Neutral Citation Number: [2020] EWHC 1023 (Comm)

Case No: CL-2016-000797, CL-2016-000798 & CL-2018-000312

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 06/05/2020

Before :

SIR MICHAEL BURTON GBE SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) Super Max Offshore Holdings **Claimants**

(2) Actis Consumer Grooming Products Limited

- and –

Rakesh Malhotra **Defendant**

- -

- -

Ms Bingham QC & Ms Rogers (instructed by **Clifford Chance**) for the **Claimants**
Mr Marshall QC & Mr McCourt Fritz (instructed by **Fladgate LLP**) for the **Defendant**

Hearing dates: 10 - 12, 17 - 18, 26, 30 March

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 6 May 2020 at 10:30 am.

SIR MICHAEL BURTON GBE :

1. This has been the hearing (including on the 18 March what I believe was then the first virtual Commercial Court hearing with (the expert) witnesses) of an application for the committal of Mr Rakesh Malhotra (the Defendant) for contempt, in fact based upon four consolidated applications alleging breach of several orders by Judges of the Commercial Court, and other alleged contempts, between 20th December 2016 and 24 March 2018.

2. It arises out of a hard fought dispute with the Defendant in relation to the management and ownership of the largest company manufacturing and marketing razorblades in India, by the First Claimant, Super-Max Offshore Holdings (SMOH), represented latterly by its Group Chief Executive Officer (CEO) Mr Anindo Mukherji (AM) and the Second Claimant, Actis Consumer Grooming Products Ltd (Actis), which had bought into SMOH, previously owned by the Defendant, and his family. The Defendant remained as Executive Chairman after the takeover, but with his powers very closely defined and restricted by an Authority Matrix, with which he was bound to comply by clauses 2.3 (ii) and 5 of his Employment Contract dated 1 April 2011, and which vested powers in an Advisory Board and most managerial powers in AM as the Group CEO.

3. The battle still continues in India and elsewhere, but so far as the litigation in England and Wales is concerned it was resolved after an eight day hearing in October 2017, by a judgment by Popplewell J on 13 December 2017, by which he concluded that the Defendant was in breach of his service contract, validly terminated on 10th February 2017, and made permanent injunctive orders in favour of the Claimants, to which I shall refer below.

4. The first contempt application (Application 1), consisting of 11 paragraphs (a) to (k) (plus one which I struck out in October 2019), relates to alleged breaches by the Defendant of the interlocutory order of Picken J of 20th December 2016 made ex parte, but in the presence of the Defendant's Counsel and Solicitors, though without instructions (the Picken Order). On 6 January 2017 the Picken Order was continued until judgment or further order by consent, by an Order by Andrew Baker J (Baker 1) and a further order was then made (Baker 2) over until a return date on 27 January 2017. The latter Order was continued on 27 January by Males J (the Males Order) over until 17 February 2017, when it was continued by consent by Teare J until 3 March 2017. The second contempt application (Application 2) relates to allegedly knowing false statements made by the Defendant in two paragraphs of a witness statement served on 20 January 2017 for the purpose of the 27 January hearing.

5. The Males Order was continued in substantially the same terms by Andrew Baker J until judgment or further order on 3 March 2017 (Baker 3). The third contempt application (Application 3) consists of 22 paragraphs. The first five relate to alleged breaches of the Males Order and paragraphs (6) to (9) inclusive to alleged breaches of Baker 3.

6. Popplewell J made a further interlocutory order until judgment or further order on 8 August 2017 (Popplewell 1) and he then heard the speedy trial between 9 and 19 October 2017, giving judgment, as I have said, on 13 December 2017, when he continued the interlocutory

orders over until the resolution of final relief (Popplewell 2), which took place on 27 March 2018. Paragraphs (10) and (13)–(14) of Application 3 relate to alleged breaches of Popplewell 1; paragraphs (11) to (12) relate to further alleged breaches of Baker 1, and by paragraphs 1 to 7 and (in part) 9 of Application 4 the same matters are alleged to have constituted interference with justice by deterring or obstructing AM and the group CF0 Mr Desai from attending to give evidence before Popplewell J. Paragraphs (15) to (22) of Application 3 and paragraphs 8 and 9 of Application 4 relate to alleged breaches of Popplewell 2 and to interference with justice by punishing or victimising those, including AD and Mr Desai, who had given evidence before Popplewell J.

7. There has been considerable delay in resolving these contempt applications, although the Claimants have listed them for hearing on at least two previous occasions:

i) Applications 1 and 2 were issued on 28 February 2017, and permission was given for the latter by Andrew Baker J on 24 March 2017. They were originally to be heard at the same time as the speedy trial, but, at the instance of the Defendant, at the pre-trial review before Picken J on 15 September 2017 they were adjourned until after that trial. Applications 3 and 4 were issued on 14 May 2018 and permission was given for the latter by David Foxton QC on 27 July 2018.

ii) There were orders made in October 2018 and July 2019 by Cockerill J and Knowles J, and the matter came before me for a four day hearing of the contempt applications on 7 October 2019. By that time the Defendant, now represented by Mr Philip Marshall QC and Mr McCourt Fritz, after several changes of Counsel and Solicitors, had issued an application to strike out a number of the grounds of application , and I dealt with that application, and with an application for a stay then raised for the first time by the Defendant by reference to two cases in Dubai, which meant that the full hearing time intended for the contempt application was in the event taken up with my dealing with those various applications by the Defendant. I struck out one of the subparagraphs of Application 1, as I have mentioned above, and granted a short stay. Permission to appeal my judgment was sought by the Defendant from the Court of Appeal and refused by Leggatt LJ in robust terms.

After a number of further orders by the Court, and the bringing of another strike-out application by the Defendant, which has not in the event been pursued, the matter has come on before me. The Defendant has not attended, and so has not given evidence, as he did not attend at the October 2019 hearing. He has been represented again by Mr Marshall and Mr McCourt Fritz, now instructed by Fladgate, and the Claimants, as they have been throughout, by Ms Bingham QC and Ms Rogers, instructed by Clifford Chance.

8. This is a contempt application, and the Defendant is entitled to elect, as he has done, not to give evidence and hence not to be cross-examined, and the Claimants must prove their case beyond reasonable doubt, and if an innocent explanation remains a reasonable possibility, the Defendant is entitled to the benefit of the doubt (see Daltel v Makki [2005] EWHC 749 (Ch) at [30] and JSC BTA Bank v Ablyazov [2012] EWHC 237 (Comm) at [8-9]). However, the Claimants are entitled to rely on the absence of explanation by the Defendant when explanation is required (and especially when notice has been given by the

Claimants of an intent to do so, as it was here). I have drawn guidance from Arlidge, Eady & Smith on Contempt (5th Ed) at 15-55A and from Averill v U.K. [2001] 31 EHRR 36 at [43] and from the words of Popplewell J in Therium (UK) Holdings Ltd v Brooke [2016] EWHC 2421 (Comm) at [29], referring to Inplayer Ltd v Thorogood [2014] EWCA Civ 1511 at [40], and the inference that may be drawn by the Court that "*a deliberate decision not to give evidence by a person charged with contempt in relation to matters within his own knowledge has been made because he does not believe that his case will withstand scrutiny when tested by cross-examination, provided the case against him is such that it calls for an answer*", and of Whipple J in VIS Trading Co Ltd v Nazarov [2015] EWHC (QB) 3327 to similar effect.

9. As it happens, the Defendant did put in evidence at the time of the interlocutory applications now in issue before me, and he gave oral evidence at the hearing before Popplewell J, but he has not given any evidence before me, and I shall be left to draw my conclusions without the benefit of any explanation from him in response to the substantial quantity of correspondence before me, to much of which he was party, the evidence of the Claimants' witnesses, whom I have heard cross-examined by Mr Marshall and, in respect only of Applications 3 and 4 (by virtue of the Order of Cockerill J of 18 October 2018), in the light of the 13 December 2017 Judgment of Popplewell J. Silence cannot be a basis for finding a case of contempt of court proved, but if there is otherwise a case to answer I am entitled to draw an adverse inference from the absence of evidence from a witness such as the Defendant who could have given relevant evidence in explanation or answer. This applies also to the absence of evidence from other witnesses who could have produced some explanation in rebuttal of the Claimants' case (Imam-Sadeque v Bluebay Asset Management (Services) Ltd [2012] EWHC 3511 (QB) at [9] per Popplewell J). That was a civil case, but, subject to caution, I apply the same approach to a number of witnesses, particularly those who, although abroad, came to give evidence to support the Defendant before Popplewell J.

10. I shall narrate briefly the relevant part of the history leading up to the making of the Picken Order, before I set out the orders variously made and the content of the four applications, though there is a much fuller picture given by Popplewell J in his judgment, which, as I have said, by virtue of the Order of Cockerill J is admissible only in respect of Applications 3 and 4.

11. The immediate lead up to the commencement of proceedings by the Claimants can be said to have commenced when the Defendant, after being primed, in cooperation with Mr Wagh, his close confidant, with whom he exchanged emails through their private email addresses, with legal advice from a lawyer (presumably Mr Amin, mentioned later), wrote to the Advisory Board members on 14 December 2016, proposing that AM be suspended from all executive management responsibilities with immediate effect; and when reminded that such a step would be a "reserved matter' within clause 16.1 of the Subscription and Shareholders Deed (SSD), and asked for confirmation that he would take no further steps, by the Second Claimant's solicitors, he sent a letter dated 18 December directly to AM, purporting to suspend him as Group CEO with immediate effect. The same day the Defendant notified all employees of the Group of such suspension and that he was with

immediate effect "*assuming the responsibility of Group CEO*", such that all employees reporting to that position would now report to him.

12. While the Claimants were gearing up to bring proceedings in the Commercial Court on the morning of 20 December 2016, as notified by email to the Defendant's solicitors at approximately 11:15 am GMT (3:15 pm Dubai time; 4:30 pm Indian time (IST)) and to the Defendant himself shortly after 1125, the Defendant swung into action. He put into effect a plan to dismiss four senior employees loyal to AM ("the Senior Managers"), Messrs Khamkar, Sreeram, Rawat and Balan, with constant communications to that intent between himself and Mr Wagh, the head of HR, and Mr Kumar, by emails between 5:54 am and 9:51 am GMT (I shall now, for the most part, unless there is a particular significance to a time, refer only to GMT); with a view to an announcement to all employees of their dismissal and replacement at 11 pm IST that night (5:30 pm GMT, 9:30 pm Dubai time). He approved such a draft announcement, by email to Mr Wagh, at 9:25am with the instruction (in capital letters) "*SEND AT 9:30 PM TONITE FROM DUBAI*" 11 pm IST).

13. In his witness statement in support of the ex parte injunction signed on 20th December Mr Shomik Mukherjee (SM) on behalf of the Claimants said (at paragraph 45): – *"I believe that [the Defendant] is, owing to his de facto control over the Group and perceived personal authority (in the eyes of many employees in the Group) both as Executive Chairman and as a member of the Malhotra family, able to give effect to a suspension or removal of the CEO and of other management whether this is technically valid or not."*

14. The hearing before Picken J commenced at approximately 12:30 pm GMT, ex parte but in the presence of the Defendant's solicitors and Counsel, who had been notified of the hearing, but had had no time to obtain instructions. He made his order at approximately 1:40 pm GMT. The Picken Order recorded in material part: –

> "*1. For the purposes of this Order:*
>
> > *(a) "Relevant Employee" shall mean any employee, director or officer of any Relevant Entity*
> >
> > *(b) "Relevant Entity" shall mean any Group Company*
> >
> > *(c) "Group Company" shall mean any company which is a direct or indirect subsidiary of the First Claimant*
> >
> > *(d) "subsidiary" shall have the meaning given by s.1159 Companies Act 2006.*
>
> *2. Until the return date, namely Friday 13 January 2017 (time estimate: half a day) or further order discharging this Order, the Defendant must not directly or indirectly:*
>
> > *(a) Take any steps to procure or implement the suspension or removal of Anindo Mukherji from his position as Chief Executive Officer of the Super-Max group of companies;*
> >
> > *(b) Take any steps to procure or implement the suspension or removal of any Relevant Employee (save in accordance with Clause 17.2.1 of the Subscription*

and Shareholders' Agreement entered into in respect of Super-Max Offshore Holdings dated 4 December 2010 (as amended))

(c) Hold himself out as or purport to act as Chief Executive Officer of the Super-Max group of companies.

3. The Claimants have permission to serve the Claim Forms, together with any other documents in these claims, on the Defendants at Building S10806, Jabel Ali Free Zone South, Dubai, United Arab Emirates or elsewhere in the United Arab Emirates.

The Defendants' time for Acknowledgment of Service to each Claim Form shall be 22 days after service of the Claim Form in each claim.

The Claimant has permission to serve this Order together with the supporting evidence listed in Schedule A below, together with a copy of the Application Notices for the Return Date on the Defendant by email address to Rocky.Malhotra@supermaxworld.com."

15. Subparagraphs (a) to (g) of the amended Application 1 set out the following as being the matters relied upon in breach of the Picken Order:

"(a) On 20/21 December 2016, the Defendant instructed Mr Kishor Wagh to proceed to implement the removal of Mr R Sreeram, Mr Milind Khamkar, Mr Ashish Balan and Mr Ashish Rawat (thereby "procuring" and "implementing" their removal and purporting to act as Group CEO in breach of the Picken Order);

(b) On 20/21 December 2016 the Defendant instructed Mr Rajib Kumar to proceed to implement the removal of Mr R Sreeram, Mr M Khamkar, Mr Balan and Mr Rawat (thereby "procuring" and "implementing" their removal and purporting to act as Group CEO in breach of the Picken Order);

(c) On 20 December 2016 the Defendant instructed Mr Kishor Wagh to circulate announcements to the effect that, following the departure of Messrs Khamkar, Balan and Rawat, certain other employees had been assigned new responsibilities and reporting lines (thereby "implementing" the removal of Messrs Khamkar, Balan, and Rawat and purporting to act as Group CEO in breach of the Picken Order);

(d) On 20 December 2016 the Defendant instructed Ms Anushuaa Bhattacharjee to circulate an announcement to the effect that, following the departure of Mr Sreeram, certain other employees had been assigned new responsibilities and reporting lines (thereby "implementing" the removal of Mr Sreeram and purporting to act as Group CEO in breach of the Picken Order);

(e) On 20 December 2016 the Defendant instructed Ms Anushuaa Bhattacharjee to circulate an announcement to the effect that Nitin Merani was to assume additional responsibilities, reporting to the Defendant (thereby acting as Group CEO in breach of the Picken Order);

(f) On 21 December 2016 the Defendant instructed Ms Gayatri Gumaste to cancel the employee stock option plans of Messrs Sreeram, Khamkar, Balan and Rawat

(thereby "implementing" their removal and purporting to act as Group CEO in breach of the Picken Order);

In each case, as to paragraphs (a) to (f) inclusive, the Defendant so acted after the Picken Order was made and with knowledge of its terms.

(g) In the alternative to paragraphs (a) to (f) inclusive, if (contrary to the Claimant's primary case) the instructions in question or any of them were given by the Defendant before the Picken Order:

(i) the Defendant failed to recall the instructions in question or any of them promptly upon being notified of the Picken Order on 20 December 2016;

(ii) [by Amendment] *further, in acting after the Picken Order was made in accordance with the instructions in paragraphs (a) to (f) inclusive, Messrs Wagh, Kumar, Bhattacharjee and Gumaste were acting as agents of the Defendant and/or on his behalf or on his instructions or with his encouragement, and within the scope of the authority conferred by him. Their actions are, accordingly, to be imputed to, and entail a breach of the Picken Order by, the Defendant personally."*

16. The Defendant served a witness statement, dated 20 January 2017, before the return date of the Picken Order, resisting the making of further orders seeking (inter alia) that he be banned from all of the Group's premises at all times (paragraph 25). He said as follows, in paragraph 27 and following:

"27. ....SM alleges that four senior managers (Messrs Sreeram, Khamkar, Balan and Rawat) had their employment terminated by letters dated 19 or 20 December 2016, and that two of those letters were served by hand on 21 December 2016. SM also states that on 20 and 21 December 2016 Mr. Kishor Wagh (the Group's Head of Human Resources) and Rajib Kumar (Head of Human Resources in India) made or procured several announcements by email around the time when the [Picken] Order was made, which purported to make several internal promotions.

28 ....

(c) Following my letter to AM, I instructed Mr Kumar and Mr Wagh to terminate the employment of Messrs Sreeram, Khamkar, Balan and Rawat ...

...

(d) On 20th December 2016 [the Second Claimant] ...obtained the [Picken] Order and, whilst I called Mr Wagh to inform him of the [Picken] Order, regrettably Mr Kumar and Mr Wagh had already taken steps to put into effect the actions which I had initiated prior to the [Picken] Order being made....

...

> *29… ..Following my letter to AM on 18 December 2016, all my actions to appoint and remove certain employees were initiated before the [Picken] Order was made. Whilst it is regrettable that two of the letters referred to in paragraph 27 above state that they were delivered by hand on 21 December 2016, Mr Wagh and Mr Kumar were instructed not to give effect to any of my earlier instructions immediately after the [Picken] Order was made and, to the best of [sic] knowledge, complied with this request. Any such delivery was therefore done without my approval or knowledge and I confirm that each of my instructions has been reversed (or is capable of being reversed).”*

17. In a further witness statement dated 8 February 2017 the Defendant develops and particularises his account that he learned of the injunction, understood it required him to prevent the terminations and gave instructions to Mr Wagh to that effect, in paragraph 42 and following:

> *"42. (a) before I was served with the [Picken] Order, I called Mr Wagh on… (Mr Wagh's mobile phone) from my mobile for approximately 10 minutes at around 15:36 (UK time)… on 20 December 2016; I then called Mr Wagh on..…… (his home landline) for approximately five minutes, with the call ending at [17.28]. As part of these calls, I informed Mr Wagh that an injunction had been obtained which would require me to stop the suspension/terminations and that I had not yet seen the details of the order and I was taking advice as to its scope and effect.*
>
> *(b) I received an email from [the Claimants' Solicitors] at [18.04] on 20 December 2016 enclosing the [Picken] Order.*
>
> *(c) I then called Mr Wagh on his home landline from my Mumbai home landline for approximately 10 minutes, with the call ending at around [18.55] 00.25 [IST] on 21 December 2016. I called Mr Wagh again on the same number from my Mumbai home landline for approximately 20 minutes, ending at [19.59] 01.29 on 21 December 2016 ([IST]).*
>
> *(d) The purpose of these two calls was to be more precise, as I had by then received the wording of the [Picken] Order. I explained what the Picken Order said and instructed Mr Wagh to stop any terminations and to reverse the organisational changes that I had sought to initiate following my letter to AM on 18 December 2016….I made it clear to Mr Wagh… that the terminations should not be proceeded with and the changes I had made had to be reversed; and Mr Wagh agreed to implement my instructions. Although I cannot recall it being part of my discussion with Mr Wagh I understood that Mr Wagh would ensure that his subordinates would carry out my instructions (including Mr Kumar)....*
>
> *43. I do not know why Mr Wagh did not ensure that my instructions were given full effect….*
>
> *...*
>
> *47… I wish to emphasise again that, from late on 20 December2016, I was aware of the terms of the [Picken] Order and the consequences that might follow if I bring*

> *that Order. The allegation against me is that I instructed Mr Wagh to ignore the [Picken] Order and continue to implement the organisational changes which I had initiated before the...Order was made. This is untrue. Pursuing such an agenda would have been foolhardy and illogical, given that (a) I was aware that any such changes would been of no effect; and (b) I was aware of the serious consequences that might arise for me if I breached the [Picken] Order."*

18. The position is now clear from the documents which the Claimants have obtained and produced as to what happened subsequent to 15:36 GMT, by which time the Defendant accepts, clearly having learnt from his solicitors, that he knew about the terms of the injunction sufficiently to understand that he must stop the suspension/terminations (paragraph 42 (a) of his second witness statement). With regard to the period prior to that, numerous calls between the Defendant and Mr Wagh on 18,19 and 20 December are recorded in the telephone records which have been exhibited, but I turn to consider events as they appear subsequent to 15:36 (using, as I have said, for the most part GMT times only).

19. As to the four Senior Managers, by that time, Mr Sreeram had been given notice. As for Messrs Rawat and Balan, the proposal to terminate their employment was sent to Mr Wagh, for the Defendant's approval, at 14:06 on 20 December by a Ms Dev, and at 14:16 Ms Dev sent to Mr Wagh a draft email to go out to Mr Rawat, which said:

> *"This refers to a meeting today in my cabin to issue the termination letter. However you informed me that you will not sign/accept. As required, I am sending the same termination letter by this email as attachment. You are advised to accept this letter & send the signed copy ASAP. As discussed since it's a termination of services, you are required to report the office tomorrow for handover."*

It is unclear whether this email was sent to him, but in any event it seems that nothing was signed/accepted by Mr Rawat, and on the following day, 21 December, a letter dated 20 December was hand-delivered to him, which he signed as received at 10:05 am (Dubai time) on 21 December. As for Mr Balan, he too had, as recorded in an email of 19 December from Mr Wagh to him, refused to sign or accept a termination notice. His dismissal was it seems still therefore only a proposal on the 20th, as set out above, and it is not clear when, if at all, a formal termination letter was sent to him, as it was with Mr Rawat. In his case there was simply an instruction by Ms Dev, with a copy to Mr Wagh, that his email (like Mr Rawat's) should be blocked at 5:26 GMT on December 21, and Mr Wagh emailed Ms Gumaste at 08.13 GMT on 21st, *"As advised by [the Defendant] please arrange to cancel the ESOP [Employee Stock Option plan] contracts of the following employees*", including the Senior Managers. I am satisfied that the employment of Mr Balan was, like Mr Rawat's, not terminated till 21 December.

20. As for Mr Khamkar, he too declined to accept the notice on 19 December, and, although Mr Wagh sent to the Defendant, by an email at 9:19 GMT on December 20, a draft announcement of Mr Khamkar's departure, for his approval, and although the Defendant, presumably assuming that the departure had been effected, noted in an email to Mr Wagh

and others at 10.50 GMT, on seeing an email from Mr Khamkar, "*His email is still live*", in fact Mr Khamkar only accepted the termination letter when it was delivered to him by hand (still dated 19 December, as if prior to the Picken Order) on 21 December. He then signed and annotated it as at 11:40 (IST) 21 December, sending a confirmatory email at 14.06 IST to Mr Kumar; Mr Kumar sent this on to Mr Wagh who (clearly recognising the failed attempt to backdate the letter, and hence the dismissal, to 19 December) responded to Mr Kumar: "*He is smarter than us to build the records*".

21. In the event therefore, the employment of none of Mr Khamkar, Mr Rawat or Mr Balan had been terminated prior to 15:36 GMT on 20th December, but the termination was only effected thereafter, on 21 December. In a stream of some 20 or more emails through 21 and 22 December between and by Mr Wagh, Mr Kumar, Ms Gumaste and Ms Bhattacharjee (only one of them, at 10:08 GMT on 21 December, copied to the Defendant), they continued to complete the exercise of terminating the employment of the Senior Managers, terminating and dealing with their ESOP entitlements, recovering from them company property and equipment, disabling their access to the internet portal, and their SIM cards, recovering their iPhone passwords and calculating their salary and notice entitlements.

22. Returning to 15:36 on 20 December, Mr Wagh telephoned the Defendant at 1609 and then immediately rang Ms Ramachandran, who was to replace Mr Khamkar, presumably giving her such news. At 16:32 Mr Wagh circulated an "*Approved draft of announcement by [the Defendant*]" relating to the replacement of Mr Sreeram by Mr Merani. There was then the lead up to the Announcement, at 9:30 pm Dubai time/11 pm IST/17.30 GMT, exactly as planned earlier in the day. The Defendant says, at paragraph 42 (a) of his Second witness statement, referred to in paragraph 17 above, that he ended his call with Mr Wagh at 17:28 GMT (10.58 pm IST). There is then a record of a short telephone call between the Defendant and Mrs Bhattacharjee, at 11 pm IST precisely. Mr Wagh and Ms Bhattacharjee then sent out at 11pm IST, as planned, the approved announcements to the Group employees (of course including the Defendant), announcing the departure of Messrs Khamkar and Sreeram, and their respective replacements: Mr Merani was to report to the Group Chairman (the Defendant).

23. The Picken Order was served by email on the Defendant's solicitors at 18:04 GMT, 34 minutes later, and at 18:57 the Defendant emailed Ms Gumaste to ask what clause 17.2.1 of the SSD (referred to in paragraph 2(b) of the Order) was. According to the Defendant's witness statement (paragraph 17 above) he spoke to Mr Wagh at the same time, and again for 20 minutes at 19:39. The '*Reorganisation*' continued, and at 19:30 GMT, Mr Wagh copied the Defendant in on a draft announcement about 'Organisation Restructuring' to be sent to Super-max staff worldwide.

24. This was sent out by Mr Wagh at 08:30 IST (03:00 GMT) on 21 December, immediately after a telephone call between him and the Defendant lasting 1.26 minutes according to the records, plainly intended to give final approval to it, as another announcement to Super-Max staff worldwide (including the Defendant) that*: "Further to separation of [Messrs Balan and Rawat], some strategic restructuring decisions have been made over the past few days…"* At 08:32 IST an email was sent by Ms Gumaste to Mr Wagh, copied to the

Defendant, requesting copies of the *"resignation letters/termination letters received from/issued to [the Senior Managers] as the case may be*" so that, as *"advised"* by the Defendant (paragraph 19 above), their ESOP contracts were cancelled, and Mr Wagh responded at 10:08 IST with copy to the Defendant (as referred to in paragraph 21 above) that he had, as required, sent copies of the termination letters of the Senior Managers although, as appears from paragraphs 19-20 above, they will not have actually received them all by then.

25. An "*Amendment/Addition to HR policies*", being "*Policy instructions from the Executive Chairman*", ostensibly dated 19 December 2016, relating to not re-hiring any terminated or resigned employee (i.e. the Senior Managers), signed by the Defendant, was sent to Mr Wagh by Ms Fernandes, the Defendant's Executive Assistant, at 12:19 GMT on 21 December, with the words *"Apologies, I forgot to email this earlier*". However it is clear from the metadata that this document, purportedly dated 19 December, was in fact another example of backdating so as to appear to antedate the Picken Order, since it was created by the Defendant's PA Linet Pereira, only that day, 21 December, at 06:15 GMT.

26. AM was, with some difficulty, ascribed by him to various acts of the Defendant, back in the saddle, on 26 December 2016, and the Senior Managers restored to employment, but when he emailed Mr Wagh on December 24, asking him to confirm that no steps were being taken to procure or implement the suspension or removal of any employee, and again on 26 December to ask him to ensure that all forms of connectivity/infrastructure were fully restored to the Senior Managers, on both occasions Mr Wagh passed them on to the Defendant via their private emails with "*please advise on response*".

27. No evidence has been provided by the Defendant since the two witness statements referred to in paragraphs 16 and 17 above. Mr Wagh has not given evidence, but the affidavit he made on 26 April 2019 has been put before me, (and, without objection from Ms Bingham, Mr Marshall also put forward the witness statement that he made on 8 February 2017) under cover of a Hearsay Notice dated 10 March 2020, on the basis that he "*cannot be called as a witness to give oral evidence because… he is unwilling to travel to London to give evidence or to give evidence via video link"*. Mr Marshall accepts that there is no further admissible explanation for his absence. He has therefore not been capable of being cross-examined, and, when he was cross-examined before Popplewell J, his evidence was roundly disbelieved. But even without cross-examination his evidence is incredible. His 8 February statement purports to say that the Defendant did give him instructions, in the telephone calls referred to by the Defendant, that the organisational changes and the termination of the employment of the Senior Managers should be reversed (and that he agreed to do that), but that when he went to work on 21 December he did not regard reversing them as his "*first priority*": "*Although I appreciated that the matter was important, there were other factors that affected my thinking*", which he purports to set out. I do not accept that, as a dedicated follower of the Defendant, his 'malik', as AM described such relationship in evidence, he would not have complied with any such instructions, if they had really been given; but in any event it is manifest from my summary set out above that he kept the Defendant fully in touch with his continued compliance with the Defendant's original, plainly uncountermanded, instructions. It was compliance with

the Defendant's original instructions which was, as ever, his "*first priority*". In his affidavit of 26 April 2019, he repeats that he was instructed by the Defendant to stop the terminations, and he said that he continued ("*to finalise the legislative and administrative consequences of the terminations*") in order to avoid leaving "*things in limbo*". This is equally incredible. The Defendant in paragraph 43 of his Second Witness Statement of 7 February 2017 sought to suggest, having read Mr Wagh's 8 February statement then in draft, that Mr Wagh may have been distracted by his imminent leave, or may not have been well. But the Defendant knew perfectly well that his original instructions were still being complied with, unreversed (and, to say the least, without complaint from him).

28. I have no hesitation in disbelieving not only Mr Wagh's hearsay statements (clearly intended to assist the Defendant if he could) but also the Defendant's uncross-examined statement that he instructed Mr Wagh to stop or reverse the terminations after learning of the Picken Order to that effect. It is quite plain, to the contrary, from the account I have given above, that he continued to put into effect his plan, assisted by Mr Wagh, Mr Kumar and Ms Bhattacharjee, to remove the Senior Managers, sped them on (anxiously noting that Mr Khamkar's email had not been stopped), and, after he knew of the terms of the Picken Order, was constantly in contact by telephone, approved and then saw the announcements, and the dismissals and replacements, and was party to what continued to occur. Even as late as 10:08 IST on 21 December, Mr Wagh was plainly carrying forward, unreversed, the plan, and the Defendant was being kept fully in touch. At that stage neither Mr Balan nor Mr Khamkar had accepted the termination letters which Mr Wagh sent to their homes to be signed. It is quite plain that, acting on instructions from, and at all times in collaboration with, the Defendant, Mr Wagh and Mr Kumar planned and executed, including where necessary some attempts at backdating, the attempted reorganisation, and continued to do so after 15:36 GMT on 20th December, and indeed after the service of the Order at 18:04 GMT. I reach this conclusion without the need to rely on the obvious adverse inference to be drawn from the Defendant's deliberate abstention from the hearing and therefore the absence of any explanation from him or from any of Mr Wagh, Mr Kumar, Ms Gumaste or Ms Bhattarcharjee. But the absence of evidence emphasises the strength of the case which the Defendant is unable to answer.

Application 2 (a)

29. I turn first to deal with this ground, which alleges that: –

> *" On 20 January 2017 the Defendant filed and served a witness statement jointly… 'verified by a [statement]of truth, containing the following statement which [was], to the Defendant's knowledge, false and likely to interfere with the course of justice:*
>
> *(a) at paragraph 29, the Defendant's statement that immediately after the* [Picken] *Order was made, Messrs Wagh and Kumar were instructed not to implement the removal of [the Senior Managers]"*

CPR 32.14 provides as follows: *"(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."* Permission was given by Baker J (paragraph 7(i) above).

30. I have no doubt whatsoever that, for the reasons I have just given, this statement by the Defendant was knowingly false. He did not give instructions to stop or delay implementation of the removal of the Senior Managers. Rather, he knew about, directed and encouraged the continuation of the removal. I set out the words used in paragraph 29 of his first witness statement in paragraph 16 above. Mr Wagh was not so instructed, nor was Mr Kumar (via Mr Wagh or otherwise) and to the Defendant's knowledge they did not act in accordance with any such instructions (which were not given).

31. Mr Marshall submitted in his Opening Submissions that it is a necessary part of the Claimants' case that the Picken Order needs to imply a mandatory injunction to bring implementation to an end (to which I shall return below) and if there is no such implication then the Defendant's statement cannot have been likely to interfere with the course of justice. This is in my judgment wholly illogical. The Defendant made the statement in the hope and expectation that his bona fides would be accepted and that no further orders, or at any rate less stringent orders. would be made.

32. He did not repeat that submission in closing. He rather submitted that:

    i) There is no public interest in Application 2, as it is very stale:

    ii) There is no corroboration of the statement's falsity; and the Defendants failure to give evidence cannot be used to add credibility or weight to other material when the other material is insufficient to sustain a finding of contempt. As to the former submission, his case is that the offence of criminal contempt of court by making false statements in evidence should be treated as the same as, or perhaps analogous to, an offence of perjury, in respect of which s.13 of the Perjury Act 1911 states that, "*A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury* or *subornation of perjury, or to be punishable as perjury or subornation of perjury, solely upon the evidence of one witness as to the falsity of any statement alleged to be false*."

33. With regard to (i), Ms Bingham contends that the application can only be said to be 'stale' because of the fact that the proceedings have been delayed in coming to trial: and Leggatt LJ was critical of the delay, none of which was the fault of the Claimants, when he said on 9 December 2019, in refusing to the Defendant permission to appeal "*the committal applications need to be heard as soon as possible without wasting any more time and money on procedural manoeuvring*."

34. In any event, there is plainly a public interest in ensuring that statements made in witness statements presented in interlocutory applications with a statement of truth are not made knowingly falsely. This is not, as suggested by Mr Marshall, a purely technical contempt, as referred to in Sectorguard plc v Dienne [2009] EWHC 2693 (Ch). Ms Bingham referred

to the well-established proposition that the committal of those who knowingly make false statements in documents verified by a statement of truth is in the public interest, both because of the effect of such falsehoods on those involved in litigation and on the entire system of justice. She referred to Fairclough Homes Ltd v Summers [2012] 1 WLR 204 SC at [57–58], Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1540 and Wakely v Conn [2015] EWHC 3277 (QB) at [26].

35. As to Mr Marshall's second submission, Ms Bingham submits, and I agree, that it does not appear that criminal contempt is in any event an offence within the ambit of s.13 of the Perjury Act 1911, and no suggestion has ever been previously made in any reported case of any analogy to it: the Law Commission Report 1990 left in question the appropriateness of such a provision, and I see no need to extend it. However, whether or not there is a requirement, by analogy or otherwise, for corroboration, I am quite satisfied in this case that the evidence is overwhelming. I do not need to rely on any adverse inference resulting from the Defendant's not giving evidence, and, if I need to look for something analogous to corroboration, there is abundance of it in the documents, including emails from and to the Defendant. At the end of the day there seem to me to be two questions:

> 1. If the Defendant had given the alleged instructions to stop the terminations, would Mr Wagh have complied with them? Plainly yes.
>
> 2. If the Defendant did give the instructions, would he have known that they were not being complied with? Answer: yes, and as he did know what was continuing to happen and did nothing to stop it, that corroborates that the instructions were never given.

36. I am satisfied beyond reasonable doubt that he did not give the reversal instructions and that this contempt is proved.

Breach of the Picken Order: Application 1 (a) to (g)

37. I have considered the checklist of Peter Jackson LJ in Andreewitch v Moutreuil [2020] EWCA Civ 382 and in particular the need for the order of which breach is alleged to have been clear: Harmsworth v Harmsworth [1987] 1 WLR 1676 at 1686D, Federated Bank of the Middle East v Hadkinson 2001 WLR 1695 at 1705, The Starsin [2004] 1 AC 713 and Pan Petroleum AJE Ltd v Yinka Folawiyo Co Ltd [2017] EWCA 1525. A number of different grounds of contempt is alleged, and I am entitled and obliged to consider them in totality as well as individually: see per Lord Phillips MR in Gulf Azov Shipping Co Ltd v Idis [2001] EWCA Civ 21 at [18]; and I need to pay regard, as I said in paragraph 13 of my judgment of 15 October 2019, to the mischief sought to be prevented by the Picken Order.

38. It is, in my judgment, manifest that the Defendant knew what he ought to have done, because he (falsely as I have found) said he did it – namely give instructions to his agents to put a stop to the terminations. The question is whether he was beyond reasonable doubt in contempt of the Picken Order in not doing so.

39. I shall start with subparagraphs (a) and (b). I am satisfied that the employment of Messrs Khamkar, Rawat and Balan was not terminated until 21 December. There is no dispute (paragraph 16 above) that the Defendant instructed Messrs Wagh and Kumar to proceed to implement the removal of all four Senior Managers. He admittedly gave those instructions on December 18 or 19. But the instructions remained in place, I am satisfied, with constant encouragement and pursuit by him, and there was no countermanding of those instructions, as falsely asserted by the Defendant and Mr Wagh, and they carried through to 21 December. Mr Marshall submits that the signatures of Mr Khamkar and Rawat cannot be found to have been procured, but they plainly were, by the simple fact that each was chased for them after their initial refusal to accept their notices. The instructions were plainly given by the Defendant to Mr Wagh and through him to Mr Kumar (plainly a party to the attempt at backdating (paragraph 20 above)). The documents are clear, the continuous telephone calls support that inference and there is no explanation from the Defendant or from Mr Wagh or Mr Kumar to rebut the obvious.

40. As for (d) and (e) those announcements were preplanned by the Defendant and in the event put into effect at 11 pm IST (17.30 GMT) (paragraph 22 above) and the announcement in (c) was approved by the Defendant at 1930 GMT on 20 December and sent out on his instructions at 03 .00 on 21st December (paragraphs 23-24). Again the documents are plain as is the timing of the telephone calls. And again there is no explanation to the contrary from any witness for the Defendant.

41. With regard to (f) the instructions ("*advice*") to cancel the Employee Stock Option Plans (ESOPs) of the four Senior Managers plainly came from the Defendant and were given and put into effect, on 21 December (paragraphs 19 and 24). Again the instructions are plain.

42. Mr Marshall raises the following issues:

i) (a) and (b) relate to the removal of the four Senior Managers. '*Removal*', he submits, means no more than dismissal (or even giving notice, as in the SSD) and implementing and procuring the removal means no more than procuring or implementing dismissal. The reference in clause 2 (b) of the Picken Order to Clause 17.2.1 of the SSD makes it unclear and consequently incapable of enforcement:

ii) As to (c) (d) and (e), announcements of the departure of the Senior Managers and as to their replacements do not constitute implementing their removal:

iii) In relation to (f), the cancellation of the ESOPs of the Senior Managers does not amount to implementing their removal, but is a consequence of it:

iv) In relation to all six subparagraphs, there is an alternative of *'purporting to act as CEO'* contrary to clause 2(c) of the Picken Order. This is not clear, and consequently the Order cannot be enforced:

v) The interpretation put upon the Picken Order by the Claimants leads to the implication of a mandatory duty upon the Defendant, which is not appropriate for enforcement, and contrary to authority.

43. I shall consider each of these in turn.

44. With regard to (i) it is plain that the reference to the saving in the Picken Order clause 2(b) does not render it in the slightest unclear. It is a reference to an exception, which, if relevant, would mean that there was not a breach, but it does not affect the clarity of the rest of the provision. In his email to Ms Gumaste referred to in paragraph 23 above, the Defendant was plainly querying the effect of the proviso to see if it could have any impact on compliance with the injunction. As to the reference to '*removal*', I have no doubt that he understood that the Order prevented him from removing or getting rid of the Senior Managers. Mr Wagh in his purported justification (paragraph 27 above) referred to not wanting matters to be left "*in limbo*", and to "*finalising*" the legislative and administrative consequences of the termination. It is clear to me that Mr Wagh and the others continued to execute the instructions of the Defendant to implement the removal of the Senior Managers, while they took all the steps set out in paragraph 21 above. Had any one of those steps not been taken, the termination would not have occurred and/or would not have had effect, and the Senior Managers would not have been removed. It did not come to an end with their technical dismissal, although in the event only Mr Sreeram was dismissed before the Picken Order.

45. (ii) I accept that (d), (e) and (f), the announcements of the successors of the Senior Managers, do not constitute implementing their removal.

46. (iii) (f) however is in my judgment part of the implementation of the removal of the four Senior Managers. They were not removed until all the stages set out in paragraph 21 above were completed: and hence the '*advice'* to that end by the Defendant.

47. (iv) In the case of clause 2(c) of the Picken Order, and the allegation, in relation to each of subparagraphs (a) to (f), that the instruction in question was given by the Defendant holding himself out as or purporting to act as Group CEO, the position seems to me to be entirely clear. Whatever might be the position in other companies where there is an Executive Chairman, the position here was well known to the Defendant and agreed by him; whereby he had a specifically limited role, by reference to the Authority Matrix, signed off by both the Defendant and AM after AM was appointed, and setting very clearly defined limits to the role of the Executive Chairman. The Defendant himself clearly realised this when he specifically announced to all employees, when purportedly suspending AM, that he was with immediate effect "*assuming the responsibility of Group CEO*". This enabled him to take the steps which he continued to take over the next few days by stepping into the shoes of the CEO, in accordance with the provisions of the Authority Matrix. The relevant lines read as follows

	Group CEO	*Exec Chairman*
Key controls		
37. Policy & Procedures		*A*

38. Internal Announcements (other than policy, procedure or compliance)	*A*	
Human Resources		
73. New hires (budgeted/replacements)	✓	
74. New hires (Unbudgeted/New positions)	*A*	*1*
75. Bonuses/Incentives/Increments for Managers & Above	*A*	*1*
77. Dismissals	*A*	*1*

The tick obviously denotes 'Group CEO only'. A means 'Final Approving Authority'. There is thus no role for the Executive Chairman at all in relation to lines 37, 38 and 73. Where there is a 1, that means that the Group CEO must get "*joint buyin*" from the Executive Chairman. But there is an express Note "*There will not be any direct communication by the shareholders with any employee. All communication will flow through the CEO*". I am satisfied that the reference to shareholders was to the Defendant, as representing the family shareholding, thus preventing the kind of mass announcement to all employees by him, which the Defendant intended and effected in his assumed capacity of CEO. I conclude that the cancellation of the ESOP contracts was either part of Dismissals or related to Incentives for Managers, and in either event would be covered by A 1.

48. I am satisfied that the Defendant well knew that each of his actions within (a) to (f), indeed the entire 'coup' that he was carrying out, involved the taking of powers belonging within the sole responsibility of the Group CEO, or which were for the final approval of the CEO (with the need to obtain "*joint buyin*" from the Executive Chairman). All of the acts he performed in (a) to (f), hiring, firing, making public announcements to the employees etc. could only be carried out by him if he were indeed purporting to be CEO, hence his 18 December announcement.

49. (v) As is normal in a court order of this kind, there was an express provision in the Picken Order as to "the Effect of this Order" by paragraph 6: "A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement". There is in those circumstances no need to search for an implied term in order to ensure that, as the Defendant plainly well knew, he could not "directly or indirectly" take any steps to procure or implement the suspension or removal of any Relevant Employee by using, or giving instructions to, others, which is what he did. I refer in any event to paragraph 16 of my Judgment of 15 October 2019, where I referred to Hone v Page [1980] FSR 500, and in particular to World Wide Fund for Nature v THQ/Jakks Pacific LLC [2004] FSR 10, to emphasise that the restriction is not only limited to a defendant's employees, but extends to anyone whom a defendant can control. That is satisfied in this case. SM, in paragraph 45 of his witness statement cited in paragraph 13

above, had described the fact that the Defendant was indeed in a position to influence and direct many employees in the Group, and all those who acted on his instructions in the context of the contempts alleged regarded him, as was indeed put by Mr Marshall in cross-examination, as their malik (paragraph 27 above). The contempts in each case are said to be founded upon the instructions given by the Defendant to those whom he could control, to carry out acts which constituted a breach of the Picken Order. The 'alternative' way in which the Claimants' case is put in the amendment (g) (ii) is unnecessary, because it is subsumed within (a) to (f) if the instructions were continuing.

50. I turn then to consider the question of timing. It is quite apparent that the Defendant knew what was in the immediate offing. He had been sent, as had his solicitors (paragraph 12 above) clear notice that the Claimants were proceeding to Court to obtain relief against him, and attached to the email was a copy of SM's affidavit, which set out in clear terms, in paragraph 2, the relief that was to be sought (which according to him he accurately summarised to Mr Wagh in their conversation, when he allegedly gave instructions to stop). He was constantly on email on that day, I am satisfied he saw and understood the impact of what he had been sent. What he then did was to plough on, and seek to put his plans into effect notwithstanding. Plainly the Court should not encourage such a 'race against the clock', whereby a defendant proceeds with his actions with knowledge of the imminent making of an order. His solicitors were in court with their counsel when the Picken Order was made at 13:40 GMT, and the Claimants invite me to infer that those solicitors must have done their duty to their client and to the Court in informing him of the result: he was plainly at the end of an email and on the telephone all day. Clearly that was the source of his information, but I need to draw no inference that he knew any earlier than he himself admits:

i) By 15:36 GMT, on his own evidence, he knew the terms sufficiently to know that what he was doing offended against the Picken Order and, as I have found, he intently pursued his plan thereafter nevertheless, allowing his instructions to remain in place. It is not simply a question of failing to take steps to prevent his agents as in Hone v Page, but, as I am satisfied, encouraging and instructing them to continue.

ii) At 18:04 GMT there was service on him of the Picken Order, with penal notice attached, in accordance with the express terms of the Order for service on him by email. The Order at that stage was not yet sealed, but I do not see that as significant for this purpose, and in any event declare it to have been good service (it was later re-served sealed).

51. On any basis with regard to 18.04 on December 20, his instructions with regard to (a) and (b) then continued in place (three of the Senior Managers had not even been dismissed), and the instructions for removal of all four continued to be complied with. The instructions in (c) also post-dated 18:04 (paragraphs 23-24), as did (f) (paragraphs 21 and 24). (d) and (e) however had occurred and been complied with (paragraph 22), prior to 18.04, though subsequent to 15.36. It would only be in that regard that it would be necessary to consider any *'failure to recall'* instructions within (g) (i) in regard to (d) and (e).

52. I am asked by Ms Bingham, opposed by Mr Marshall, to vary retrospectively the Order of Picken J so as to dispense with the need for the email service, given that it is plain that the Defendant knew of the terms of the Order and knowingly and deliberately acted in contravention of it. If I make that order, there is no need to consider the question of (g) (i).

53. The relevant CPR provisions are as follows (replacing the earlier equivalent provisions in RSC Order 45).

> *"Dispensation with personal service*
>
> *81.8*
>
> *(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –*
>
> *(a) by being present when the judgment or order was given or made; or*
>
> *(b) by being notified of its terms by telephone, email or otherwise.*
>
> *(2) In the case of any judgment or order the court may –*
>
> *(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or*
>
> *(b) make an order in respect of service by an alternative method or at an alternative place."*

The Practice Direction (81PD) provides as follows:

> *"16.2 The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect."*

54. I am satisfied that, provided that a defendant was notified of the terms of an order "*by telephone, email or otherwise*", the discretion to dispense with personal service in an appropriate case is wide and unfettered, and can be exercised retrospectively (Davy International Limited v Tazzyman [1997] 1WLR 1256 (CA), approved in Benson v Richards [2002] EWCA Civ 1402. I have considered in addition the authorities to which I have been referred by both parties, namely Jolly v Hull [2000] FLR 69 CA, Bell v Tuohy [2002] 1 WLR 2703 CA, Re Ticketout [2008] EWHC 3325 (Ch), Masri v Consolidated Contractors International Co SAL [2010] EWHC 2458 (Comm), Prosser v Prosser [2011] EWHC2172 (Ch), Group Seven Ltd V Allied Investment Corpn Ltd [2014] 1 WLR 735 (following Davy and Hydropool Hot Tubs Ltd v Roberjot [2011] EWHC 121 (Ch), Khawaja v Popat [2016] EWCA Civ 362, Al-Ko Kober Ltd V Sambhi [2018] EWHC

165 (QB) and Dell Emerging Markets (EMEA) Ltd v Systems Equipment Telecommunications Services S.A.L. [2020] EWHC 561 (Comm).

55. I conclude that the authors of Arlidge & Eady are correct that the recent cases are consistent with "*the more flexible modern policy embodied in para 16.2 of PD 81"* and that the Court may, in relation to the service of orders in the context of proceedings for contempt, waive procedural defects if satisfied that no injustice has been caused (12–38–39 and 15–29–32). I find helpful the summary of the law by Blair J in Masri, and I note the caution emphasised by Judge LJ in Jolly at 725D that the jurisdiction should not be exercised too readily, but I am wholly unpersuaded that, as Mr Marshall submits, Khawaja, which is only one of several Court of Appeal decisions to emphasise that the test is (as the Practice Direction says) one of satisfaction as to the absence of injustice, was decided *per incuriam.*

56. No point as to service was taken by the Defendant at any of the numerous hearings leading to the trial before Popplewell J, nor in any of the similarly numerous hearings which have dealt with these contempt applications, including two strike-out applications by the Defendant, and the point was first raised by Ms Bingham in her written closing submissions. There is no doubt that I can make an order retrospectively.

57. Mr Marshall submits that there is a difference where, as here, the original order already provided for service by an alternative method than personal service, but I see no distinction. It may be that some difficulty was foreseen as to service in a different jurisdiction, and it was known that both the Defendant and his solicitors were amenable to email, but I have to look now as to what has actually occurred; in a case where there was a 'race against the clock', and where I am satisfied that the Defendant had notice that an order had been made which meant that the conduct on which he had set out was in breach of it.

58. In those circumstances, none of the grounds put forward by Mr Marshall leads me to consider that I should not make the order as to dispensation with personal service. I am satisfied beyond reasonable doubt as to the Defendant's breaches in relation to Application 1 (a) to (f) - as to (c), (d) and (e) with reference to clause 2(c) of the Picken Order only; and (g) (i) and (ii) do not need to be separately addressed.

Application 1 (h) - (k)

59. The subparagraphs read as follows

> "(*h) On 27 December 2016, the Defendant countermanded the CEO India's instructions to revoke access to the Group's email systems of Mr Sameer Khan (thereby purporting to act as Group CEO in breach of the Picken Order);*
>
> *(i) On 30 December 2016, the Defendant approved Mr Khan's access to the Group's SAP IT systems (thereby purporting to act as Group CEO in breach of the Picken Order);*

> *(j) On 2 or 3 January 2017 the Defendant approved the appointment of Mr Sameer Khan as National Sales Head, Wholesale, India (thereby purporting to act as Group CEO in breach of the Picken Order);*
>
> *(k) On or about 5 January 2017 the Defendant appointed Mr Khan as Vice President of a newly formed "Special Projects" Division (thereby purporting to act as Group CEO in breach of the Picken Order)."*

60. These subparagraphs are unaffected by the question of service, as they postdate 21 December 2016. They relate to the Defendant's appointment of Mr Sameer Khan (SK), as he bluntly told Mr Abraham, CEO India, with a copy to SK, on 3 January 2017: "*Sameer Khan is there under my instruction to curb the mess made of the Indian market by [AM] and yourself."* It was presented as though the Defendant had appointed SK as National Sales Head (India) on 19 December (i.e. before the Picken Order) by a contract carrying that date (providing for an annual salary of INR 100, 000,000 and ostensibly signed on that date by SK and Mr Rajib Kumar. However it is plain that that is another example of backdating; Ms Bhattacharjee, after discussing on 20 December a draft with Mr Wagh, by reference to using Mr Abraham's contract with appropriate adjustments, supplied a draft (with a then proposed salary of only INR 90,000,000), said to contain outstanding queries, for Mr Wagh's consideration on 21 December; and on 23 December she sent an email to Mr Kumar (one of the signatories of the 'contract' dated four days earlier): "*This is the service agreement of Sameer Khan, which we are yet to roll out. I believe there are salary differences, due to which the process is delayed. As next week I won't be around, please refer the same for any changes"*. The draft was sent to SK on Mr Wagh's instruction on 24 December, and sent back on 3 January, on which day Ms Bhattacharjee wrote to Mr Wagh: "*New joinee: Sameer Khan – confidentiality maintained for his onboarding, just got the approval from [the Defendant*]", to which Mr Wagh responded on the same day, confirming its confidentiality. It would seem therefore that, with the approval of the Defendant, the contract ostensibly dated and signed 19 December was in fact agreed and executed on 3 January. Then, by a letter dated 5 January 2017, Mr Kumar wrote to SK to say that *"Effective immediately it has been decided that you will no longer be working as NSM – Wholesale India… In view of this you have* been *assigned with a new role in the Special Projects. Therefore you are re-designated as "VP-Special Projects "reporting directly to the Gr[oup] Chairman. You are therefore advised not to interact with Sales Person[nel] as discussed earlier. All other terms & conditions of your appointment will remain same*". That this too was an appointment on the Defendant's instruction and at his instance is made clear by the Defendant himself in his witness statement of 20 January 2017 at paragraph 35, when he says: "*I have now changed Mr Khan's role so that it does not trespass on either the role of the wholesale team in India or AM's work*", and he refers to the 5 January document.

61. It is plain that both of these appointments by the Defendant were outside his contractual remit as Executive Chairman (see paragraph 47 above). The first appointment was plainly within line 73 of the Authority Matrix, and even if it could be said that the second appointment fell within line 74, he could not do this as Executive Chairman without the Final Approving Authority of the CEO, and it is clear that AM never gave his approval to either appointment (see for example his 4 January email to the Advisory Board). The

Defendant plainly made them as CEO (backdating the first). He has given no explanation or answer, and indeed it is clear that the appointment of SK by him, expressly "*not to interact with Sales Personnel*", was part of his continuing attempted coup (and indeed what was subsequently described as his 'parallel management structure', to which I refer below). I am satisfied beyond reasonable doubt that the steps in (j) and (k) were taken deliberately and in breach of clause 2(c) of the Picken Order.

62. So far as concerns the steps in (h) and (i), they were taken preparatory to SK's appointments, no doubt on the basis that he was already becoming involved with the Group, and to enable him to act out his role in that parallel management structure. Mr Abraham emailed on 27th December a complaint to Mr Khamkar that SK had been writing to the sales force from an official ID and creating confusion, and asked that this be deactivated: when Mr Khamkar passed on this request to the HR department, the response was on 27th December "*We have been instructed by Chairman a few hours ago that for any email blocking we need to get his consent before any action is taken on. Accordingly, upon checking with him… he has asked instructed us not to action on the same*." On 30 December an email was sent direct to the Defendant by the Administrative Group, noting that SK had "*requested for SAP access. This requires your approval. Pls accord your approval*". It is to be inferred that he gave his approval. The Claimants contend that steps such as ordering that security access not be blocked (overruling the CEO India) and then be authorised is not the action of an Executive Chairman, given his very limited managerial role. Mindful that contempt needs to be proved beyond reasonable doubt, even in the absence of any explanation from the Defendant, I am not persuaded that these alleged contempts are proved.

Application 2(b)

63. This reads as follows

> *"On 20 January 2017 the Defendant filed and served a witness statement ...verified by a statement of truth containing the following statement which was, to the Defendant's knowledge, false and likely to interfere with the course of justice:-*
>
> *(b) At paragraph 33, the Defendant's statement that he appointed Mr Khan as National Sales Head, Wholesale, India before 20 December 2016."*

64. The Defendant stated in paragraph 33 of his first witness statement that his appointment of SK was by an employment contract dated 19 December "*that is, before the* [Picken] *Order*". He thus was not simply asserting what the date was, but was going further and asserting, on the basis of a statement of truth, that it had been entered into on the 19th and thus before the Picken Order. As is apparent from paragraph 60 above, his agents arranged the backdating of the contract, and he knew that perfectly well, because he approved it on either 3 or 4 January. No explanation has been put forward by him in evidence which begins to justify the false statement. A statement dated 26 April 2019 has been produced from SK, under cover of a Hearsay Notice in similar unsatisfactory terms to that of Mr Wagh referred

to in paragraph 27 above, which suggests that the employment contract was backdated to 19 December because 9 and 19 are regarded as lucky numbers, but that, even if credible and properly admissible, is no answer to the case as to the falsity of the Defendant's evidence: and I am satisfied beyond reasonable doubt that the Defendant's statement was untrue, and, as I conclude in paragraphs 32 to 35 above, it is important that the Court emphasises that veracity of such statements is essential to the operation of justice. I find the contempt proved.

Application 3: Grounds (1) to (5)

65. These all relate to SK, and are set out below:

> *"(1) On 16 January 2017, Mr Sameer Khan (a Group employee at the time) emailed the Defendant's personal email address (rockeek@gmail.com) from his own personal email address (sameer_hll2003@yahoo.com) attaching information about Indian cyber-crime law. In May 2017, bogus criminal complaints were filed by people closely associated with the Defendant against two Group employees alleging hacking crimes. It is to be inferred that on a date between the making of the Second Baker Order and Mr Khan's email, the Defendant solicited the information on Indian cyber-crime law from Mr Khan (thereby communicating directly with a Relevant Employee in breach of Clause 2 of the Second Baker Order).*
>
> *(2) On 25 January 2017, Mr Khan sent a second email to the Defendant (using their personal email addresses), attaching documents and analysis relating to the Supermax business. It is to be inferred that on a date between the making of the Second Baker Order and Mr Khan's email, the Defendant solicited this information from Mr Khan (thereby communicating directly with a Relevant Employee in breach of Clause 2 of the Second Baker Order).*
>
> *(3) On 1 February 2017, Mr Khan sent a third email to the Defendant (using their personal email addresses) attaching documents and analysis relating to the Supermax business. It is to be inferred that on a date between the making of the Males Order and Mr Khan's email, the Defendant solicited this information from Mr Khan (thereby communicating directly with a Relevant Employee in breach of Clause 3 of the Males Order).*
>
> *(4) On 4 February 2017, Mr Khan sent a fourth email to the Defendant (using their personal email addresses) attaching documents and analysis relating to the Supermax business. It is to be inferred that on a date between the making of the Males Order and Mr Khan's email, the Defendant solicited this information from Mr Khan (thereby communicating directly with a Relevant Employee in breach of Clause 3 of the Males Order).*
>
> *(5) On 6 February 2017 Mr Khan sent a fifth email to the Defendant (using their personal email addresses) attaching documents and analysis relating to the Supermax business. It is to be inferred that on a date between the making of the Males Order and Mr Khan's email, the Defendant solicited this information from Mr*

Khan (thereby communicating directly with a Relevant Employee in breach of Clause 3 of the Males Order).”

66. The clauses in question of Baker 2 (2 (c)) and the Males Order (3(c)) were materially identical. They ordered the Defendant not to communicate directly or indirectly with any Relevant Employee, otherwise than for the purpose of discharging the responsibilities allocated to him in the Authority Matrix (which are then set out), with a proviso that nothing in the clause should prevent him from communicating with the Advisory Board or Relevant Employees for the purposes of discharging any of his other duties under his employment contract or with the prior written consent of the Second Claimant. Relevant Employee was defined as any employee, director or officer of any group company. By (respectively) clauses 2 (b)) and 3(b) he was ordered, with an immaterial proviso, not to communicate directly or indirectly with any Relevant Employee in terms that are disparaging of any of the Relevant Management or calculated/likely to undermine their authority in their respective positions. Relevant Management was defined as AM, Mr Desai, Mr Abraham and Mr Mateen.

67. The five emails the subject of these grounds were sent between 16 January and 6 February 2017 by SK to the Defendant, and are alleged by the Claimants to indicate breaches of the relevant Orders, by reference to communications between the Defendant and his appointee SK, using their personal email addresses, as part of the Defendant’s ‘parallel management’ and, as they submit, intended to undermine the business of the Claimants. They are as follows:

(1) Examples of cybercrime complaints sent by SK to the Defendant, supplied on the basis “*Not to be shared to anyone*”. The Claimants submit that these formed the basis of complaints subsequently made by the Defendant against Mr Abraham and Mr Khamkar in May 2017 and again in September 2017, part of the exercise of issuing criminal complaints against AM, Mr Desai and Mr Khamkar, the subject of Grounds (11) and (12) and Application 4. Hence supply on the confidential basis referred to above and “*we could go in same lines*”; and SK points out to the Defendant that certain pages of the complaints “*will give us more input*”.

(2) Copies of invoices and *findings* at an identified factory, requesting the Defendant to have a look at dates and timing of the invoices.

(3) Three apparent complaint letters from stockists dated 5 and 6 January, sent on by SK to the Defendant on 1 February, all seemingly addressed to the Defendant, not to SK.

(4) A detailed analysis of current sales. AM pointed out in evidence (Day 3:142) that SK had never worked in manufacturing and had no knowledge of it, so it would not form part of any reporting route.

(5) Four apparent complaint letters from distributors sent on by SK on 6 February, but all dated 19 and 20 December 2016, and all again addressed to the Defendant, and in terms critical of Mr Abraham (but laudatory of SK).

68. The Claimants contend that these evidence communications with SK as a Relevant Employee, responding to requests from the Defendant for information that will support his campaign. The mischief is that by communicating with him and through him to others, the Defendant is evading the restriction upon him of being unable to communicate directly with employees, enshrined in the Authority Matrix (paragraph 47 above) and in breach of Baker 2 and the Males Order.

69. The first question is whether SK is a Relevant Employee:

i) SK was appointed by the Defendant, as set out in paragraph 60 above, and worked under that contract. When Mr Abraham complained about SK as an "ex-employee", as pointed out by Mr Marshall, he had been previously employed, and therefore was understandably so described on 27 December, before the crushing response by the Defendant set out in that paragraph, and the appointment of SK.

ii) The contract was honoured by the Claimants, and SK remained in their employment until December 2017. Because of the requirements of line 74 of the Authority Matrix, AM could not dismiss SK without a *buyin* from the Defendant, and for some months he was communicating with the Defendant to attempt to obtain his consent, while the Defendant was emailing, as for example at 21 June 2017 "*I remain of the view that it is in Super-Max interest to continue Mr Khan's employment and I do not consent to his dismissal"*.

iii) SK described himself as employed by the Claimants (by the 19 December contract) in his hearsay statement of April 2019 and complained of his subsequent dismissal (and claimed termination payments).

70. Mr Marshall relies upon the fact that the Claimants denied, by reference to the Authority Matrix, that the Defendant had had the power to appoint him; although his reliance on the prayer (b) in the amended particulars of claim of March 2017 is not perhaps as persuasive as it could be because it seeks a declaration that any purported appointment of replacements for those removed is void and has no effect and (despite paragraph 43 (b)) SK was not a replacement; and in any event no such declaration was in the event made. However there is no doubt that SK was, as the Defendant knew, and himself accepted and asserted, an employee of the Group, and was plainly, even as a "purported" employee, covered by the Orders: indeed the more so because, as AM said in evidence, and I accept, it is plain that the Defendant was using SK to disseminate information across the Group and was all the more dangerous to the stability of the Claimants' business because, as Ms Bingham put it in argument, "the wolf was in the fold". The same applies to Mr Marshall's regularly repeated argument, in relation to a number of these grounds where the mischief, and hence the relevant order, was as to communication by the Defendant with Relevant Employees. In my judgment that mischief was as important, even if not more important, if the Relevant Employee, in a position to influence others and pass on the Defendant's views or instructions, was loyal to the Defendant, treating him as a 'malik'.

71. The next question is whether the Orders can be enforced as being sufficiently clear. I have no doubt that the recitation in the Orders of the exceptions in the Authority Matrix do not

render the Order unclear, not least in the light of the fact that the Authority Matrix contains the Note referred to in paragraph 47 above, and the Order gave the Defendant the opportunity to carry out any duties not prevented by the Authority Matrix. No explanation has been given by the Defendant.

72. The third and obviously central question is whether the five examples show beyond reasonable doubt that the Defendant was communicating with SK, or whether they were - or may have been - unsolicited communications. In paragraph 141 of his closing skeleton, Mr Marshall suggested that there could have been other explanations – unprompted sending by SK, a response to communications which he had had with the Defendant before the making of the Orders, or at the prompting of someone other than the Defendant. In his hearsay statement of April 2019, SK said that he had been tasked by the Defendant with investigations into what had gone wrong in the business, which he regarded as "*standing instructions*". He said that he had, "*pursuant to these instructions*", sent to the Defendant a number of emails from his personal email address to one of the Defendant's personal email addresses, and that these were not directly or indirectly requested or solicited. He gave no explanation as to why he was sending the ones that we have seen, and in particular why there was no need in each case to explain why he was sending them. I note from an email he sent to the Defendant of 6 January that he asked "*please guide us*", and the Claimants have referred to a transcript of his cross-examination before Popplewell J, by reference to a telephone log, in which he accepted that he was at the material time speaking to the Defendant on the telephone.

73. I am permitted by the Judgment, and particularly paragraphs 18-20, and the Order of Cockerill J of 18 October 2018 (permission to appeal against which was refused to the Defendant by Flaux LJ as totally without merit) to take account, in relation to Applications 3 and 4, of the Judgment of Popplewell J, who had the benefit of evidence in chief and cross-examination of both the Defendant and SK. The parts of his Judgment relevant to these grounds are as follows:

> *"50 (9) Mr Sameer Khan. He was rehired by Mr Malhotra as head of wholesale sales in India in circumstances addressed more fully below. He was a thoroughly unsatisfactory witness whose answers often lacked credibility and were inconsistent with contemporaneous documents. He was genuinely opposed to the management strategy (which had been approved by the Advisory Board) to rebalance sales more in favour of retail outlets, including barbers, from the predominantly wholesale model previously pursued. This was not, however, his guiding motivation. He was plainly loyal to Mr Malhotra, which was the reason for his engagement in December 2016, and was prepared to say in evidence whatever be believed would support Mr Malhotra's case, even when he knew it to be untrue.*
>
> ….
>
> *89 (5) Mr Khan's continuing operational role is apparent not only from what he did, but also from Mr Malhotra's email to Mr Abraham of 3 January 2017. On 2 January 2017 Mr Abraham had received an email from Datta K enclosing sensitive stocklist target incentive and price list information which he had copied to Mr Khan. Mr*

Abraham had also learned around this time that Datta K and Mr Kulkarni had been setting up calls for Mr Khan with the field sales team. When he instructed them to stop such actions immediately, instead of following his directive they copied the email to Mr Khan and thence to Mr Malhotra who replied to Mr Abraham on 3 January, copied to Messrs Khan, Datta K and Kulkarni (and later much more widely distributed by them lower down the sales force) that "Sameer Khan is there under my instruction to curb the mess made of the market by Anindo and yourself". I have already referred to the undermining effect of this email and what it went on to say, but its significance in the present context is that it reveals Mr Malhotra's instructions as to the role which Mr Khan was to play, which was an operational one as a counter to the management decisions of Mr Abraham and Mr Anindo Mukherji.

(6) I reject Mr Malhotra's evidence that he changed Mr Khan's role in early January because he did not want it to trespass on either the role of the wholesale sales team or Mr Anindo Mukherji's work and that it was "an audit type function gathering information not interfering with reporting lines." There is a letter dated 5 January 2017 purporting to change Mr Khan's title to VP Special Projects Division. The evidence suggests that it was backdated from 12 January 2017 or thereafter. Whenever the change in title occurred, it did not stop Mr Khan from carrying out his brief to undermine Mr Anindo Mukherji and Mr Abraham. He continued to report directly to Mr Malhotra so that Mr Abraham remained sidelined and undermined. On 5 January 2017 Mr Khan coordinated a series of emails from senior sales managers to Mr Malhotra denigrating current management and/or praising Mr Khan and attributing their success to him. These were procured at Mr Malhotra's instigation for him to forward to the board. Mr Khan continued to occupy his old office at Thane and regularly interacted with Datta K and Mr Kulkarni who told Mr Abraham that they felt that they could not refuse instructions from Mr Malhotra when he instructed them to assist Mr Khan. Mr Khan was responsible for preparing, at Mr Malhotra's behest, four documents entitled "value destruction" reports which purported to show the adverse effect which the senior management had had on sales. These were provided to Mr Malhotra on 9 January 2017 for him to include in the papers for the next Advisory Board meeting, which he did without identifying their author. By the very use of the title "value destruction", both Mr Malhotra and Mr Khan intended them to undermine Mr Anindo Mukherji and Mr Abraham. A further "value destruction" report was sent by Mr Khan to Mr Malhotra on 10 January 2017 and on for Advisory Board consideration. On 1 February 2017 Mr Khan forwarded to Mr Malhotra what purported to be three letters of complaint from wholesalers. These had been procured by Mr Khan as part of the role assigned by Mr Malhotra which was to provide evidence which Mr Malhotra could use against senior management. They had been backdated to early January and were, as Mr Khan knew, spurious. On 6 February 2017, for the same purposes, Mr Khan orchestrated a series of letters from distributors addressed to Mr Malhotra which were critical of Mr Abraham and praised Mr Khan. These were backdated to 19 and 20 December 2016 and sent to Mr Malhotra, at his private email address, by Mr Khan, from his private email address, on 6 February 2017, notwithstanding that they purported to be addressed to Mr Malhotra, not Mr Khan. Again they were spurious. Mr

> *Abraham's evidence, which I accept, is that although Mr Khan's role means that in theory none of the sales force report to him, in practice he sits in the middle of the team who have worked with him in the past, with Mr Abraham and Mr Anindo Mukherji locked out. Many of the sales force have told Mr Abraham that it is difficult to refuse to carry out Mr Khan's instructions because he has the authority of Mr Malhotra, and there have been multiple instances where Mr Abraham was able to track disruptions in the field back to Mr Khan.*
>
> *....*
>
> *91. I conclude that Mr Khan's continuing disruption was part of the continuing attempt by Mr Malhotra to impose his own strategy on the business in parallel to the management which Mr Anindo Mukherji and Mr Abraham have been trying to carry through. It is inconceivable that Mr Khan would continue to behave in this way without Mr Malhotra's approval and authority. It is not necessary to decide whether this is as a result of direct communication between the two, or whether others such as Mr Chaudhuri have been involved, as they clearly were in the past.*
>
> *...*
>
> *102. Ms Bingham also relied upon the fact that Mr Malhotra forwarded to the board a series of 10 emails sent to him on 5 January 2017 from senior employees criticising current management and/or praising the efforts and success of Mr Khan. These were sent to Mr Malhotra within the space of a few hours. I reject his evidence that they were unsolicited. His explanation that the employees happened to have been talking amongst themselves because they were "tickled pink at the upbeat of the sales" is improbable. I conclude that he procured these messages, through Mr Khan, as part of the campaign to justify Mr Khan's appointment and exaggerate its effect, with the same motives as the misleading 41% growth email. This is of a piece with his procuring emails from customers and distributors through Mr Khan in February 2017, to which I have referred above."*

74. I take these passages into account alongside the hearsay statement of SK, but, subject to the express caution that any findings by Popplewell J were only on the balance of probabilities and not, as must be the case with me, beyond reasonable doubt.

75. No explanation was given by the Defendant (or, even in his hearsay statement, by SK) as to why these emails were sent. I am satisfied that these emails formed part of a continuing communication between SK and the Defendant, and that they were neither one off nor unsolicited. The whole purpose of SK being placed where he was is so that he could be the ears and mouthpiece of the Defendant, obtaining no doubt, at the Defendant's request, suitably worded letters from stockists and distributors, and I am satisfied that this was not pursuant to any purpose of his (limited) role as Executive Chairman. I take into account, as Lord Phillips permits (paragraph 37 above), the other grounds, particularly those in Application 3, which I am considering.

76. I must deal with the question of service of Baker 2 (relevant to Grounds 1 and 2) and the Males Order (relevant to Grounds 3-5). Baker 2 was not served on the Defendant

personally, but only on the Defendant's solicitors. This point was again not raised at all by the Defendant or any of his advisers over 3 or more years, but was only addressed for the first time in closing by Ms Bingham. I am satisfied that the Defendant had knowledge of the Orders, and was represented at the hearing by solicitors and counsel. Justice requires that in those circumstances where, as here, a considerable number of return dates follow on (see paragraphs 4 to 6 above), and there are reputable solicitors and counsel representing the Defendant, who take no point on service, that any technical failure should be excused, when I am satisfied as to his knowledge, through his solicitors, and the continuing case. The Males Order was similarly served on the Defendant's Solicitors and not on the Defendant, on the same day as the hearing at which they appeared with Counsel on the Defendant's behalf, and the orders were effectively continued. I make the order retrospectively dispensing with service on him personally. Because it was not known or expected that any service point would be taken, the email showing service on the solicitors of the Males Order was, although all the relevant emails are in a Bundle G served between the parties and prepared for the Court, not specifically cross-referred to in the application for contempt. Plainly no injustice whatever is caused. In relation to this and other similar grounds, which I shall mention, I grant the necessary leave pursuant to CPR 81.28 for the emails relating to service contained in Bundle G to be relied on by the Claimants on these applications.

77. As to Grounds 1-5, I am sure beyond reasonable doubt that the Defendant was communicating with SK, soliciting his communications during this period and knew that in doing so he was in breach of the relevant clauses of the Orders, clearly knowing that SK was a Relevant Employee, and one important to him because he was loyal to him and would keep him regularly informed, as he did. I find these grounds proved.

Application 3: Grounds 6-9 and 13-14

78. Clauses 2(d) of Baker 3 and of Popplewell 1 are both materially identical to, but simply replaced and continued, clauses 2(c)of Baker 2 and 3 (c) of the Males Order. The grounds read as follows: –

> *(6) At 5:32AM GMT on 4 March 2017 the Defendant sent an email to all Group employees (all@supermaxworld.com) in response to an email sent by Mr Anindo Mukherji, the Group CEO, regarding the Defendant's position in the Group pending resolution of the English court proceedings (thereby communicating directly with Relevant Employees in breach of Clause 2 of the Third Baker Order).*
>
> *(7) At 5:44AM GMT on 4 March 2017, the Defendant forwarded his email referred to in paragraph 6 above to Ms Gayatri Gumaste (the (then) Group Company Secretary), his personal assistants (Ms Antoinette Fernandes and Ms Linet Pereira), Mr Benjamin Gendron (the Regional Head of Latin America) and his (then) nominee directors on Group company boards (thereby communicating directly with Relevant Employees in breach of Clause 2 of the Third Baker Order).*
>
> *(8) At 9:18AM GMT on 4 March 2017, the Defendant emailed the Group CEO, copying in the Advisory Board, in terms that were calculated/likely to undermine the*

authority of the Group CEO (thereby communicating directly with Relevant Employees in breach of Clause 2 of the Third Baker Order).

(9) At 9:19 AM GMT on 4 March 2017, the Defendant forwarded his email referred to in paragraph 8 above to the same recipients in paragraph 7 above (thereby communicating directly with Relevant Employees in breach of Clause 2 of the Third Baker Order).

(*13) At 15:43 GMT on 19 November 2017, the Defendant's Personal Assistant at the time, Ms Linet Pereira, forwarded an email from the Defendant to a number of Group employees with the headline "FORWARDING ON BEHALF OF MR RAKESH MALHOTRA, MAJORITY SHAREHOLDER AND CHAIRMAN, SUPERMAX GROUP", with the clear intention that the email be understood by recipients as coming from the Defendant (thereby communicating indirectly with Relevant Employees in breach of Clause 2 of the First Popplewell Order).*

(14) At 15:47 GMT 19 November 2017, Ms Pereira forwarded the Defendant's email referred to in paragraph 13 above to more Group employees with the same headline and with the clear intention that the email be understood by recipients as coming from the Defendant (thereby communicating indirectly with Relevant Employees in breach of Clause 2 of the First Popplewell Order).

[By amendment] *In each case, as to paragraphs 13 and 14*:

(a) Ms Pereira was, thereby, acting as agent of the Defendant and/or on his behalf or on his instructions or with his encouragement, and within the scope of the authority conferred by him. Her action is, accordingly, to be imputed to, and entails a breach of Clause 2 of the First Popplewell Order by, the Defendant personally.

(*b) (Alternatively, if and in the event that (contrary to the Claimants' primary case) the relevant instruction to Ms Pereira was given not by the Defendant, but by Subhash Chaudhuri, Mr Chaudhuri was himself acting as agent of the Defendant and/or on his behalf or on his instructions or with his encouragement, and within the scope of the authority conferred by him. His action is, accordingly, to be imputed to, and entails a breach of the First Popplewell Order by, the Defendant personally."*

There is no real distinction between these. The Defendant himself sent out the first four (the subject of Grounds (6)-(9)). His PA, Linet Pereira, sent the other two, (13)-(14), on his behalf. There can be no doubt (and there has certainly been no evidence to the contrary from the Defendant) that when the two emails the subject of Grounds (13)–(14) said in terms, and in capital letters, "*forwarding on behalf of Rakesh Malhotra*", that was done with his authority and at his instance. The amendments above are unnecessary, and the second was made at a time when it was understood that some case was to be put forward as to the involvement of Mr Chaudhuri, which did not eventuate. I can put them aside.

79. (6)-(9) were sent by the Defendant himself to all employees of the Group, plainly all Relevant Employees. In those emails he attached a commentary to the content of Schedule

C to Baker 3, which was the subject of a Recital in the Order, whereby the Defendant agreed with the Claimants that "*the only communication to the email address [*for all the Group employees*] in relation to the making of the Order will be made by the Advisory Board in the terms contained at Schedule C*", which was a relatively neutral account of the proceedings, described as "*Agreed communication to Relevant Employees*". The Defendant however re-sent this communication to all employees with his own commentary, which included disparaging comments about AM to the effect that he had made a "*factually incorrect statement*" and "*misrepresenting the board is a very serious issue*". Plainly this was on its face a breach of clause 2(d) of the Order and a breach of the recorded agreement as to the sending of Schedule C.

80. The Defendant has given no explanation of this. Mr Marshall has put the following forward on his behalf:

i) He submitted on the Defendant's behalf that the Defendant was justified in sending out the comments he did to all employees, because the agreed communication had not been sent out with the authority of the Advisory Board. This asserted justification was made only in closing submissions, and no opportunity was given for the Claimants to answer the point, although it is apparent from one of the emails that it was so approved, and that such approval was supplied to AM by SM. In any event, as Ms Bingham submitted in her closing submissions, that was irrelevant, given that the Defendant had agreed to Schedule C and, even if it were the case that it had not been approved by the Board, it could not possibly justify the Defendant in sending out a derogatory email to all employees in breach of clause 2(d).

ii) Mr Marshall sought to justify this by reference to line 96 of the Authority Matrix, which reads "*Issue of Legal notice and taking of legal action: Group CEO ✓Executive Chairman A*". In my judgment, this could not even for a moment have been thought to fall within that line. Mr Marshall described it as a "debate about a legal notice"; this 'debate' was of course sent to all employees (contrary to the Note about no direct communication). However even if it did even arguably fall within line 96 it leads nowhere, because the line requires that it is solely the responsibility of the CEO, and the most that the Defendant as Executive Chairman could have would be the opportunity to approve, and he had not only approved but consented in Schedule C to the Order.

81. Mr Marshall further submits the breach to be technical or disproportionate by reference to Sectorguard and to PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2014] EWHC 4370 (Comm) but I cannot consider that a breach of this kind, where there was a specific order restraining communication and an agreement scheduled to the Order that only one agreed communication would be sent out, was other than a serious matter.

82. There is a service point. Baker 3 was served on the Defendant (though, for similar reasons as above, the email was only contained in Bundle G, and I would give the necessary permission under CPR 81.28). However, although again no point was taken at any time by the Defendant, Ms Bingham has pointed out that service on the Defendant of Baker 3 was

by email on 7 March, and he had sent out the three emails the subject matter of these grounds almost immediately after the Order was made on 4 March. I have no doubt whatever that he knew about the terms of the Order, because his solicitors and Counsel were of course present at the hearing, and the very subject matter of his emails was the Schedule to the Order to which he himself had agreed. I make the order dispensing for the need for personal service in respect of Baker 3 in those circumstances. Mr Marshall makes a point that, since it was a consent order, that makes it a contract between the parties, including therefore a contract as to the method of service, but I have no doubt that the power of the Court to dispense with personal service is unaffected by the parties' prior agreement.

83. As for Grounds (13)-(14), these were emails sent out by the Defendant, again to all employees, 29 of them it seems, making the points and the vigorous criticisms that he intended to make at the extraordinary general meeting called by one of the Group companies. Not surprisingly it was derogatory of the Claimants, and the more unsuitable to be communicated to all employees.

84. Again there is no explanation by the Defendant. Mr Marshall put forward on his behalf again reference to line 96. He suggests again that it is somehow a legal notice, or a debate about a legal notice, alternatively he submits in any event that it relates to the position of the Defendant as a shareholder. But he has nevertheless sent it to all employees, and I am satisfied that it cannot possibly qualify within line 96, and could not amount to his exercising any role of Final Approving Authority: in any event, as with grounds (6)–(9) the Note attached to the Authority Matrix prevented him from communicating directly with employees.

85. Grounds (13)–(14) are relied on as in breach of clause 2(d) of Popplewell 1. There is no difficulty with service in relation to Popplewell 1, because it was served on the Defendant personally on 17 August. The email evidencing that service is in bundle G and I have given permission for such documents to be adduced for the purposes of these applications.

Application 3: Ground 10

86. The ground is set out as follows:

> "(10*) On 5 September 2017, the Defendant's personal adviser, Mr Subhash Chaudhuri, acting on the Defendant's behalf and at his direction, accidently sent a WhatsApp message to Ashish Balan (a Group employee) which was intended for Nitin Merani (a nominee director on the Group company boards) who previously had custody of the company issued phone to which the message was sent (thereby communicating indirectly with Relevant Employees in breach of Clause 2 of the First Popplewell Order.* (By amendment] *For the avoidance of doubt, Mr Chaudhuri was thereby acting as agent of the Defendant and/or on his behalf or on his instructions or with his encouragement, and within the scope of the authority conferred by him. His action is, accordingly, to be imputed to, and entails a breach of Clause 2 of the First Popplewell Order by, the Defendant personally."*

87. This is again said to amount to a breach of clause 2 (d) of Popplewell 1, restraining direct or indirect communication with any Relevant Employee, and the service position is as set out in paragraph 85 above.

88. The ground relates to a WhatsApp sent by Mr Chaudhuri, whom the Claimants allege to have been an important agent of the Defendant in the carrying through of his "parallel management". Mr Chaudhuri was appointed by the Defendant by a Consultancy Services Agreement dated 1 January 2016 to carry out "*all the duties and responsibilities diligently as per my instructions*", and in the Defendant's evidence before Popplewell J (Day 6:2) he described this as a "*personal retainer*". Mr Chaudhuri sent a WhatsApp on 5 September 2017 to what he thought was the number of a Group employee who was a loyal supporter of the Defendant (also treating him as his 'malik'), Mr Merani, plainly a Relevant Employee. In fact, unknown to Mr Chaudhuri, this number had been taken over by Mr Balan, another Relevant Employee. The WhatsApp read "*Please see the draft reply to the mail of [*Mr Abraham*]. I just read it out to [*the Defendant*] and he has cleared it. So just fire it asap*". Both Mr Merani and Mr Balan were Relevant Employees: the communication was therefore sent to one Relevant Employee and received by another. As it happens, it is clear that this was intended to be the start of Mr Merani's participation in emails leading to a critical email to be sent to Mr Abraham, and there is in fact evidence in the bundle that Mr Merani did shortly afterwards send a vituperative email to Mr Abraham. But that is not the subject of this ground, which is simply based upon the What'sApp communication of 5 September 2017.

89. It is quite plain that Mr Chaudhuri sent the WhatsApp on behalf of the Defendant. Again, neither he nor the Defendant gave evidence. Not only do I have the benefit of the Consultancy Services Agreement, but I refer to the judgment of Popplewell J at paragraph 51:

> *"51... Mr Malhotra engaged Mr Chaudhuri as a consultant to handle all his personal litigation in India and "any assignments/tasks that I may allocate to you from time to time". It is clear from the evidence as a whole and from disclosed telephone records in particular, that Mr Chaudhuri's role as a loyal personal assistant to Mr Malhotra included frequent contacts with Mr Khan, Mr Wagh and others within the group who were loyal to Mr Malhotra, at times when the events in dispute in these proceedings must have been being discussed. Mr Chaudhuri was a go-between, through whom Mr Malhotra communicated with others when he wished to conceal his direct involvement. Mr Chaudhuri's evidence on the course of events which are in issue would have been relevant to the issues in the case. He was not called to give evidence by Mr Malhotra and disclosed no documents. I have little doubt that he would have been prepared to do so out of loyalty to Mr Malhotra had Mr Malhotra wished him to give evidence and/or provide documents within his control, including phone and messaging*

records. The natural inference is that his evidence would not stand up to cross examination and would undermine Mr Malhotra's."

90. The issue which is raised by Mr Marshall is by reference to the fact that the sending of the WhatsApp to Mr Balan was an accident, because it was intended for Mr Merani. Mr Marshall refers to Heatons Transport (St. Helens) Ltd v TGWU [1973] AC 15 at 108H-109E and to Stancomb v Trowbridge UDC [1910] 2 Ch 190, whereby "*casual or accidental and unintentional acts"* do not constitute contempt. However, I agree with Ms Bingham that this is not the kind of accidental act which is there referred to. This was a deliberate act in breach of a court order and it was not inchoate but performed.

91. I am satisfied that Ground 10 is made out beyond reasonable doubt.

Application 3: Grounds 15-22 and Application 4 paragraphs 8-9

92. These grounds are as follows:

(*15) Between 19 and 21 March 2018, the Defendant sent a series of abusive and threatening WhatsApp messages to Mr Kenny Abraham (the India CEO) (thereby communicating directly with a Relevant Employee in breach of Clause 5 of the Second Popplewell Order).*

(16) Further to paragraph 15 above, the abusive and threatening nature of the Defendant's communications was calculated and/or likely to put pressure on Mr Abraham to resign (thereby taking steps to procure the removal of a Relevant Employee, in breach of Clause 3 of the Second Popplewell Order).

(17) On 21, 22 and 27 March 2018, the Defendant sent a series of abusive and threatening WhatsApp and SMS messages to Mr Desai (the Group CFO) (thereby communicating directly with a Relevant Employee in breach of Clause 5 of the Second Popplewell Order).

(*18) Further to paragraph 17 above, the abusive and threatening nature of the Defendant's communications was calculated and/or likely to put pressure on Mr Desai to resign (thereby taking steps to procure the removal of a Relevant Employee, in breach of Clause 3 of the Second Popplewell Order).*

(19) On 22 and 24 March 2018, the Defendant communicated with Mr Mukherji (the Group CEO) via WhatsApp in abusive and threatening terms (thereby communicating directly with a Relevant Employee in breach of Clause 5 of the Second Popplewell Order).

(20) Further to paragraph 19 above, the abusive and threatening nature of the Defendant's communications was calculated and/or likely to put pressure on the Group CEO to resign (thereby taking steps to procure the removal of the Group CEO, in breach of Clause 2 of the Second Popplewell Order).

(21) On 23 March 2018, the Defendant communicated with Mr R Sreeram (the Group Chief Supply Chain Officer) via WhatsApp in abusive and threatening terms

(thereby communicating directly with a Relevant Employee in breach of Clause 5 of the Second Popplewell Order).

(22) Further to paragraph 21 above, the abusive and threatening nature of the Defendant's communications was calculated and/or likely to put pressure on Mr Sreeram to resign (thereby taking steps to procure the removal of a Relevant Employee, in breach of Clause 3 of the Second Popplewell Order).

(8) *Having testified at the trial of liability, Messrs Mukherji, Desai, Abraham, Mukherjee and Mateen have been subjected to scandalous and grotesque abuse, threats and insults by SMS text message, WhatsApp and/or email from Mr Malhotra by way of punishment, victimisation and/or retribution for having given evidence in the Super Max Case (which is ongoing*).

(9) The Defendant's actual and attempted interference with witnesses summarised above (and described further and evidenced in the attached affidavits of Messrs Mukherji and Desai sworn on 12 May 2018 and the exhibits thereto) was calculated by the Defendant to interfere with the due administration of justice and was likely to create a real risk of the same.

93. I must set out the relevant contents of the messages : –

(1) [15-16] to Mr Abraham on 19 March 2018: *"Stupid incompetent fat mallu slob": "Idiot":* on 20 March*: "You make a fool of yourself you don't know your business: you fat incompetent dick: moron":* on 21 March*: "you are an incompetent third class salesman that got a job you don't deserve by fraud… you are a petty crook and will get what you deserve you overweight slob": "You picked the wrong guy to fight with you obese mallu": "Dear fat mallu stop talking out of your fat ass: you are a failure and a loser and will end on the street: U are not a ceo, just a fat mallu Gandu"; "You successfully screwed up the business I built you idiot": "Your two arsehole friends [Balan] and [Rawat] screwed up Wesley": "Bunch of losers will deal with each of you: fat mallu idiot": "You buggered up all product launches you monkey…. you are such a moron: I [will] bankrupt you u dickhead: the noose tightens you mallu idiot."*

(2) [17-18] to Mr Desai on 21–22 March 2018: *"You are fast asleep: wake up please:" "Idiot you need to reply".* And on 27 March: *"Stupid cunt: waiting to see your ugly face you short shut head: you and your lover Andy [AM] come and destroy the company I made I will now destroy you you little fart: you think I'm a bully you fuckhead! Wait till you see how I'll screw your happiness you little shit:" "Jackass: you made this personal now sit back and enjoy the rest of your fucked life you incompetent oaf": "You need to respond you inefficient idiot".*

(3) [19-20] to AM on 22 March 2018 *... "Your CFO Desai is fast asleep and unresponsive. The board needs to see how much further damage you have done to the company under your pathetic leadership urgently":.. "And do not fudge figures*

in your usual fraudulent manner to cover up your incompetence and mislead the board": ... "Overpaid lazy incompetent failure":.. "You idiots and Actis have screwed up: You will pay my friend, I guarantee you that: You ungrateful wretch:" "I'm coming after you in every court: idiot": "No wonder General Mills kicked you out you moron": "You have me to deal with you son of a bitch your nightmare has just begun." And on 24 March: *"You idiot you have messed up the Nigerian business!! And the UAE business: What are you stupid or on a destructive mission": "Stupid is me and Actis as you take your salary and fuck up the company": "I created a brand as a business and a useless dickhead like you is destroying it: "Looking forward to seeing you you disgusting piece of shit:" "I will crush you": "U picked the wrong guy to make an enemy of".*

(4) [21-22]to Mr Sreeram on 23 March 2018 *"In life pick your friends well and choose your enemies carefully": "It's obvious you don't know your business or the costings."*

(5) [8} To SM on 29 January 2018 *"Arrest warrant for you in Dubai you Bengali bastard dwarf. Come show your face you motherfucker."*

(6) [also 8] to Mr Mateen (by email) on 28 February 2018: *"Mateen you are indeed a corrupt two-faced waste of space and people like you give our communities a bad reputation. I know the board of Ormond Street very well and shall have no hesitation of making my views of you well known. No wonder you were sacked by Unilever as an audit guy at age fifty. With good reason."*

94. The first four are relied upon by the Claimants as in breach of clause 5 of Popplewell 2, which was a repeat of (most recently) clause 2(d) of Popplewell 1, and in breach of clause 3 of Popplewell 2, which provided that "*until further order…the Defendant must not, directly or indirectly, take any steps to procure or implement the suspension or removal of any Relevant Employee*". They are all Relevant Employees. The first three, and the fifth and sixth, are relied upon as a complaint of contempt, of intimidation and victimisation, by way of interference with justice, against them for giving evidence against the Defendant (Mr Sreeram did not) in the trial before Popplewell J, which led to his Judgment on 13 December 2017, and to a final Order on 27 March 2018, when he said: –

"3. I have already found by reference to his conduct prior to the valid termination of his employment contract that Mr Malhotra was embarked upon a campaign of aggressive abuse, disparagement and obstruction In relation to the claimants management team, that his intention was to seek to force those managers to resign, to undermine their ability to exercise effective management of the business, to ferment descent and insubordination from junior employees and to seek to try and maintain and consolidate his own power base amongst the workforce in India

...

6. He has avowed an intention to punish [AM] and Mr Desai and Mr Abraham and has indulged in extensive abusive communications to them, as well as highly

> *disparaging communications about them to more junior employees and managers within the group.*
>
> *…*
>
> *11…There has been what can only be described as disgraceful and vile abuse in crude terms of the existing senior management, Mr Desai and Mr Abraham and [AM] and of former members of the Advisory Board."*

95. Mr Marshall conceded at the strike-out hearing last October, and again at the outset of this hearing, that the first four sets of messages constituted a breach of clause 5 (but not clause 3) of Popplewell 2. However, after the service point was raised and addressed by Ms Bingham in her closing submissions, he withdrew that concession. Popplewell 2 was served on the Defendant's solicitors by email of 15 December 2017, as appears in the bundle (in this case D not G, so no need for permission arises), but in the circumstances appearing in that email it was not served on the Defendant personally. The Claimants' solicitors wrote: "*Please see attached by way of service sealed orders as just received from the court. Please indicate whether this suffices for service on your client, or whether we are to email Mr Malhotra directly*." The response by email at the same date was "*We are content to provide it to him*." That service is now challenged by Mr Marshall. In the light of the authorities which I have considered, set out in paragraphs 54 and 55 above, I dispense with personal service of Popplewell 2 in those circumstances. In any event the allegations of contempt in paragraph 8 of Application 4, for which permission was granted by David Foxton QC on 27 July 2018, are entirely independent of the service of any order.

96. The WhatsApp messages 1–4 were plainly sent in breach of clause 5 of Popplewell 2, as Mr Marshall, rightly, originally conceded. I so find, and that they constituted contempt, all the four recipients being Relevant Employees, with whom communication (not to speak of such unpleasant communication) by the Defendant was enjoined.

97. There are issues as to (i) whether (1) to (4) constituted a breach of clause 3 of Popplewell 2, i.e. whether they were calculated and/or likely to put pressure on the recipients to resign, thus procuring their removal and (ii) whether the messages (1)–(3) and (5) and the email (6) constituted an interference with justice, in contempt of court.

98. The first issue is whether the WhatsApp messages to the Relevant Employees were sent with a view to making them resign. They must plainly be seen in context. The Defendant had continuously plied them with threats and abuse (as appears from the December judgment of Popplewell J at paragraphs 67, 68, 69, 72, 73, 74, 75 and 78). AM expressly referred to some of the effects:

> "*He has been really on a mission to threaten us and intimidate us. That is obviously very clear. I have had to really gather my team together, because my team, unfortunately, experienced the same abuse, sometimes worse, and every time I have had to huddle with them and have had to bind them together to stay in."* (Day 3:168).
>
> Further at Day 3:169 he said:

> *"Nobody likes to receive these kind of messages… It was very unfortunate that it came sometime in the middle of the night and my wife woke up and saw the messages and she was all over me telling me: "Get out of this place". It has been tough at a personal level, it has been tough at a professional level. It is not just these messages, as I said, it is the totality of the abuse and the intimidation and the threats we have received over time. We just decided that we will stick in and we will make this work the best we can for the company, because the company is important to us*."

In my judgment, there was no need for there to be specific evidence from the other recipients, although I refer below to what Mr Desai said in evidence.

99. The second issue is whether the messages were intended as punishment/retribution for having given evidence. Mr Marshall submits that there is no causative link between the giving of the evidence by the five in October 2017 leading to the judgment in December and the final order on 27 March 2018, but the timing of them seems manifestly clear (the third of the messages to Mr Desai was sent on the morning of the hearing on 27 March, at which the Defendant did not attend). As to the content, I note a number of obvious references to the fact that they have given evidence including '*making it personal'*, '*picking the wrong guy to fight with'*, '*coming after you in every court'*, and '*you think I'm a bully'*. The threats are overt – "*Your nightmare has just begun*", and in relation to Mr Mateen's apparent employment with Ormond Street.

100. No evidence was given by the Defendant as to his explanation for any of the messages, and I am entitled to reach my own conclusions, particularly where there is, without his evidence, a strong prima facie case, as found by David Foxton QC on 27th July 2018.

101. Mr Marshall submitted that AM and Mr Desai should or could have blocked the WhatsApp if they were concerned about receiving messages from the Defendant. I find this unpersuasive, just as would be an allegation of failure to block telephone calls. A victim does not need to stop his ears in order to complain of abuse. Similarly in my judgment it is irrelevant whether the recipients are thick- or thin- skinned.

102. Mr Marshall referred both AM and Mr Desai to a reaction by SM, as set out in an email of 7 July 2014 to the fact that the Defendant "*has now stepped up his personal attacks on me. I think all of this is bluster and laughable. However I am listing down his threats/abuse as requested*". This was apparently the reaction of SM in 2014, nearly 3 years earlier, and before the course of events which became the subject of Popplewell J's judgment. In particular it falls to be compared with paragraph 11 of his Judgment of 27 March, set out in paragraph 94 above, the former Advisory Board members there referred to plainly being SM (and presumably Mr Mateen). However the reaction of the witnesses before me was clear. AM said he did not think "*this is bluster and laughable. I think we have felt threatened over time. We have stuck it out for the reasons that I gave, but it's not comfortable at all. It is not the kind of workplace you really want to be in*". (Day 3:171). Mr Desai said: "*In all the companies that I have worked in…name-calling is not something I've ever experienced in my 30 years of working, except in the March of 2018*" (Day 3:199), and at Day 3:201 he said:

> "*A That is how [*SM*] may have looked at it. I didn't look at it that way.*
> *Q What did you look at it like?*
> *A Terrible."*

103. I accept this and the above evidence of AM and Mr Desai. However in any event it is clear that it is not necessary for there to be evidence as to the effect on the recipient, provided that it is likely to have had such an effect: see In re B [1965] Ch 1112 and Neil v Henderson [2018] EWHC 90 (Ch) at [71-75] I am satisfied that even if in the event the recipient was not in fact intimidated by intimidatory conduct, a contempt application is still justifiable in the public interest: see also Attorney General v Butterworth [1963] 1 QB 696.

104. Mr Marshall however submitted that the effect of the views of Davies LJ and Pearson LJ in Butterworth is that there would not be a criminal contempt if the intimidation did not come to the attention of others. Quite apart from the widespread nature of these threats in this case, I am satisfied that is not the law, as was made plain by subsequent authority: see Chapman v Honig [1963] 2 QB 502 per Lord Denning MR at 512*: "...the victimisation of a witness is a contempt of court and unlawful, irrespective of whether other people get to know of it or not. It is a gross affront to the dignity and authority of the court and a grievous wrong to the individual affected."* Davies LJ agreed at 526, and the authority was followed in terms in Moore v Clerk of Assize, Bristol [1971] 1 WLR 1669 CA.

105. I am satisfied beyond reasonable doubt that these messages were intended to intimidate or bully the recipients into resigning and leaving him to run the company, and once they had given evidence was intended to threaten those who had done so. I cannot accept the characterisation by Mr Marshall in opening (though not repeated in closing) of the case as fanciful. It may be that yet again, as Popplewell J discussed, the Defendant was carried away by his passion:

> "51 (6) *Mr Malhotra. He regarded the group as his family business and in his eyes, Mr Anindo Mukherji and Actis have destroyed the value of the group. From the second half of 2016 Mr Malhotra believed, with a genuine and heartfelt passion, that Actis' support for the existing senior management, in particular for Mr Anindo Mukherji, was not in the best interests of the financial health of the group and that he needed to step in to reverse the decline in its fortunes. That passion was apparent throughout his evidence. It clouded his judgment at the time, and infected his evidence, to the extent that he lacked any objectivity or regard for the truth when seeking to portray events in a self-justificatory way and in an attempt to put Actis representatives and the senior management in the worst light. He would readily attribute fraud, dishonesty or conspiracy to such individuals without any justification. In significant respects he was not prepared to concede the obvious and maintained aspects of his account of events which were contradicted by the contemporaneous documents. His intemperance and bullying manner is clear from a number of the communications he sent. It was apparent that in a number of respects he was not being frank with the court, and at times his evidence was deliberately evasive. I have been driven to the conclusion that in important respects what he said was untrue and deliberately so."*

106. But that is no excuse. Mr Marshall suggested in opening that the Defendant's motive might have been that he was upset by the performance of the Group. That may be, but it is no possible excuse for what he did. Popplewell J concluded (at paragraph 5 of his 27 March 2018 judgment) that it was apparent from the extensive evidence he had been shown (and hearing evidence from the Defendant, unlike me) that the Defendant remained "*determined to seek to return the group to his own control so as to force out the present management or, if he is unable to do so, to destroy the business and to compete with it*". Interference with justice need not have been his predominant motive (Attorney General v Sport Newspapers Ltd [1991] 1 WLR 1194), but in this case he regarded himself as in a battle which he would take every possible step to try and win, and I am satisfied that he did so in contempt of court.

Application 3 and Application 4 (except paragraph 8)

107. I turn finally to the alleged contempts relating to the issuing of criminal complaints against AM, Mr Desai and Mr Khamkar on 25 September 2017 ("the September criminal complaints") just prior to when AM and Mr Desai were due to leave Dubai to travel to London to give evidence in the trial against the Defendant before Popplewell J. The grounds set out in paragraphs 11 and 12 of Application 3 allege a breach of clause 3 of Baker 1, which was a renewal of the Picken Order, set out in paragraph 14 above. Application 4 is, like that discussed in paragraphs 103-106 above, an allegation of contempt by interference with justice, though in relation not to victimisation after giving evidence but to seeking to prevent the witnesses from giving evidence. The grounds are:

> *"(11). On 25 September 2017 the Defendant, through his agent and accomplice Mr Kishor Wagh, procured, instigated or approved the filing of false criminal complaints in Dubai against Mr Mukherji (the Group CEO), Mr Ketan Desai (the Group CFO) and Mr Milind Khamkar (the Group CIO), which were calculated and/or likely to put pressure on Messrs Muhkherji, Desai and Khamkar to resign (thereby taking steps to procure the removal of the Group CEO and Relevant Employees in breach of Clause 3 of the First Baker Order).*
>
> *(12). On 28 September 2017 the Defendant, through his agent and accomplice Mr Ahmad Awwad, instigated or approved the filing of a false criminal complaint in Dubai against Mr Desai which was calculated and/or likely to put pressure on Mr Desai to resign (thereby taking steps to procure the removal of a Relevant Employee in breach of Clause 3 of the First Baker Order).*
>
> *2. The trial of liability in the Super-Max Case took place between 16 and 26 October 2017 before Mr Justice Popplewell in the High Court in London. Mr Anindo Mukherji (CEO of the Super-Max Group) and Mr Ketan Desai (CFO of the Super-Max Group) were due to give evidence on behalf of the Claimant and Additional Defendant at the trial. Also due to testify were Messrs Kenny Abraham, Shomik Mukherjee and Akhter Mateen.*
>
> *3. On or around 17 - 25 September 2017 (being shortly before the trial was due to commence) the Defendant procured, by his agents and accomplices*

Messrs Kishor Wagh and Ahmad Awwad, that there were lodged with the police authorities in Dubai three criminal complaints against Messrs Mukherji and Desai.

4. The criminal complaints in question centred on allegations (a) that Mr Mukherji had made fraudulent expense claims, (b) that Mr Desai had facilitated the reimbursement of those claims and (c) that Mr Desai had stolen a company-issued laptop and iPhone (the "Criminal Complaints").

5.The Defendant well knew that the Criminal Complaints and each of them were wholly without substance or foundation in fact and that it is standard practice for the police authorities in Dubai to confiscate the passports of individuals who are the subject of criminal investigations.

6. The Defendant procured the making of the Criminal Complaints (a) with the intention of deterring Messrs Mukherji and Desai from testifying in the Super-Max Case/ intimidating them into the withdrawal of their evidence and (b) with the intention of obstructing their attendance at trial.

7. Mr Desai was required to relinquish his passport to the Dubai police on 25 September 2017 and was as a consequence unable to travel to London to give evidence in person at the trial (instead giving evidence by video link following an eleventh hour application for permission to do so). Mr Mukherji succeeded in resisting the confiscation of his passport because it happened to be at the Canadian Embassy for the processing of a visa application and he was accordingly able to travel to London to testify.

9. The Claimant seeks the Court's permission pursuant to CPR rule 81.14 to make a committal application against the Defendant in relation to his interference with the due administration of justice in the case of Super-Max Offshore Holdings (Claimant) and Rakesh Malhotra (Defendant/Additional Claimant) and Actis Consumer Grooming Products Limited (Additional Defendant), claim number CL-2016-000797 (the "Super-Max Case").”

108. I shall set out the facts as I have found them to be on the evidence before me. I have carefully considered all the documents and the Claimants' evidence, as cross-examined by Mr Marshall, from AM and Mr Desai, together with the evidence of two lawyers who were involved in Dubai, Mr Mahmoud called by the Claimants and Mr Amin called by the Defendant.

109. Mr Marshall did not challenge Mr Desai's evidence. As to AM he accused him of dishonesty. AM was wrong in two respects:

i) He said that the proceedings brought by Wesley International Ltd (Wesley), the First Claimant's subsidiary, against Mr Wagh, Mr Awwad and Mr Williams for breach of Article 106 of the UAE Civil Code (Case no 566/2018 "the Civil Claim") relied only upon alleged false complaints made in the Bahamas causing loss to

Wesley in the Jebel Ali Free Zone Authority in Dubai, and not the September criminal complaints. He was quite insistent about that, and it was only when, at the request of Mr Marshall on Day 3, Exhibit 4 to one of the pleadings in the Civil Claim was found and produced (in Arabic), which consisted of one of the September criminal complaints, that he accepted that he was wrong. He had got it into his head that the September criminal complaints were only the subject of the other Dubai action, Case no 3362/2018 (the Labour Court claim). Plainly he ought to have remembered, although not a lawyer nor in charge of the Dubai claims, and he persisted in his recollection, although saying he would defer to the lawyer Mr Mahmoud who would know better, until proved wrong. But I do not accept that he was dishonest or other than genuinely failing in his recollection about this.

ii) The other respect in which he was wrong related to whether a criminal complaint had ever been issued against Mr Wagh. In cross-examination, when asked whether there had ever been such a criminal complaint by Mr Marshall, he said that there had not been, and in terms said that he wished that there had been. Mr Marshall did not suggest that there had been, and cross-examined him on the basis that there ought to have been one in order to be consistent with the Claimants' case. In fact, Mr Mahmoud, when he gave evidence, said that there had a criminal complaint, and that it had been dismissed. I am quite satisfied that AM believed that there had not been a criminal complaint, indeed regretted that there had not been, and was not lying as Mr Marshall suggested.

110. Mr Marshall was strongly critical of AM, though not at all of Mr Desai, in his closing submissions. However, I found them both, AM's two errors apart, reliable, persuasive and measured. As he did not attend, there was thus again no evidence from the Defendant, and he gave no answer or explanation as to the strong prima facie case for the Claimants, as found by Mr Foxton QC, and further expanded before me. Not only he but also Mr Wagh gave no evidence, apart from his hearsay statements, to which I referred to in paragraph 27 above. Again no explanation has been given as to why he did not attend to be cross - examined, and in his hearsay statement he simply said, with little embellishment, that he felt duty-bound to make the criminal complaints, did so of his own initiative and not at the Defendant's instigation and that he did not even discuss the criminal complaints with the Defendant before filing them. For reasons that will appear, this evidence is not credible, and had he attended would not have been believed after cross-examination, just as with his evidence when he did come before Popplewell J, as he concluded:

> *"50 (10) Mr Kishor Wagh. He has been the group Global Head of Human Resources since 2011, working from the Dubai offices. He too was a thoroughly unsatisfactory witness who showed no apparent embarrassment when in cross examination his evidence was repeatedly shown to be inconsistent with contemporaneous documents. These were not errors of recollection. He was at the time of the events in question, and remains, staunchly loyal to Mr Malhotra, and was prepared to lie in his evidence in the belief that it would assist Mr Malhotra's case."*

111. On the evening of 25 September 2017, AM and Mr Desai were separately summoned to the police station and told to bring their passports. After several hours of waiting, they were separately interviewed, and learned that Mr Wagh had filed a criminal complaint alleging that AM had stolen substantial monies from Wesley by making fraudulent expense claims, and that Mr Desai had enabled this by authorising reimbursement. They were both told to hand over their passports, which Mr Desai had no option but to do, after being advised by the lawyer with them, Mr Juma, that this was standard practice. AM, whose passport was fortuitously at the Canadian Embassy, was required to find a substitute (in the event the Group's UAE manager) to lodge his passport instead of him. This was less than two weeks before the commencement of the trial in London at which they were due to give evidence before Popplewell J on 9 October.

112. The police officers told them that Mr Wagh had also made allegations of cybercrime, including complaints against Mr Khamkar, for whom, since he was not in Dubai, a warrant was to be issued for his arrest. A further complaint was filed by Mr Wagh's assistant Mr Awwad on 28 September against Mr Desai, alleging that he had stolen a laptop and an iPhone from Wesley, which were in fact his company issue. Mr Wagh, Mr Awwad and Ms Gumaste were at the station on a number of occasions. Mr Desai had to return to the police station for this new charge, on the 28th.

113. Because AM had been able to find a substitute passport, he was able to attend at the London trial. Mr Desai, however, who, despite attending the police station on a number of occasions with his lawyer, was unsuccessful in recovering the passport, was unable to attend the trial (there had to be an application for his evidence to be taken on video link) and he was unable to leave Dubai until November, when the Claimants were successful in obtaining the complaints to be dropped. However he was unable until November to return to Mumbai, where he lived, normally working in Dubai only a few days at a time, to see his wife and children, and in addition the police barred him until then from attending at his office, and retained his laptop, so that he had difficulty in working. Both AM and Mr Desai were greatly disturbed by these events. Mr Desai described it as extremely traumatic and distressing. They had only been able to leave the police station at 3am, and neither had been previously involved with the police; AM described it as causing "*panic in the system*". Mr Desai found it particularly stressful having to stay in Dubai without his family until November. Mr Marshall was unjustifiably critical of him for his unsuccessful efforts to recover his passport. To Mr Marshall's attempt to play it down, AM responded "*I wish you were in my shoes, Mr Marshall. Sorry, my Lord*." I am satisfied that this was a very distressing experience for them both, and was intended to be so.

114. As to the timing of these events, the fact that they took place just before AM and Mr Desai were to leave for London to give evidence against the defendant starts by being too great a coincidence:

    i) Quite apart from whether there was any substance to the allegations (to which I return below) the alleged theft of expenses can be derived from an exchange of correspondence between the Defendant and AM in the previous December, 9 months earlier. By an email dated 27 December, just after AM's return to work after the failed coup, headed "*Violation of Expense Policies*", the Defendant drew AM's

attention to the terms of his contract of employment, which required pre-approval of expenses. AM responded at some length on 31 December: "*I am surprised by this communication, particularly as this has never been brought up during the last 2 years. You have been aware of most of my business travel and have, in fact, joined me on many occasions*," referring to the Group's travel policy. The Defendant sent on this response to Mr Wagh. He responded on 2 January: "*This just illustrates your flippant attitude. Any professional with a failed track record such as yours would not be wasting company money to set an example to others*." The Defendant copied Mr Wagh in. AM responded on 3 January with a detailed answer, again relying on the travel expense policy put in place by the Advisory Board. This the Defendant again sent on to Mr Wagh. Popplewell J refers to this correspondence at paragraph 72 of his Judgment:

"*72. On 2 January 2017, Mr Malhotra sent Mr Mukherji a long email in aggressive and intimidatory terms. It was in the context of a dispute over procedure in relation to approval of business travel expenses, which Mr Malhotra had raised as a pretext on which to attack Mr Mukherji, but the email was abusive and disparaging in wider and more general terms, accusing him amongst other things of "value destruction" "incompetence" "a failed track record" "wasting company money" and "a flippant attitude". It was copied to Mr Desai and a more junior member of the finance department."*

Without any further correspondence and certainly without any internal company investigation, it resurfaces in the September criminal complaint as theft and embezzlement.

ii) The lawyer Mr Amin, who gave evidence before me for the Defendant, was instructed to advise about the letter suspending AM sent by the Defendant, referred to in paragraph 11 above. He seems to have given the advice to Mr Wagh. He denies at any rate at that stage meeting the Defendant. In his evidence he said he met with Mr Wagh at the end of 2016/beginning of 2017, and that was related to what he called the "*criminal case… I believe the suspension letter and all of this…was related to the same things… You see the criminal case, it was built on many of the evidence which is the mismanagement from* [AM)" *(*Day 4:81*).* Thus 8 months earlier.

iii) The September criminal complaints were issued on 25 September on the basis of an "Investigation Report" by a company called Secure World. According to this one page "Report", their investigation was initiated on 18 September 2017 and concluded on 19 September 2017. It is hard to explain why the Defendant's allegation of AM's failure to have expenses pre-approved in December should have resurfaced in September as theft and embezzlement, on the basis of a one page "report".

115. As to the substance of the allegation of theft:

i) The quantum of the loss was said to be AED 606000, being the total amount of expenses charged by AM from 2015 to August 2017 (together with "moral damage" of AED 1 million), supported by a "*Consultant report submitted to Mr..Wagh in his capacity as the manager of Wesley .. on the breach of trust, embezzlement and manipulation of the official papers committed by [AM] and Mr Desai"*. It is dated 30 September and thus appears to have been presented to the police after the date when they were summonsed to the police station, and thus not available at that stage. The exchange of correspondence, with AM's explanations, of December/January was not exhibited, and seemingly not provided to the Consultant or to the police.

ii) Mr Wagh in fact himself signed off, in his capacity as Head of Human Resources each of AM's monthly expense forms which had been authorised over the period of two years (Day 3:77).

iii) The complaints against Mr Desai in relation to his own company issue laptop and iPhone appear to have been petty makeweights.

iv) Evidence was given by Mr Amin before me, which I am afraid I disbelieve, no doubt intended to give verisimillitude to the allegations. He said that he was told by the police at the station that AM had offered to repay all the money to Wesley if the case where dropped against him, he believed AED 800,000 or 1 million, and further said that Mr Mahmoud had repeated this offer to him, and he had passed this on to Mr Wagh at the time. The fact is that this dramatic piece of evidence (a) was not put to AM (or to Mr Desai) (b) was not put to Mr Mahmoud (c) was not stated by Mr Wagh in his hearsay statement (d) is completely inconsistent with the police certificate, which recorded that "*the accused person(s)… denied what is attributed to them* ".

116. The next question is whether the issue of these complaints and the summonses to the police station were calculated to prevent AM and Mr Desai from giving evidence. The following matters are of obvious relevance:

i) The criminal offences charged were (on the face of them) very serious: a substantial theft and breach of trust, and the cybercrimes, which Dr Alhammadi (the Defendant's UAE legal expert), as an expert in that field, confirmed carried substantial penalties (and a custodial sentence was sought for the cybercrimes complaint against both AM and Mr Desai).

ii) Both men were apparently obvious flight risks, neither being a UAE citizen.

The experts agreed that both of these factors are very relevant to whether their passports may be retained by the police.

117. The two experts, Dr Alhammadi and Mr Merdas for the Claimants, both gave evidence to the best of their ability, and in the end were not in major disagreement on the question of the risk of the passports having to be surrendered. Mr Merdas produced copies of two well

recognised local newspapers reporting on the high proportion of passports being detained at that time. Dr Alhammadi agreed that it was commonplace for the passport to be surrendered, though the police required the authority of the prosecutor. Mr Merdas spoke of his two decades of practice in the UAE, and his experience that it was the norm that the passport should be handed over, the common practice effectively being that the police would ask for the passport and if you refused you would risk being put in jail. Mr Juma had similarly so advised AM and Mr Desai at the station. Centrally Mr Amin, called for the Defendant, narrating how the police requested the passports from AM and Mr Desai, said*: "they did this because this is the normal procedure of what they do in the criminal case registered (*sic*)*" (Day 4:106). Thus the lawyer who advised and accompanied Mr Wagh to the police station knew, and is, I am satisfied, likely to have told those instructing him, that this would be the result.

118. This was further emphasised by the content of Exhibit 4 when produced, referred to in paragraph 109(i) above. It was, as was confirmed by Dr Alhammadi (Day 5:35-6) an application by the complainant Mr Wagh in the summons, that the public prosecutor should open the case, take all necessary measures and put a travel ban against AM and Mr Desai because "*they are afraid* [they will leave] *the UAE*". Dr Alhammadi said it was strange or unusual to include such a request in the application. Ms Bingham applied, since this was not previously in the bundle, for permission to rely on it pursuant to CPR 81.28. I was satisfied that since it was produced at the request of Mr Marshall and adopted by the witnesses, and since it in any event had been in the possession of Mr Amin as the author of the document and of course of Mr Wagh (as to whose agency on behalf of the Defendant I shall now turn), it was just to admit it. In any event it only confirms that which is clear from the evidence of Mr Amin as to what advice he must have given to his client, because it was his own knowledge and experience, as to the likelihood of AM and Mr Desai being prevented from leaving the country by the surrender of their passports.

119. I turn to the question of whether what was done was done by Mr Wagh (and by Mr Awwad, and, so far as she was involved, Ms Gumaste) as agent for the Defendant. It would obviously have been a great help to the Defendant if the two important witnesses could be prevented from attending in London. But *cui bono*, though obviously a pointer, does not always supply the answer. At paragraph 6 of his Costs Judgment of 13 December 2017, Popplewell J said: "*there were several of his witnesses, and I have in mind in particular Mr Wagh and Mr Khan, whose evidence in support of [the Defendant's] case was itself dishonest and can only have been so as a result of his encouragement and suborning."*

120. There are the following significant features:

i) Mr Wagh had been an important confidant and assistant of the Defendant (clearly regarding him as his malik) in relation to his plan to suspend AM (paragraph 11 above), to remove the four senior managers (paragraphs 16 to 25 above) and to introduce and effect 'parallel management', and there is evidence of continuing communication between them by emails between their private email addresses, WhatsApp messages and telephone calls: I refer also in this regard to Popplewell J at paragraphs 52 and 60(1) of his December judgment.

ii) From the evidence it appears that both Mr Wagh and Mr Awwad are or have been until recently still employed by one or more of the Defendant's companies.

iii) I note that it was Mr Wagh who engaged Mr Amin and his firm, but the advice which they gave related to the Defendant's sending of the suspension letter and the legal issues surrounding it, and, as Mr Amin said (paragraph 114(ii) above), he went seamlessly on to deal with the September criminal complaints. Mr Amin's firm or associate has subsequently acted for the Defendant.

iv) The allegations derived from the Defendant, in the December correspondence.

v) Significantly, after the September criminal complaints were dismissed at the Claimants' instance, the Defendant himself made three applications, between November 2017 and January 2018, to the Prosecutors office to have that decision reviewed. Mr Wagh originally applied, expressly as proxy for the Defendant, to reopen it on 23 November 2017, again on 20 January 2018 and on 11 February 2018, but in addition the Defendant put in a petition in his own name in December 2017 and signed a power of attorney for a lawyer. Although this postdated the September complaints, it seeks their reopening, and in my judgment is indicative of who was behind them originally. No explanation is given by the Defendant or Mr Wagh to rebut that clear inference.

vi) SK had already lined up for the Defendant suitable templates for the cybercrime complaints in January (paragraph 67(1) above).

vii) In any event the September criminal complaints were only symptomatic (though the most detrimental in their effect) of a number of similar criminal complaints issued during 2017 against Mr Khamkar, Mr Abraham and others, and are an exemplar of what the Defendant himself threatened SM with on 29 January 2018 "*Arrest warrant for you in Dubai you Bengali bastard dwarf*" (paragraph 93(5) above).

121. The factual position points clearly towards the conclusion that the Defendant did commit the breaches set out in the grounds in Applications 3 and 4; both to give AM and Mr Desai, and Mr Khamkar (perhaps as a necessary party to the alleged cybercrime complaints, but in any event as a yet further criminal complaint against him (see paragraphs 67 (1) and 120 (vii) above) a really frightening time in the hope of scaring them off their continued employment, but in particular calculated to prevent AM and Mr Desai from turning up at the hearing before Popplewell J. But Mr Marshall relies heavily upon the importance of the two Abu Dhabi cases, the Civil Claim and the Labour Court claim, to which I now turn.

122. I have been thoroughly re-educated by counsel on the principles of *res judicata*, issue, judicial and collateral estoppel and abuse of process, particularly by reference to the two leading authorities Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967 1 AC 853 and OJSC Oil Co Yugraneft v Abramovich [2008] EWHC 2613 (Comm). For *res judicata* there must be identity of parties and of subject matter or issue, but identity of parties becomes expanded, particularly for the purpose of estoppel, to privity of parties, and privity can be

of blood, title or interest, the last being, as Christopher Clarke J said at 409 of Yugraneft very fact-dependent; and both counsel have taken me through what they submit to be the relevant factors by refence to the facts of this case. There seem to me to be the following side-steps or stopping places:

i) The concepts owe a great deal to the principle *nemo debet bis vexari* (Lockyer v Ferryman [1877] 2 App Cas 519), but estoppel may go further, in importing the concept of 'blowing hot and cold' (Express Newspapers Plc v News (UK) Ltd [1990] 1 WLR 1320).

ii) Analysis of the issues in the foreign proceedings is, subject to any help I may obtain from the experts, a matter for me.

iii) I must exercise great caution in interpreting the foreign court decisions (Carl Zeiss per Lords Reid at 918–9 and Wilberforce at 967, Good Challenger Navegante SA v Metalexportimport SA [2004] 1 Lloyds Rep 67).

iv) A negative finding in the foreign court, such as a failure to establish something on the balance of probabilities, may not be as readily determined to create *res judicata* or an issue estoppel as a positive finding (Moss v Anglo-Egyptian Navigation Company (1865–66) LR 1 Ch App 108, Blair v Curran (1939) 62 CLR 464, The Popi M [1985] 1 WLR 948 and Kuligowski v Metrobus [2004] 220 CLR 363).

v) A finding as to 'evidentiary facts' does not create an issue estoppel: Brewer v Brewer (1953) 88 CLR 1, Inhenagua v Onyeneho [2017] EWHC 1971 (Ch).

vi) Privity of interest cannot extend so far as to pierce the corporate veil (Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016] 2 AER 740 at [33]).

vii) For *res judicata* to be applicable it must apply in both jurisdictions (Carl Zeiss at 919B per Lord Reid).

viii) Privity of interest is not achieved by a person simply having "*some interest in the outcome of litigation*" (Gleeson v J. Wippell & Co Ltd [1977] 1 WLR 510 per Megarry VC at 515).

123. Against this background I have to construe the two UAE decisions. I shall deal first with the Labour Court claim. Mr Wagh brought a claim for compensation for unfair or wrongful dismissal against Wesley, and Wesley relied in its defence, amongst a number of other matters, upon Mr Wagh's having brought the September criminal complaints, by way of justification for his dismissal. The second is the Civil Claim, in which Wesley brought a claim, referred to in paragraph 109(i) above, against Mr Wagh and Mr Awwad. In respect (among other things) of the September criminal complaints, under Article 106, which reads:

"(1) A person shall be held liable for an unlawful exercise of his rights.

> *(2) The exercise of a right shall be unlawful:*
>
> *(a) if there is an intentional infringement (of another's rights)*
>
> *……*
>
> *(c) if the interests desired are disproportionate to the harm that will be suffered by others; or*
>
> *(d) if it exceeds the bounds of usage and custom*."

By Article 104 of the Civil Code "*The doing of what is permitted by law negates liability, and no person who lawfully exercises his rights shall be liable for any harm arising thereout."* Wesley lost both actions, the Labour Law claim at first instance and on appeal to the Court of Appeal, and the Civil Claim at first instance, on appeal and in the Court of Cassation.

124. I can deal very shortly with the Labour Court claim, as I am entirely satisfied that it creates no bar, on any of the above bases, to the Claimants' pursuit of these applications. It is quite clear that the basis on which, both at first instance and on appeal, Wesley lost was because they had not relied upon the September criminal complaints as a ground at the time of dismissal and had not carried out any investigation into them at the time of dismissal. Mr Marshall did not argue the contrary.

125. I turn to the Civil Claim. Both experts agree that a claimant bringing an Article 106 claim has the high hurdle of proving that the acts of the defendant had the sole intention of causing harm to the claimant and has to surmount a defence by reference to Article 104. It is common ground that in the Civil Claim (as in the Labour Court claim) Wesley did not bring any evidence at all to establish what it had in general terms asserted in its pleadings, namely that the complaints (in the Bahamas and in Dubai) had had no factual foundation at all and were brought falsely and maliciously and in collusion with others, including the Defendant. Wesley's advisers took the view, for better or for worse, that they would only adduce evidence that Mr Wagh had not been authorised to do what he did. Hence no evidence was introduced to show the falsity of the complaints such as I have summarised in paragraph 115 above. This was despite what Mr Merdas confirms in his report of 4 September 2019 at paragraph 82 (and as was common ground) that "*in deciding whether or not a person acted in bad faith in filing a criminal complaint, the court would take into account whether or not there was any reasonable basis for suspecting that a crime had been committed*." Not surprisingly perhaps the Court found, at all three levels, that:

i) the falsity of the complaints (with or without the alleged collusion) had not been established. At first instance the Court concluded: *"No evidence has been submitted to court showing that the defendants filed the penal case to take revenge against it or to tarnish its reputation, nor is there any evidence that the defendants' intention was to arbitrarily exercise the right and achieve a personal illegal purpose or advantage except for unsubstantiated statement that has no factual or legal ground*": and in the Court of Cassation: "*It is not established that the exercise of*

the right by them was ...with malicious intention for revenging and causing damages to the appellant":

ii) the defendants had (per the first instance court) exercised "*their legitimate right to resort to the penal cases to protect their legal rights*": upheld in the two appeals.

126. It is common ground between the experts that, under UAE law, the civil judgments in the Dubai proceedings could not prevent a civil or criminal claim against the Defendant for instructing or encouraging Mr Wagh and Mr Awwad to bring the criminal proceedings (paragraphs 63 and 68 of Mr Merdas' supplementary report of 21 February 2020, with which Dr Alhammadi at paragraph 6 of his response of 2 March 2020 did not disagree).

127. However, I do not see how I can find, notwithstanding the evidence before me which was not adduced before the UAE Courts, that there was no substance in the criminal complaints or that Mr Wagh had no right to bring them. There is however no finding by the UAE Courts that:

i) Mr Wagh had a duty to bring the complaints – simply a legitimate right to do so;

ii) Mr Wagh (or the Defendant) was entitled or obliged to exercise his right in such a way as to stifle or interfere with an English trial;

iii) there was any timescale in which his legitimate right could be or was required to be exercised.

128. There was a dispute between the UAE law experts before me as to the effect of Article 37 of the Federal Law No. 35 of 1992 and Article 274 of the Federal Law No, 3 of 1987 (as amended), both seemingly in the same words, but the latter carrying a criminal penalty. Article 37 reads: "*Whoever has knowledge of the perpetration of a crime, that the public prosecution could prosecute and file an action without being asked to do* so *through a complaint or request, must report this to the public prosecution or one of the judicial police officers*." Article 274 reads: "*Any person who has knowledge of a crime, yet fails to report such matter to competent authorities, shall be punished by jail sentence for no more than one year or a fine."*

129. Dr Alhammadi opines that Article 37 should be construed as imposing a duty to report a crime where there is a suspicion, or reasonable suspicion, of its having been perpetrated. Mr Merdas' opinion is that because both Articles are worded the same, addressing where a person has *knowledge* of a crime or its perpetration, then they should be interpreted in the same way, and, if there were ambiguity, because Article 274 carries with it a criminal penalty, that in accordance with usual principles, applicable in the UAE, where there is an existence of a criminal sanction the lower duty should be expected. I found persuasive the comparison between the duty to report a crime, thus limited to knowledge of a crime, and the defence available to a defendant to a claim under Article 106, where reasonable suspicion would be a defence, to rebut mala fides, and a defence to an allegation under Article 275 of failing to report a crime, where knowledge rather than reasonable suspicion would be necessary for guilt. Mr Marshall cross-examined Mr Merdas by reference to

the terms of Article 38, which imposes the same duty as Article 37 on public servants, and suggested, by use of an example, that that extended it, and thus also Article 37, to suspicion. But I was not persuaded, and I prefer the interpretation of Mr Merdas that *knowledge* is required.

130. I note that Mr Wagh in his hearsay statement said, without dealing with any of the difficult questions facing him, set out in paragraphs 114-120 above, "*I felt duty-bound*" (on September 25) to report the complaint. In the light of what I say above, he had a legitimate right as found by the UAE Court, but I am not persuaded, as set out above, that he had a *duty* to do so, particularly not on September 25, such as to stop AM and Mr Desai travelling to give evidence in London. There is no evidence before me as to whether, if there is such a duty, it is one which must be complied with immediately (in which case he would in any event have been in breach of it in January 2017, and could provide nothing except a one page report obtained on 19 September to justify the passing of eight months) or whether it can wait the extra few weeks for AM and Mr Desai to return to work in Dubai after the trial. I do not accept that the September criminal complaints were made in pursuance of any duty under UAE law. Given my conclusions as to the intended interference with justice, the Defendant would need to show that there was a duty at UAE law which would have prevented Mr Wagh from waiting a few weeks more, and I am satisfied that he cannot.

131. I return to the question of contempt at English law. I have addressed the general principles in paragraphs 103-106 above. In this case the interference was, in the event, unsuccessful because, despite the attempt to prevent them from giving evidence, AM got through and Mr Desai gave his evidence by video link, though he has described in his evidence the difficulty that created for him, in not being able to prepare himself for it, as he would have done in arriving in London a few days before the trial. But the fact that the attempt was unsuccessful does not stop it being a contempt (Re B and Attorney General v Times Newspapers [1974] AC 273 and Neil v Henderson). Interference with a witness is a serious matter (Butterworth at 722–3).

132. So it is necessary to consider whether Article 37 impinges at all on the contempt:

i) I have not been persuaded that there was a duty to report a crime on 25 September.

ii) An interference with justice is a contempt whether the act causing it is lawful or unlawful: Rowden v Universities Co-operative Association Ltd (1881) 71 LT Jo 373.

iii) Even if there was such a duty, I am satisfied it was not one which would justify interference with the English court. I have been referred to authorities as to the interplay between the English court and foreign law in similar circumstances: Masri v Consolidated Contractors International Co SAL [2011] EWHC 1024 (Comm) at [244–61] per Christopher Clarke J and Dell Emerging Markets (EMEA) Ltd V Systems Equipment Telecommunications Services SAL [2020] EWHC 561 (Comm). Those authorities deal with the effect of whether it would be illegal at foreign law to carry out an English court order. However, this is not a case where a court order is made which impinges on a foreign law, but where a party – in this

case the Defendant – ascribes his interference with the English court to performance of a duty of the foreign law. The "flexible approach" addressed by Christopher Clarke J as between the two jurisdictions is plainly resoluble in this case. It would be expected that the English court would ask itself whether the foreign court required the Defendant to do what he did when he did it, and that is plainly not this case.

iv) The same would apply to the exercise of a right of the Defendant or Mr Wagh to make a complaint under English law (as in Marrinan v Vibart [1963] 1QB 528, to which I was referred in submissions after the closing by Mr Marshall). They would not be being inhibited from making a complaint, but only as to when they made it.

v) In any event, the test for contempt is the *actuating motive* (Butterworth at 723 per Lord Denning) and I am satisfied that the actuating motive was to prevent AM and Mr Desai getting to London to the trial and not performance of the alleged duty or of the legitimate right concluded by the UAE Courts.

133. I have only considered the question of the contempt alleged in Application 4. The central allegation, which I have found proved beyond reasonable doubt, is contained in paragraph 6, namely that the Defendant procured the making of the criminal complaints with the intention of deterring AM and Mr Desai from testifying and with the intention of obstructing their attendance at the trial. It is, in my judgment, plainly immaterial whether the allegations that were made in the criminal complaints were false or knowingly false, as alleged in paragraph 5.

134. I do not need further to consider Application 3 (11) and (12) ("11–12") either as to whether it makes any difference so far as concerns the alleged clash with foreign law, in respect of compliance with a court order rather than the deterring of interference with justice, though the latter is obviously *a fortiori*, nor whether the allegation of knowing falsity is material to 11–12. I also do not address the question of service in relation to 11–12. Baker 1, which was the subject of the breach alleged in 11–12, was a consent order. It was a renewal of the Picken Order, and the Defendant's solicitors had received instructions from their client that (according to the transcript of the hearing before Baker J) "*the Defendant is not going to seek to vary or lift that injunction on the return date. He is content for that to remain in place until trial or summary judgment or settlement."* Baker 1 was not served. The Claimants asked me to make an order under CPR 81.8, and Mr Marshall opposed it. In the circumstances I do not need to consider making such an order, as I make no order in respect of 11–12.

Conclusion

135. For the reasons I have given, I find the Defendant in contempt in respect of Application 1 (a) to (f) and (j) and (k), Application 2, Application 3, save for (11) and (12) and Application 4.