwich to perform their obligations to appoint twenty persons to be guardians of the poor of the city.

111. Mandamus also lay where the obligation of the corporation was to comply with a court order as to its private law obligations. So in *Corpe v Glyn* (1832) 3 B & Ad 801, 110 ER 294 it was directed to the treasurer and directors of a dock corporation to see to it that the corporation performed its obligations to pay money under an arbitration award which had been made a rule of court.

112. By this process mandamus could lie against directors or officers to see to it that an order of the court directed to a corporation was obeyed. Once that mandamus was issued, addressed to natural persons, they were personally exposed to contempt proceedings in the event of non-compliance, including attachment: *Salmon v The Hamborough Company* (1671) 1 Ch Cas 204, 22 ER 763. *Approved Men of Guildford v Mills* (1666) 2 Keb 1 may be another example, and was treated as such by James Stephen in *The Common Law Procedure Act 1860 with Notes and Introduction* (1860) at p. 68, although the report of the case is too exiguous to be certain.

113. The ability to use attachment in this way came to be expressed in a form which conflated the two steps in the procedure, mandamus directed to the corporation and mandamus directed to the officers. In Francis Buller's influential treatise, *An Introduction to the Law Relative to Trial at Nisi Prius* 5th Edn (1790) at pp. 201-2 he stated that "where a *mandamus* is directed to a corporation to do a corporate act, the attachment is granted only against those particular persons who refuse to pay obedience to the *mandamus*." In *A Practical Treatise on the Law of Corporations in general as Well Aggregate as Sole* (1854) James Grant stated the position (at p. 261) to be that "if the writ [of mandamus against the corporation] is disobeyed, the course is to issue an attachment against those members of the corporation who are responsible for the disobedience". James Stephen summarised the position thus at p. 68 of his 1860 work:

> "With respect to enforcing a peremptory *mandamus* against a corporation aggregate, the law seems to be to the following effect. Where the corporation at large have the power and duty to perform the act in question, the writ is directed against the corporation by its name of incorporation, and may be enforced by attachment against those members who actually, at a corporate meeting, voted against obeying the writ; or, who having been duly summoned, stayed away from such meeting without adequate excuse."

114. That this was a conflation of the procedural position is apparent from C*ope v Glyn*, in which attachment of the treasurer had been sought to enforce the order for the corporation to pay the award, prior to any mandamus directed to him. The attachment was refused; but mandamus granted directed to him and the directors to secure that the corporation paid the amount. The conflation may have been well understood by practitioners, but its expression in this form masked the cumbersome nature of the procedure. Applications for prerogative writs of mandamus involved the preliminary step of applying for leave to issue such a writ, and were subject to considerable inconvenience and delay for procedural reasons explained by Robert Kerr, later a Judge of the Sheriff's Court of the City of London, at pp. vii-viii of his work *The Common Law Procedure Act 1854 with Practical Notes* (1854).

115. By the mid-nineteenth century a number of statutes had come to be enacted requiring private corporations, such as railway, dock or utility companies, to carry out works for the benefit of private individuals, enforcement of which, at common law, involved this cumbersome procedure. This was remedied by the Common Law Procedure Act 1854 ('the 1854 Act'), which enabled a party seeking specific performance of such an obligation to include a claim for mandamus which could be addressed to the party, not the sheriff, and granted in the same way as a claim for damages. Such mandamus was to be treated in the same way as a prerogative ('peremptory') writ of mandamus, and section 73 provided that such mandamus could be enforced by attachment.

116. What section 33 of the 1860 Act achieved, which went further, was to extend the process to injunctions, and to give effect to the conflation I have identified so as to further streamline the process. The attachment of the responsible individual directors and officers, where liable, could take place notwithstanding that the injunction or mandamus was addressed to the corporate body, not the directors or officers, without the need for a further mandamus directed to the individuals. This was the interpretation of what s. 33 achieved by another commentator on the 1860 Act, John Day, later Mr Justice Day, in his work *The Common Law Procedure Acts* (1863), who observed that the words "as in the case of a mandamus" were inaccurate because a mandamus addressed to a corporation aggregate could not then, nor ever before, be enforced by attachment against the directors or other officers, although such 'vicarious punishment' (as he put it), had specifically been provided for in the case of railway and canal companies by s. 3 of the Railway and Canal Traffic Act 1854. He said of s. 33 of the 1860 Act that "the words 'as in the case of mandamus' may, however, be construed by the courts as something not descriptive of something pre-existing but as operative", which although ungrammatical would give effect to the intention of the legislature.

117. What this brief historical survey demonstrates is that s. 33 of the 1860 Act was not concerned with the substantive law which made directors and officers liable in contempt for failures by a body corporate to comply with a court order if they were responsible for its disobedience. There was already in existence a principle of law which enabled contempt proceedings to be brought against them using the writs of mandamus and attachment. I shall call this, as a shorthand, 'the responsible persons liability principle'. What s. 73 of the 1854 Act and s. 33 of the 1860 Act did was to apply the procedure which had previously existed to coercive orders made in the common law courts whether by way of mandamus or injunction; and to streamline it by removing the cumbersome aspects of applying for leave to issue a prerogative writ of mandamus. They did not create any new substantive principle of law.

Rules of the Supreme Court and Civil Procedure Rules

118. Following the fusion of equity and the common law, Rules of the Supreme Court were drawn up which initially included in the 1883 version ('the 1883 RSC') Order 42 rule 7 and rule 31 in the following terms:

> "7. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.
>
> 31. Any judgment or order against a Corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate

property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

119. What was meant by "wilfully disobeyed" in rule 31 was considered by Warrington J in *Stancomb v Trowbridge Urban District Council* [1910] Ch 190 at 194. He held that "wilfully" was intended only to exclude casual or accidental or unintentional acts. The expression did not require an intention to breach the order. It recognised, therefore, that the responsible person liability principle referred to in Order 42 rule 31 only required the mental element of a civil contempt.

120. For some while s. 33 of the 1860 Act and Order 42 of the 1883 RSC remained in force together, but the 1860 Act was repealed by The Statute Law Revision Act 1950.

121. When the Rules of the Supreme Court underwent substantial revision in 1965 ('the 1965 RSC'), the relevant Order became Order 45 rule 5 in the following terms:

> "**Rule 5**—(1) Where—
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged …..; or
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
>
> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say—
>
> …
>
> (ii) where that person is a body corporate, with the permission of the Court, a writ of sequestration against the property of any director or other officer of the body;
>
> (iii) subject to the provisions of the Debtors Act 1869 and 1878, an order of committal against that person or, where that person is a body corporate, against any such officer.

122. Order 45 rule 7 provided for prerequisites to enforcement under rule 5, and included the requirement for a penal notice to be endorsed on the copy of the order served, by rule 7(4):

> "(4) There must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in the case of an order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible."

123. These were the rules in force when *Tuvalu* was decided by the Court of Appeal in 1989. In that case the first instance judge had held the second defendant director in contempt as a result of breaches of undertakings given by a company of which he was the chairman and managing director, by application of Order 45 rule 5. That aspect of his judgment

was upheld on appeal. Woolf LJ identified the relevant principles at p. 936E-F in the following terms:

> "In our view where a company is ordered not to do certain acts or gives an undertaking to like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and if he wilfully fails to take those steps and the order or undertaking is breached he can be punished for contempt. We use the word "wilful" to distinguish the situation where the director can reasonably believe some other director or officer is taking those steps."

124. He went on at p. 938A to say:

> "There must however be some culpable conduct on the part of the director before he will be liable to be subject to an order of committal under Ord. 45, r. 5; mere inactivity is not sufficient."

And at 938D:

> "If there has been a failure to supervise or investigate or wilful blindness on the part of a director of a company his conduct can be regarded as being wilful and Ord. 45, r. 5 can apply."

125. The second defendant was held to be in contempt in that case because:

> "he failed to take adequate and continuing steps to ensure that those to whom he delegated the handling of matters which fell within the scope of the order and undertaking had not forgotten or misunderstood or overlooked the obligations imposed upon them. This reveals a further difference between the liability of directors for civil contempt from that for a criminal contempt. Mere inactivity in the form of failure to supervise is sufficient for the former, whereas it would not found liability for the latter."

126. When the Rules of the Supreme Court were replaced by the Civil Procedure Rules in 1998, contempts were initially dealt with by retaining Order 45 RSC. In 2012 Order 45 was replaced by a new CPR Part 81 ('the 2012 CPR'). Rule 81.1 was headed "Scope" and 81.1(a) provided:

> "This Part sets out the procedure in respect of – (a) contempt of court…"

127. Rule 81.2(1) provided:

> "This Part is concerned only with procedure and does not itself confer upon the court the power to make an order for-
>
> (a) committal;
>
> (b) sequestration; or
>
> (c) the imposition of a fine for contempt of court"

128. The 2012 CPR 81.4 corresponded to the previous Order 45 rule 5 by providing:

"81.4-(1) If a person-

(a) required by a judgment or order to do an act does not do it by the time fixed by the judgment or order; or

(b) disobeys a judgment or order not to do an act

then, subject to the debtors Act 1869 and 1876 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal

….

(3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation."

129. Rule 81.9 contained the requirement for a penal notice but did not replicate the wording of Order 45 rule 7 RSC in its warning to "any individual responsible" for disobedience to an order by a body corporate.

130. Writs of sequestration generally were dealt with in Part 83 of the 2012 CPR. Section 7 of Part 81 was concerned with writs of sequestration in relation to enforcement of court judgments, orders and undertakings. It included Rule 81.20 in terms which mirrored rule 81.4:

"81.20 (1)-If-

(a) a person required by a judgment or order to do an act does not do it by the time fixed by the judgment or order; or

(b) Disobeys a judgment or order not to do an act

then, subject to the provisions of these Rules, and if the court permits, the judgment or order may be enforced by a writ of sequestration against the property of that person made against any director or other officer of that company or corporation.

(3) If the person referred to in paragraph (1) is a company or other corporation, the writ of sequestration may be made against any director or other officer of that company or corporation."

131. These were the rules in force when *Dar Al Arkan* was decided. In that case the relevant issue was whether the liability of a director to civil contempt proceedings contained in or recognised by CPR 81.4(3) could be enforced by service on the director out of the jurisdiction. Beatson LJ, giving the leading judgment, treated that issue as turning on whether the Rule Committee intended CPR 81.4(3) to have extra-territorial effect. In concluding that it did, he said at [32]-[33]:

"32. …….CPR rr 81.3 and 81.4(1)(3) are not provisions in a criminal statute or Regulation but are a vehicle and a mechanism for the court's disciplinary powers over corporate contemnors which are undoubtedly subject to its jurisdiction, in this

case because they have instituted proceedings in it. Although a corporation is a legal entity distinct from its members, it is only capable of acting by its agents. …

33. It was because, absent a power over the directors and officers of companies which disobey orders of the court, the court's disciplinary powers over them would be significantly weakened, that a policy decision was taken to, in the words of Arlidge, Eady & Smith on Contempt, 4th ed (2011), para 12-116, "exert pressure" on those who have accepted responsibility by virtue of their offices in the company. For a director or officer to be liable, it is necessary to show that he or she knew of and was responsible for the company's breach of the court order, undertaking to the court, or other contempt: see *Attorney General for Tuvalu v Philatelic Distribution Corpn Ltd* [1990] 1 WLR 926, 938; *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch) at [42]; *Masri v Consolidated Contractors International Co SAL* [2011] Bus LR D55, para 40(2); and *Westminster City Council v Addbins* Ltd [2013] JPL 654, paras 50-54."

132. By the Civil Procedure (Amendment No 3) Rules 2020 (SI 2020/747) Part 81 was entirely replaced, mostly with effect from 1 October 2020, by a simplified and reduced Part 81 ('the 2020 Revision'). As explained in the foreword to the Consultation Paper leading to the 2020 Revision by the then Deputy Head of Civil Justice, Coulson LJ, the revisions followed a consultation to address procedural aspects of contempt proceedings which were causing frequent difficulties. The revisions were intended, he said, to omit substantive law which was replicated in the existing part 81, and to retain and revise procedural provisions. He said that the revisions were intended to strengthen the procedural rules.

133. This was reflected in the new Rule 81.1(2) and (3) which provided:

"(2) This Part does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law.

(3) This Part has effect subject to and to the extent that it is consistent with the substantive law of contempt of court."

134. The 2020 Revision removed the previous Rule 81.4. In relation to penal notices the new 81.4(2)(e) contained a requirement that the committal application must allege that the order contained a penal notice, which was defined in Rule 81.2 in a way which alluded to the liability of directors and officers for breaches of orders made against corporate bodies previously reflected in rule 81.4(3):

"penal notice means a prominent notice on the front of the order warning that if the person against whom the order is made (and in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law."

135. The previous Rule 81.20 was replaced but subject to a saving contained in paragraph 2(1) of SI 2020/747 which provided:

"Part 81 as it was in force immediately before 1 October 2020 continues to have effect for the purposes of rule 83.2A, but only insofar as rule 83.2A provides for

> enforcement by means of a writ of sequestration in cases where no proceedings for contempt of court are brought."

Rule 83.2A, which had been introduced by a 2014 amendment to the CPR, provided:

> "……an application for permission to issue a writ of sequestration must be made in accordance with Part 81 and in particular Section 7 of that Part."

136. The effect of this was that after October 2020 the previous version of 81.20(3) (which in accordance with a convention coined by the editors of the White Book is referred to as 81x 20(3)) continued to apply to writs of sequestration in enforcement of court judgments, orders and undertakings where no proceedings for contempt of court were brought.

137. Rule 83.2A was itself repealed by the Civil Procedure (Amendment) Rules 2021 (SI 2021/117) but only prospectively in relation to applications/writs of sequestration issued after 6 April 2021.

Conclusions

138. I have reached the clear conclusion that the responsible persons liability principle is a matter of substantive, not procedural law, which was not dependent upon the 1860 Act, the Rules of the Supreme Court prior to 2012, or the Civil Procedure Rules prior to 2020, and remains unaffected by the 2020 Revision. My principal reasons are as follows.

139. First, the power to punish disobedience to orders of the court as contempt derives from the inherent jurisdiction of the court to secure the effective administration of justice. It is a matter of substantive law fashioned by the courts for that end, and is therefore not something which one would expect to be created or confined by procedural legislation, whether a common law procedure statute, such as that of 1860, or procedural rules of court. Indeed it is not something which can be changed by rules of court, which are made by the delegated statutory authority conferred under section 1 of the Civil Procedure Act 1997 to make rules in relation to "practice and procedure" (including specific matters of that nature set out in Schedule 1).

140. Reference is often made to matters of substantive law in procedural rules of court, but that does not provide any indication that the rules are the source of such law; nor does it render the rules the source of that law. I agree with the editors of the White Book in their observation on rule 81.2(1) of the 2012 CPR at paragraph 81.2.1 that :

> "Rules of Court setting out procedures for contempt of court proceedings are drafted against the background of substantive law relating to liability for contempt, to the jurisdiction of the courts to entertain contempt applications, and to the power of the courts to punish for contempt (both for punitive and coercive purposes). Such relevant law is found in case law and statute, which together form an extensive and complicated body of law, and not in rules of court, which are confined to matters of practice and procedure. Frequently, for purposes of exposition, it is convenient if not necessary for rules of court to declare, recite or acknowledge (expressly or impliedly) aspects of the relevant substantive law. By so doing, the erroneous impression can be created that the legal basis for the substantive law is the rule … Rule 81.2.(1) issues the necessary corrective."

141. Secondly, there was already a responsible persons liability principle governing the liability of directors and officers (and others) for contempt of civil orders, which was enforced prior to the 1860 Act. The 1860 Act did not create such liability, but merely made some procedural changes to give more streamlined effect to its enforcement. It did not purport to define the circumstances in which such liability was owed, either by reference to which members directors or officers counted as responsible for the disobedience, or the state of mind required for contempt to be established. It is apparent from the passage in Stephens' 1860 book quoted above, that the category of those who could be held liable did not necessarily extend to all members directors or officers but only to those responsible for the corporation's contempt, although I have not found in prior case law any clear delineation of the boundaries.

142. The responsible persons liability principle arose so as to render effective orders against corporate bodies which have legal personality but can only act through natural persons. They are for that reason treated as a special case, for which a particular principle has been fashioned independently of the criminal law of aiding and abetting. The rationale for a special principle is that identified by Beatson LJ in *Dar Al Arkan* at [33], quoted above, namely that absent such a principle the court's powers to enforce orders against corporate bodies would be significantly weakened, and that the policy is to exert pressure on those who have accepted responsibility by virtue of their offices or position in the corporate body.

143. Thirdly, the rules of court in their various iterations did not purport to define the content of the responsible persons liability principle. They do not address the substantive question of what degree of involvement, knowledge or culpability amounted to responsibility so as to render directors and officers liable for the company's contempt. That was so throughout the period when the RSC 1883, RSC 1965 and CPR 2012 were in force and when, Mr Moxon Browne accepts, the principle applied. Order 42 in the 1883 RSC required "wilful" disobedience but that was not addressed either to the identity or to the state of mind of the director or officer who might be liable, and that wording disappeared in the 1965 RSC. The content of the responsible persons liability principle is not to be found in the rules. They recognise its existence but do not seek to define it.

144. Fourthly, and relatedly, the development of the law in this area since 1883 has proceeded not by way of construction of the rules, but by way of principles which give effect to the court's inherent powers governing contempt. In *Tuvalu*, the court sought to define the content of the principle, and what amounts to responsibility for the purposes of the principle. It did not do so by any exercise of construction of the words of Order 45 in the 1882 RSC, which were silent on the question, but rather by an expression of view as to what the law ought to be. This was the court identifying the principles applicable to its inherent jurisdiction. Beatson LJ's judgment in *Dar Al Arkan* is more directly concerned with the construction of Part 81 of the 2012 CPR, but that is because the issue in that case was whether the accepted jurisdiction to hold directors and officers liable in contempt could be exercised extraterritorially; it did not concern the substantive content of that jurisdiction but rather its territorial scope, which is the classic domain of procedural rules of court: see *Masri v Consolidated Contractors International Company SAL* [2009] UKHL 43 [2010 1 AC 90 per Lord Mance at [10]-[15].

145. Fifthly, it is clear, as Foxton J concluded in *Novans*, that the 2020 Revision did not intend to effect any change to this aspect of the law of contempt. As Nugee LJ said in *BMF4 PLC v Rizwan Hussain* [2022] EWCA Civ 1264 at [70]-[72], the 2020 Revision was not

intended to effect any change to the substantive law of contempt. That is not, as Mr Moxon Browne submitted, a conclusion merely as to the subjective intention of the Rule Committee derived from Coulson LJ's foreword in the Consultation Paper; it is to be derived objectively from the terms of the 2020 Revision, and in particular rule 81.1(2) and (3). It also follows that the members of the Rule Committee must have considered that the power to commit a director or officer for contempt of an order made against the company, reflected in rule 81.4(3) of the 2012 Rules, did not derive from the rules but existed as a matter of substantive law, because its removal must have been deliberate. I agree with their view: the principle is one of substantive law. Similarly it is implicit in rule 81.2 that there was no intention to remove the principle previously reflected in rule 81.4(3) of the 2012 Rules: the requirement retained in rule 81.4(2)(e) of the 2020 Revision that the order be endorsed with a penal notice in accordance with rule 81.2, which requires it to allude to the liability of officers and directors for breach of orders against corporate bodies, is a clear indication that it was understood that the substantive law in respect of such liability, previously reflected in rule 81.4(3) and its predecessors, was to subsist.

146. The editors of the White Book, in supporting this conclusion, also rely in support on the transitional retention of rule 81x.20. I do not treat that as an indication in either direction. It relates to the ability to sequester the property of directors and officers but was made inapplicable to sequestration for contempt. This is consistent with the removal of rules 81.4(3) and 81.20(3), so far as applicable to contempt, taking place because they reflected the substantive law of contempt, from which rule 81 was to be cleansed by the 2020 Revision.

147. Mr Moxon Browne suggested that the historical analysis was undermined by the concept of separate corporate personality for companies not being established until the decision of the House of Lords in *Salomon v Salomon & Co* [1897] AC 22. That is mistaken. The very essence and raison d'être for bodies corporate, from their earliest existence, was that they should have separate legal personality from their members so as to have perpetual succession; and that they could sue and be sued in their own name rather than that of their members: see for example Blackstone's *Commentaries* at Book 1 467-8, 475; and *The Case of Sutton's Hospital* [1610] Co Rep 1, 27a, 32b, 77 ER 937, 964-5, 973. *Salomon v Salomon* simply involved the application of an accepted background of separate legal personality for companies to the particular factual circumstances of the case involving a one man company: see the argument at p. 28.

148. Mr Moxon Browne also submitted that "the corporate veil doctrine" precludes the existence of the responsible persons liability principle which is why (a) at common law directors will only be liable for criminal acts by their companies upon proof of their own direct criminal involvement and (b) numerous statutes creating criminal offences by companies include special provisions imposing statutory liability on directors who consent to or connive at and/or permit or ignore such offences, citing by way of example Bribery Act 2010 s14, Theft Act 1968 s 18, Fraud Act 2006 s. 12, and Health and Safety at Work Act 1974 s. 37. However, this submission proves too much because these matters existed between 1860 and 2020 when it is accepted that the responsible persons liability principle was in force. They have no bearing upon the principle because the matters relied on are concerned with liability for criminal offences, whereas the responsible persons liability principle is concerned with civil contempt by a corporate body.

149. In conclusion on this point I can refer to the way the appellants framed the point in their supplementary skeleton argument: "the true issue, and the only material issue, is whether the Court's jurisdiction to make orders for committal in respect of breaches of court orders by companies against the companies' directors, is inherent, and/or is based on pre-existing statutory or common law, independently of the former CPR 81.4. In which case the purpose of CPR 81.4 was merely to serve as a reminder of the existing law. If so, the repeal of CPR 81.4 would leave that jurisdiction unaffected. But if it is not, the repeal of CPR 81.4 will have removed the sole basis in law for that jurisdiction." For the reasons I have endeavoured to explain, the former is the case. The Court's jurisdiction to make orders against directors and other officers in respect of breaches of the court's orders addressed to corporate bodies is inherent; and it is based on law independent of the former CPR 81.4 and indeed of its predecessors in rules of court and the 1860 Act.

The appeal against sentence

150. The principles governing an appeal against sentence are those set out in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524 at [37]-[38]:

> "37. In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge. See *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101, at paras 35–36, *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748, at para 16, *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823, at paras 76 and 81 and the very recent decision of this court in *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] EWCA 392 (Civ), at para 44.
>
> 38. It follows from that approach that there will be few cases in which a contemnor will be able successfully to challenge a sentence as being excessive. If however this court is satisfied that the sentence was "wrong" on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision."

151. The Judge identified and paid careful heed to the principles applicable to sentencing, including *JST BTA Bank v Solodchenko (No 2)* [2011] EWCA Civ 1241 [2102] 1 WLR 350 in relation to breaches of freezing orders. No criticism can validly be made of her approach.

152. In relation to GHI, the Judge applied a fine of £75,000 for the totality of the Contempts she found proved, Contempts 1 to 4. I have concluded that ADM only established Contempts 1, 2 and 4. If my Lords agree, it is therefore necessary to reconsider sentence on GHI (remission not being necessary or appropriate). That is a matter for our judgment applying the applicable principles, but I feel constrained by the sentence imposed by the Judge. It would not be right to impose a greater sentence, and some reduction is required by virtue of the successful appeal on Contempt 3. The result is not necessarily that at which I would have arrived if sitting at first instance.

153. I would reduce the fine to £50,000 taking into account that the Judge will have applied the principle of totality, rather than simply adding up the total of the penalties which would have been appropriate had each contempt stood alone; and the view she expressed that Contempt 4 was a serious breach which involved a deliberate breach of the freezing element of a freezing order over a period of several years and which is continuing. I too regard that as serious.

154. In relation to Mr Boutgueray, the penalty of imprisonment for 12 months on Contempt 3 falls away with the successful appeal against the finding of contempt. The arguments advanced in respect of the 6 month penalty imposed for Contempt 4 (which were addressed compendiously to both Contempts 3 and 4) were as follows.

155. First it was submitted that that the Judge failed to take any or any sufficient account of the fact that the contempt was not contumelious with the deliberate intention of defeating the court's order; and had not been committed in furtherance of dissipation. This is not true of Contempt 4. The Judge found it was deliberate and involved dissipating assets in breach of the WFO.

156. Next it was submitted that the Judge failed to pay adequate heed to the efforts made by Mr Boutgueray to purge the contempts in the short time available. There is no merit in this criticism. The Judge did pay heed to them and reduced the sentence she had otherwise been minded to impose from 18 months to 12 months. In order to purge the continuing breach of the freezing aspect of the WFO Mr Boutgueray would have to show that his continuing trading did not affect unencumbered assets of U$4 million. His sixth affidavit did no more than show he had started to take such steps and Mr Moxon Browne recognised before the Judge that further work was required and greater explanation needed to be given. Sufficient account was taken of such initial steps in a sentence of 6 months imprisonment on Contempt 4.

157. Next it is said that the Judge was wrong to give too little weight to "the apparent fact, supported by affidavit evidence, that GHI's net assets exceeded US$4 million". This is not a fair representation of the evidential position at the time of sentence. There was simply a mass of material which was not properly explained which cannot have led the Judge to be able to draw any conclusions from it as to GHI's assets, in fairness to ADM.

158. Finally it was submitted that an order for immediate imprisonment was unnecessary and that the sentencing hearing should have been adjourned and/or the sentence should have been suspended. This is hopeless. The refusal of the adjournment was a case management decision which was entirely justified by the history of the proceedings and the unheralded production at the very last minute of material in a form which could not properly be put before the court. It is always open to a contemnor who subsequently purges his contempt to apply for a sentence to be reduced. The Judge was undoubtedly entitled to proceed to sentence on the material which had properly been adduced at the time. A sentence of 6 months immediate custody was justified for Contempt 4, which involved a deliberate flouting of a freezing order over a period of several years and which was, on the evidence properly before the Judge, continuing. Declining to suspend the sentence was well within the range of decisions properly open to the Judge, indeed inevitable.

159. I would therefore dismiss Mr Boutgueray's appeal against sentence in respect of Contempt 4.

Conclusion

160. I would therefore allow GHI's appeal to the extent of quashing the finding of contempt on contempt 3 and reducing the sentence to a fine of £50,000. I would allow Mr Boutgueray's appeal to the extent of quashing the finding of contempt and sentence on contempt 3, which has the effect that his overall sentence is reduced from 12 months to 6 months. Save in these respects I would dismiss the appeal.

Lord Justice Snowden :

161. I agree.

Lord Justice Singh :

162. I also agree.