Neutral Citation Number: [2024] EWHC 3243 (KB)

Case No: KB-2023-004010

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

MR JUSTICE FREEDMAN

- -

Between :

MEX GROUP WORLDWIDE LIMITED

Claimant

- and –

(1) STEWART OWEN FORD
(2) BRIAN ROBERT CORMACK
(3) COLM DENIS SMITH
(4) MICHAEL GOLLITS
(5) MELVILLE CONSULTING PARTNERS LIMITED
(6) MELVILLE CONSULTANCY LIMITED
(7) REGAL CONSULTANCY INTERNATINOAL LIMITED
(8) CSM SECURITIES SARL
(9) VON DER HEYDT & CO AG
(10) VON DER HEYDT INVEST SA
~~**(11) MEX SECURITIES SARL**~~
(12) VIACHESLAV VOLOTOVSKIY

Defendants

- -

Thomas Grant KC and Caley Wright (instructed by **Quillon Law LLP**) for the **Claimant**
Dr Julian Roberts (instructed by **William Sturges LLP**) for the **Third and Eighth Defendants**

Hearing date: 18 November 2024
Draft sent to the parties: 29 November 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN:

I Introduction

1. This is a reserved judgment in an application for committal made on behalf of the Claimant, Mex Group Worldwide Limited, against the Third Defendant, Colm Denis Smith, and the Eighth Defendant, CSM Securities SARL. It arises out of the failure to provide information pursuant to disclosure obligations under a Worldwide Freezing Order ("WFO") ordered by Lavender J in October 2023.

2. There is a history of this matter which I shall summarise briefly, although the matter has been before the Court and detailed judgments have been given by Ellenbogen J on 12 June 2024 and Morris J on 30 July 2024. On each occasion, the application for committal was adjourned. There were statements to the Court that the hearings, if they had proceeded, would be a split hearing, of liability for contempt first, and if contempt was found, penalty second.

3. It was the stated position of the Claimant that there should be a split hearing of the question whether there was a contempt first and, depending upon what was found, sanction at a later hearing. It was suggested that that had been overtaken by the order of Morris J such that at the adjourned hearing, the parties should be prepared to address all matters including sanctions should that issue arise. This was not apparent and the Court acted on the statements of a split hearing: see para. 44 of the Claimant's skeleton argument dated 22 July 2024 (references updated on 14 November 2024). That skeleton was expressly relied upon for the 18 November 2024 hearing at para. 6 of the updating note of the Claimant dated 6 November 2024.

4. Irrespective of the above, I am satisfied that this remains a sensible approach to have a split hearing so that only if and to the extent that any contempt has been proven, the submissions as to penalty are made only after any findings of contempt. As part of this process, a reserved judgment in writing is being handed down so that the parties have a determination of the contempt application, and to the extent that anything remains, they know and understand any contempt before addressing penalty.

5. It should be added at this stage that the contempts are not merely technical in nature. The inclusion in the standard WFO of disclosure of assets worldwide is a standard order. It has often been said that it is required in order to police or supervise the WFO. Without this information, it is not possible to monitor whether the injunction has been observed. The information enables the WFO to be served on third parties holding assets such as banks with the effect that a defendant will not be able to utilise those assets or draw on money unless it falls within an exception provided in the order. As is stated in Gee on Commercial Injunctions 7th Ed. at 23-006:

> *"the disclosure order will reveal and evidence the existence of assets, and therefore encourage compliance with the injunction for fear of contempt proceedings. It is essential in enabling policing of the injunction. It enables the Claimant to consider whether further steps should be taken to preserve or safeguard the assets which are within the scope of the injunction, and whether there are other assets which should be made the subject of an application for freezing relief, whether in England or*

> *abroad, or brought specifically within the terms of the existing relief, for example, assets recently acquired or receivables."*

6. The issues between the parties as to whether there was a contempt have centred on the propriety of the court order, and in particular as to whether the order was one which ought not to have been made. It is said that the order for alternative service infringed the sovereignty of another country, albeit that the application to set aside has been of the WFO rather than the order for alternative service. In particular, it was submitted that the order for alternative service and the mode of service disregarded an applicable Convention, that is the Hague Convention, namely the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The submission was made that this was more fundamental than a case of an order made without full and frank disclosure which might thereafter be set aside. It was said that this was a case of an order which the Court should not have granted at all, such that it had no force. Alternatively, the order was illegal or the Claimants had not shown that it was not illegal: it was therefore void, and the order had no effect and it could not give rise to a committal for breach. It was submitted that applying this to the instant case, no order of committal could be made.

7. The Claimant submitted that there no breach of the Hague Convention. Even if there was a breach in the making of the order, indeed even if the order the service of the order was illegal (which it was not), that was not an answer to the committal application. There was an obligation on a party served with an order to observe it, and until such time as the order was set aside, there was an obligation to observe it: see *Hadkinson v Hadkinson* [1952] P. 285 at 288.

8. There was to be heard at the same time an application for committal on behalf of the Claimant against the Twelfth Defendant, Viacheslav Volotovskiy. There was a peculiarity about the continuance of that application because the Claimant has discontinued the action against the Twelfth Defendant. In fact, since then the Claimant has agreed to pay the costs of the Twelfth Defendant and not to proceed with the application for contempt against him. A consent order to that effect was placed before the Court, which pointed out that the question as to whether an application for committal can be withdrawn is not a matter which can be agreed between the parties. It depends upon the consent of the Court. Since the case against the Twelfth Defendant has been discontinued and further since the Claimant does not intend to proceed against the Twelfth Defendant, the Court acceded to the withdrawal of the contempt application. There was no longer any point in seeking the provision of the information, and if the Claimant did not wish to pursue the past contempt, there was no overriding interest in insisting that the application proceeded.

9. There was a suggestion orally in the course of the hearing that once the contempt against the Twelfth Defendant had been settled, it was unduly harsh, perhaps abusive, for the Claimant to continue to pursue the Third Defendant and the Eighth Defendant. There is nothing in this argument. The fact that there had been a settlement with one and not the other does not affect the contempt issue: whether or not it affects penalty does not have to be decided at this stage. In any event, it is apparent from the papers that the position of the Twelfth Defendant stood on its own because there was confusion in the Scottish proceedings, and the English proceedings are simply in aid of Scottish

proceedings. It appeared in July 2024 that it was not intended that the Twelfth Defendant should be in the Scottish proceedings, but a question was raised by the Claimant at that stage as to whether the Twelfth Defendant was to be joined. That has now been clarified that the Twelfth Defendant is not to be joined, and so he has no position in the English proceedings. This is the background to the discontinuance and withdrawal against the Twelfth Defendant which is peculiar to him and does not affect the position of the remaining Defendants. The fact that the Claimant did not wish to pursue the contempt against a defendant whom they are not pursuing does not assist the position of the Third Defendant and the Eighth Defendant whom the Claimant has been pursuing and continues to pursue.

II Background

10. On 18 October 2023, proceedings were issued in Scotland by the Claimant against a number of parties including the Third, Eighth and Twelfth Defendants. A part of the Scottish proceedings was an order for the preservation of assets broadly akin to a freezing order. There was an allegation that the defenders to those proceedings conspired to attempt to cause Mex Securities, a Luxembourg based securitisation vehicle, to renege upon a settlement agreement which it had reached in negotiations in Dubai in December 2020 with the Claimant. That agreement was called the Dubai agreement, and it was subsequently scheduled to a Tomlin order by which proceedings in the BVI were compromised. The various disputes in other jurisdictions are set out at in the skeleton argument of the Claimant at paras. 20 and following.

11. On 20 October 2023, the Claimant issued Part 8 proceedings in this jurisdiction seeking worldwide freezing orders ("WFOs") ancillary to the Scottish proceedings. These were under section 25 of the Civil Jurisdiction and Judgments Act 1982 against all but one of the defenders to the Scottish proceedings. A without notice hearing took place on 20 October 2023 before Lavender J and he granted a WFO against all the Respondents including the Third, Eighth and Twelfth Defendants. The WFO contained the following material provisions:

    (1) the usual orders for the provision of information relating to the respondent's assets: para. 11;

    (2) confirmation of that information by affidavit: para 12;

    (3) permission to the Claimant to serve the WFO out of the jurisdiction on all the Respondents: para 26;

    (4) permission pursuant to CPR 6.15 and 6.27 to serve the claim form, the WFO, the application materials, evidence, skeleton arguments, the transcript of the hearing and any other documents requiring service on the Respondents by an alternative method, specifically by e-mail to addresses set out in the WFO and/or by delivery by process agent to the postal addresses set out in the WFO": para 27.

12. The WFO was served on the various defendants including the Third, Eighth and Twelfth Defendants. That is proven through the second affidavit of Mr Hastings: paras. 17-19. The WFO was continued on 2 November 2023 on the first return date by Mr Justice Jay. Time for compliance with para. 12 of the WFO was postponed to 6 November 2023. The order of 2 November 2023 was served on the contempt defendants by e-mail.

13. On 16 November 2023, various defendants (not the Third, Eighth and Twelfth Defendants) applied to discharge the injunction. The application for discharge was heard in December 2023 before Mr Simon Tinkler sitting as a deputy judge of the High Court. After a three-day hearing, the deputy judge gave an oral judgment discharging the WFOs against the three applicants. Permission to appeal was obtained and the appeal was heard over three days in July 2024 and dismissed on 8 August 2024.

14. The instant contempt application was issued on 22 March 2024. Within the application, the Claimant sought the following relief, namely that:

    (1) the Third and Twelfth Defendants be committed to prison and sanctioned in any manner which the Court may see fit for contempt of court;

    (2) the Eighth Defendant be fined in whatever sum the Court may see fit and/or sanctioned in any manner which the Court may see fit for contempt of court.

15. On 23 April 2024, orders for service out of the jurisdiction and for service by an alternative method of the contempt application were made by Mr Charles Morrison sitting as a deputy judge of the High Court. The contempt application was then served in the manner authorised by the Court, full details of which are contained in the third affidavit of Mr Hastings. It is also clear from the affidavits of Mr Hastings that the Third Defendant, and through him the Eighth Defendant which he owns and operates, have been aware of the WFO and the contempt application for some time. In particular, the Third Defendant engaged in the Scottish proceedings using the e-mail address at which the WFO and the contempt application were served on CSM. He appeared as a litigant in person on 14 May 2024 and on 5 June 2024 before the Scottish court and referred on the latter occasion to the English proceedings. He filed a witness statement in the Scottish proceedings which made extensive reference to the WFO.

16. On 11 June 2024, the Third Defendant emailed the court saying that he was appearing in person and he required a lot of time to prepare the case. On 12 June 2024, about four hours before the hearing, he emailed the court with an application notice and a witness statement seeking an adjournment. He said that he expected the claims of the Claimant to be overturned, apparently based on defences put forward by other defendants. He said that he and CSM had not participated in the proceedings because they considered themselves to be not under the jurisdiction of the courts of England or Scotland. They said that participation of him and the CSM in the English proceedings could prejudice proceedings elsewhere referring to the Luxembourg court case. He said that the WFO had been discharged against certain defendants. He referred to the difficulties in identifying a suitable lawyer.

17. On 12 June 2024 he appeared by video link before Ellenbogen J. She granted an adjournment to 30 July 2024 she ordered that the parties should come prepared to address all matters arising including sanction should that issue arise. She ordered that all parties attend in person. Any evidence would have to be filed by 5 July 2024 by the Defendants. She ordered that the Third Defendant and the Eighth Defendant were to be jointly liable for the costs thrown away by the adjournment with a payment on account assessed at £15,000 to be made by 3 July 2024. The payment was made albeit late.

18. There was a further application for an adjournment which came before Morris J on 30 July 2024. The application by the Third Defendant and the Eighth Defendant was on the basis that the Third Defendant was unable to travel to the UK to attend the hearing since he had suffered injuries due to a horse riding accident. Further, by this stage on 18 July 2024, after several months of silence, the Twelfth Defendant applied to strike out the Claimant's application. Morris J acceded to the application for a second adjournment.

19. On 25 September 2024, the Third Defendant filed an affidavit in opposition to the Claimant's application. On 27 September 2024, the Third Defendant, the Eighth Defendant and the Twelfth Defendant applied to discharge the WFO and to stay the application to commit and to vacate the hearing listed for 18 November 2024 pending the outcome of their discharge application. On 21 October 2024, Soole J made an order on paper dismissing the application to stay the application to commit and to vacate the hearing listed for 18 November 2024. Soole J held that *"the fact of the application to discharge the worldwide freezing Order provides no good reason to stay the contempt application nor therefore to vacate the hearing listed for 18 November 2024"*. He ordered in respect of the discharge application that it be listed for directions only on 18 November 2024 by the Judge hearing the contempt application, who would determine at what stage in the hearing to consider the directions. Since this order was made without a hearing, Soole J granted any person affected by the order 7 days within which to apply to the court to set aside or vary its terms. No application was made within the seven-day period, and no attempt was made on 18 November 2024 to apply out of time.

20. The position adopted by the Third and Eighth Defendants at the hearing on 18 November 2024 as presaged by an updating note of 12 November 2024 was as follows:

    (1) to deny contempt and in particular on the basis that the service was not effected in accordance with the Hague Convention;

    (2) not to tender the Third Defendant for cross-examination on the basis that there would be no reliance on his evidence for the purpose of the question whether there had been a contempt;

    (3) to reserve their right to tender the evidence for the purpose of the question whether sanctions were appropriate if the Court concluded that the Third Defendant and the Eighth Defendant were in contempt;

    (4) to seek relief from sanctions for the contempt in the event that the Court concluded that they were in contempt.

21. The Third Defendant and the Eighth Defendant were entitled respectively to take this approach notwithstanding that they had served evidence. Their right to do so was expressed and/or preserved by the order of Morris J that the defendants had the right to choose not to deploy any written evidence filed and served: see para. 3 of the order. Further, it was provided that *"anyone who has elected to give evidence by affidavit, affirmation or witness statement shall attend the Further Adjourned Hearing for cross-examination, failing which the Judge should be entitled to disregard, or reduce the weight to be given to, any evidence filed and served, insofar as any committal defendant chooses to deploy it."*

22. At the hearing, the way in which the above arose was as follows. After the openings of the cases, Counsel for the Claimant tendered Mr Hastings for cross-examination. Counsel for the Third Defendant and the Eighth Defendant stated that there would be no cross-examination, and it was agreed that it was not necessary for him to be sworn again in the witness box in addition to the oaths in the affidavits. Counsel for the Third Defendant and the Eighth Defendant then stated that he would not be submitting the Third Defendant for cross examination in respect of the contempt issue, but he reserved the right to do so at the sanctions stage if that should arise. The Court then sought assistance as to whether the effect of this would go as to the admission of the evidence or as to the weight of the evidence, and it was accepted by Counsel for these defendants that he was not relying at all on the evidence for the contempt stage. He reserved the right to rely upon them at the committal stage. It therefore followed that it was not necessary for the Court to consider the impact of the many questions which Mr Grant KC said that he had intended to ask the Third Defendant if he had chosen to deploy the evidence. This did not arise at the contempt stage of the application.

III Issues for determination on contempt application

23. These were set out in the first instance in the Claimant's skeleton argument at para. 43 in the following terms, namely:

> *"…whether [the Claimant] has made out its case to the relevant standard of proof that the Contempt Defendants are in contempt of court. That will require the Court to determine the following questions (per Miles J in Business Mortgage Finance 4 Plc v. Hussain [2022] EWHC 449 (Ch) at [39]:*
>
> *(1) Whether the Contempt Defendants knew of the terms of the WFO;*
> *(2) Whether the Contempt Defendants acted or failed to act in a manner which involved a breach of the WFO; and*
> *(3) Whether the Contempt Defendants knew of the facts which made their conduct a breach."*

24. In addition to these issues, the Third Defendant and the Eighth Defendant in their updating note of 12 November 2024 identified further issues, namely:

(1) did the Hague Convention apply;

(2) if so, did the Claimant effect service in accordance with the Convention or at all?

25. In the course of the hearing, the Third Defendant and the Eighth Defendant added the following, namely that if there can be service that is effective for the purpose of these courts even if it is not in accordance with the Hague Convention, that will not apply to "anything which is contrary to the law of the country where the claim form or other documents is to be served": see CPR 6.40(4). This applies if service of a claim on the defendant is altogether prohibited by the relevant foreign law: see *Von Pezold v Border Timbers Ltd* [2020] EWHC 2172 (QB). The burden of proof is on the Claimant to establish that service would not contravene the relevant foreign law, and in *Von Pezold* it was held that the relevant standard of proof is on the balance of probabilities rather than a good arguable case. It was also submitted on behalf of the Third Defendant and the Eighth Defendant that in a committal case the standard of proof should be to the criminal standard.

26. It was therefore submitted that in addition to the issues referred to in the updating note of 12 November 2024, there is an issue as to whether the Claimant has proven to the requisite standard that service in Luxembourg of the claim form and the WFO did not contravene the law of Luxembourg.

IV Relevant principles

27. The following further matters are relevant to the Court's determination, which the Court has taken from the skeleton argument on behalf of the Claimant at para. 46, namely:

> *" (1) The Court will have to:*
>
> *(i) Be satisfied that the requirements of CPR 81.4 have been met; and*
>
> *(ii) Consider the criteria in the judgment of Theis J in Re L (a child) [2017] 1 FLR 1135;*
>
> *(2) MGWL accepts that it must prove that the elements of contempt to the criminal standard. However, it is not necessary for MGWL to establish "every fact or piece of evidence relating to each element" to the criminal standard and in "a case based wholly or primarily on circumstantial evidence, the Court must assess the evidence cumulatively rather than piecemeal" (Business Mortgage Finance 4 Plc v. Hussain [2022] EWHC 449 (Ch) at [40]-[41]; approved by the Court of Appeal [2023] 1 WLR 396, at [19] and [97] – [101]);*

> *(3) It is not necessary to show that the breaches are wilful. As explained by Flaux LJ (giving the leading judgment) in Pan Petroleum AJE Limited v. Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 as follows at [43]:*
>
> > *"Where the Court concludes that the party in contempt has acted on the basis of an interpretation of the Order which was not reasonably arguable, it is not necessary for an applicant to also show that the breach of the Order was committed with actual knowledge. Christopher Clarke J put this point clearly in Masri v Consolidated Contractors [2011] EWHC 1024 (Comm) at [155]… As that passage demonstrates, equally it is no defence for the party in breach to show that it acted on the basis of legal advice. That will only go to issues of mitigation, not to whether there was a contempt: see the judgment of the Restrictive Practices Court (Megaw J President) in The Tyre Manufacturers' Conference Ltd's Agreement [1966] 1 WLR 1137 at 1162D-H."*
> >
> > …."

28. I am satisfied that each of the formal requirements in CPR 81.4 and in Re L have been met. The specific points which have been challenged are about service. It is therefore not necessary to go into detail in respect of each and every element. However, particularly salient points are as follows:

    (1) There is complete clarity in the application notice as to what is the alleged contempt, namely comprising breaches of the order of Lavender J of 19 October 2024 ("the WFO") and in particular that:

        (i) they failed in breach of para. 11 of the WFO to inform the Claimant's solicitors of all or any of their assets worldwide exceeding £10,000 by failing to respond to the WFO and to provide disclosure by the required time or at all;

        (ii) they failed in breach of para. 12 of the WFO to file affidavits confirming the information about their assets which they were required to provide under paragraph 11 of the WFO by the required time as extended by the order of Jay J or at all;

        (iii) they failed to provide the information despite having assets in excess of £10,000 in value;

        (iv) the Third Defendant caused or allowed the Eighth Defendant to breach the WFO in the manner set out in (i)-(iii) above.

(2) the WFO was served by alternative service in the manner provided in the order by email to the addresses therein referred to.

(3) the WFO contained a penal notice.

(4) the Third and Eighth Defendants have had the opportunity to obtain legal representation and have been informed of their right to remain silent in the application notice, the covering letter and in the order of Morris J.

(5) the Third and Eighth Defendants have had full time to arrange representation and have arranged representation.

29. The Court will now consider whether the three elements referred to at para. 21 above have been proven. It will then move on to consider the issues raised by the Third Defendant and the Eighth Defendant about service.

V The first element: whether the contempt defendants knew about the terms of the WFO

30. I am satisfied to the criminal standard that the Third Defendant was served with the WFO in accordance with paragraph 27 of the WFO and was aware of it at all material times. None of the emails bounced back or were returned undeliverable. A delivery receipt was received in respect of service of the WFO from one of the email addresses used for the Third Defendant. Likewise, I am satisfied to the criminal standard that the Eighth Defendant was also served with the WFO in accordance with para 27 at the WFO and was aware of it at all material times. None of the emails bounced back or were returned as undeliverable. Further the Third Defendant is the owner and operator and the controlling mind of the Eighth Defendant, as is apparent from his representation of the Eighth Defendant in the Scottish proceedings and from evidence filed in the Scottish proceedings.

31. The Third Defendant could have tendered and deployed evidence to the effect that he was unaware of the WFO. He has not done so and the clear inference is that he has received the emails properly served and he had knowledge of the WFO at all material times. The Third Defendant and the Eighth Defendant's real case is that even if it is proven that they received the WFO, as a matter of law, there was no breach of which the Claimant is able to complain. This judgment will revert to that below.

VI The second element: whether the Contempt Defendants acted or failed to act in a manner which involved a breach of the WFO

32. The WFO gave rise to two disclosure obligations on the Third Defendant and the Eighth Defendant, namely, first to provide to the Claimant information regarding their assets, and second to confirm that information by affidavit. Neither the Third Defendant nor the Eighth Defendant complied with those obligations. On the contrary, they failed to respond to the WFO at all. This has been proven to the criminal standard.

33. A point is raised in the skeleton argument on behalf of the Claimant at para 92 that *"even if the contempt defendants were to maintain that they have no assets, they would have had to provide nil returns"*. This is said to be supported by *JSC BTA Bank v Solodchenko* [2011] EWHC 1613 Ch. at [15]. That is not what was said expressly in that case, albeit that it was a case where a defendant provided no disclosure in respect of a similar disclosure provision and the Court (Briggs J as he then was) found in his absence that he was guilty of contempt.

34. At para. 93 of the same skeleton, there is evidence which is intended to lead to an inference that the various defendants concerned have assets which met the disclosure threshold. As regards the Eighth Defendant, the most recent accounts filed in 2022 disclosed assets of €631,738.21 included cash at bank or in hand of just over £125,000. Whilst there may be an issue as to whether or not all of its assets were assets of the Eighth Defendant, in a hearing in the Scottish proceedings on 5 June 2024, it was stated that it had cash of about £125,000. When paying the costs order of £15,000, this was paid from a bank account of the Eighth Defendant. This is evidence to the effect that the Eighth Defendant had assets over the threshold of £10,000 which required disclosure. I am satisfied to the criminal standard that the Eighth Defendant did have the required assets to make the disclosure.

35. As regards the Third Defendant, the evidence of Mr Hastings at paras. 30-31 of his second affidavit was that he had links to other active companies in Luxembourg of which three companies had assets over £10,000 in value. Further he lived at a property at 92 Avenue Gaston Diderich, but it was owned by a company which was in an insolvency procedure. He is also the sole owner of the Eighth Defendant: see para. 2 of his affidavit of 27 July 2024 deployed in support of the second application for an adjournment.

36. I am satisfied that no issue arises to the effect that the Third Defendant might not have any assets of in excess of £10,000 such as would be an answer to the contempt application for the following reasons or any of them, namely:

    (1) this issue has not been raised on behalf of the Third Defendant (or the Eighth Defendant) in circumstances where there is an inference that it would have been raised in the event that it was or might be a complete answer to the committal application;

    (2) since this would be a matter within the knowledge of a defendant, it would seem logical that there is in the first instance an evidential burden on them to raise the point before a claimant has to rebut it;

    (3) in any event, in this case, where the Third Defendant owns the Eighth Defendant which is a continuing trading company, and where he is associated with other companies which have assets, there is an inference that he does have assets of over £10,000 which has not been rebutted by any responsive evidence;

    (4) there are other ways of coming to the same conclusion, but they all come to the same thing, namely that a person like the Third Defendant (or a company like the Eighth Defendant) cannot be expected not to provide disclosure about their assets and to imagine such an unlikely possibility (given the kind of trading and corporate connections which they have) of having no assets, without themselves

raising it as a possibility. It is so fanciful that I am satisfied that this element of the case is satisfied to the criminal standard.

37. Further support for the above is derived from the case of *Pirtek (UK) Limited v Robert Jackson* [2018] EWHC 1004 QB in which Warby J (as he then was) said in respect of proving contempt at [37] that *"The Court may also be invited to draw inferences, including drawing adverse inferences from the respondent's silence. But, as in a criminal case, such an inference may not be the sole basis for finding against the respondent; and the inference should not be drawn unless it is fair to do so and the Court is satisfied that the applicant has established a case that calls for an answer, and that the only sensible explanation for the respondent's silence is that he has no answer, or none that could withstand proper scrutiny: Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) [147]." The matters in the preceding paragraph are to the effect that combined with the above matters, there is an inference from silence that they do have assets of over £10,000.

38. To the extent that the matters above apply to the Third Defendant, they also apply to the Eighth Defendant. If and to the extent that this arises as an issue for the Court to consider, I am satisfied to the criminal standard that they do have assets of at least £10,000.

VII The third element: whether the Contempt Defendants knew of the facts which made their conduct a breach

39. This is self-evident. In evidence which has not been deployed, it has been suggested that Luxembourg lawyers advised these defendants that there was no obligation to provide the information whether because the order might not have been served by a bailiff or any other reason. As a matter of law, this is not an answer to an allegation of contempt. The absence of wilful default does not affect whether there has been a contempt. The citation above of Flaux LJ in *Pan Petroleum* is confirmation in a very long line of authority to this effect. It is no defence to contempt that a person acted on legal advice, but it might be relevant to mitigation.

40. Likewise, in *Hadkinson v Hadkinson* [1952] P.285 at 288, Romer LJ said the following:

> *"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it. ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court*

> *and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."* (Per Lord Cottenham L.C. in Chuck v. Cremer.).
>
> *Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise…"*

41. This principle was reiterated by Lord Donaldson MR in *Johnson v Walton* [1990] 1 FLR 350: *"It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place."*

42. In *Isaacs v Robertson* [1985] AC 97, the Privy Council upheld a finding that the appellant was in contempt where he had breached an injunction of the High Court of St Vincent notwithstanding that the order ought not to have been made. In so ruling, the court rejected the contention that there was a distinction between 'void' orders which could be ignored with impunity and 'voidable' orders which may be enforced until they are set aside. Lord Diplock said that such contrasting concepts at 101-102:

> *"are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either regular or irregular. If it is irregular it can be set aside by the court that made it upon application to the court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."*

43. It follows that while the reasons for disobedience may be revisited in the context of sanction, it is no answer to the alleged contempts in the instant case.

44. The Third Defendant and the Eighth Defendant through the Third Defendant knew that the order required the provision of the information. They knew that not to provide the information would be a breach of the WFO. Whether their motive was because they did not want to provide the information or because they had received advice that they could choose not to do so does not affect the fact that they knew that their conduct was a breach. It might be relevant to penalty, but that is not for this stage of the case.

45. In the event, the Defendants have not provided any evidence as to why they did not comply with the order. In those circumstances, it is not for the Court to infer that they might have some reason to disobey the order. Absent evidence, there is no reason to

speculate on their motive. The objective facts are that there was an order, and they chose for whatever reason not to obey it without seeking in the meantime (indeed until many months after the breach) to set aside the WFO. The fact that there is currently a pending application to set aside the WFO is no answer without an order to stay the disclosure orders in the WFO. At the material time, and continuing at this stage, there has been no stay.

VIII The Hague Convention points

46. The Third Defendant resides in Luxembourg and the Eighth Defendant is incorporated in Luxembourg. Both Luxembourg and the United Kingdom are Hague Convention signatories. Article 5 reads as follows:

> *"The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either -*
>
> *a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or*
> *b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed…."*

47. It is apparent that service under the Hague Convention is always carried out either by the Central Authority in the state where the service is to take place or else by an appropriate agency to which the Central Authority has delegated this task. Service by e-mail is not necessarily excluded, but it would have to take place by or on behalf of the Central Authority and not directly.

48. The Convention does not exclude other means of service or of communicating documents: see articles 8 - 11. However, these provisions fall outside the procedure for service under the Convention, and, in any event, if effective service is to be achieved, they depend upon service not by the parties but by the Central Authority or an appropriate agency.

49. In the oral address to the Court of Dr Roberts on behalf of the Third Defendant and the Eighth Defendant, the submission was made that the starting point is one of sovereignty. In the Hague Convention, the requesting state seeks to assert its authority on the territory of the addressed state. The Convention represents a concession that the requested state will allow this as long as the rules set out in the Convention are observed. The addressed state may always decline measures which infringe its sovereignty.

50. In *Cecil v Byatt* [2011] EWCA Civ 135, Stanley Burnton LJ (with whom Wilson and Rix LJJ agreed), said as follows at para. 65:

> *"In modern times, outside the context of the EU, the most important source of the consent of States to service of foreign process within their territory is to be found in the Hague Convention (in relation to the State parties to it) and in bilateral conventions on this matter. Because service out of the jurisdiction without the consent of the State in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR 6.15 should be regarded as exceptional, to be permitted in special circumstances only."*

51. It may be that the reference to sovereignty needs to be adjusted because of the speech of Lord Sumption in *Abela v Baadarani* [2014] UKSC 44 at [53], who criticised what he called the traditional view that service was an interference with the sovereignty of the state in which process was served. Notwithstanding the possible need to rephrase interference with the sovereignty in the light of this, Longmore LJ in *Societe Generale v Goldas* [2018] EWCA Civ 1093 said at [33]:

> *"The phrase "interference with the sovereignty" might now be re-phrased in the light of Lord Sumption's judgment in Abela but the essential reasoning of Stanley Burnton LJ (with whom Wilson LJ and Rix LJ agreed) remains binding on this court so that service by an alternative method is to be permitted "in special circumstances only."*

52. At [34], Longmore LJ said the following:

> *"Soc. Gen submitted that alternative service (if there was otherwise good reason) should only be refused if such service subverted and was designed to subvert the Hague Convention. But, although that was in fact the position in Knauf GmbH v British Gypsum Ltd [2002] 1 WLR 907 which was one of the cases on which the judge relied, there is no indication in Cecil that any such subversion is required."*

53. In *Nokia Technologies v OnePlus Technology* [2022] EWHC 293 (Pat), Marcus Smith J summarised the case law at [20] as follows:

> *"What one gets, in cases where there is a convention in place, is that a form of service that is not that stipulated by the agreement between the States – here the Hague Convention – that process can only be disregarded or set aside or circumvented where there are special or exceptional circumstances."*

54. In the circumstances of this case, I am satisfied that there were special circumstances to depart from the Hague Convention. In circumstances where a WFO was being sought on the basis of a reasoned fear for dissipation of assets, and where key defendants were in Luxembourg, the whole purpose of the WFO would be undermined in the event that it had to await service through the State Authority in Luxembourg. This would involve a delay of months. This was not a mere desire for speed. It was that there was the serious and well-founded risk that the WFO would prove ineffective due to months of delay in effecting service. I am satisfied in the light of the foregoing that the order for alternative service was made out whether the test is special or exceptional circumstances.

55. I am satisfied that in the circumstances, the order for alternative service was made out and the attempt to say that the order was defective due to alternative service must fail. In any event, it is to be noted that whilst an application has been made to set aside the WFO, no such application was made to set aside the alternative service.

IX The possibility of illegality and related considerations

56. The arguments for the Third Defendant and the Eighth Defendant go further. As noted above, they submit that the order must not be illegal in the country where it is served, and further the onus is on the party seeking to enforce the order to prove that it is not an illegal order: see CPR 6.40(4). The Defendants relied upon the case of *The Sky One* [1988] 1 Lloyd's Rep. 238, where the court was concerned with an application to set aside service under the old RSC, which contained a provision in materially identical terms to Part 6.40(4). The question was whether service of a writ by private means in Switzerland was contrary to Swiss law because it was an act carried out on behalf of a foreign state which under Swiss law could only be effected through the competent authorities. In that case, as in this, the position was not that the claim could not be served at all; it was simply that service on behalf of a foreign state had to be effected in a particular manner. Staughton J considered expert evidence on Swiss law from both parties' respective experts. The evidence was of article 271 of the Swiss Penal Code and concluded that service by private means did involve a breach of Swiss law for which there were criminal penalties on those who carried out such service including lawyers who facilitated it.

57. It does not follow from the above that there is any reason to believe that service other than through the competent authorities in Luxembourg constitutes a criminal offence under Luxembourg law. It is simply a breach of the Hague Convention without more. The *Sky One* turned upon particular criminal offences under Swiss law, and absent reference to similar provisions in Luxembourg law, there is no reason to believe that there should be such provisions in Luxembourg.

58. It may be that in certain circumstances, the matter could be raised evidentially by the person against whom service has been effected in the foreign state. It might then be that if there is some prima facie case, the onus shifts to the person serving to show that there has been no illegality. It is not necessary in this case to consider whether that is the case because no prima facie case has been raised that such service is or may be illegal.

59. In any event, if it were the case that illegality had to be disproved by the serving party, I am satisfied that this has been done in this case. In the evidence of the Twelfth Defendant, he stated that bailiffs are the only receiving agencies for the receipt of judicial documents in Luxembourg and that electronic service is not available in Luxembourg. He relied upon an opinion of Elisabeth Alves dated 17 July 2024 to the effect that *"a service of a judicial order by e-mail does not comply with the requirements of The Hague Convention and Luxembourg laws."* I am satisfied that this has been answered in this case by the letter of Elvinger Hoss Prussen SA, registered with the Luxembourg Bar ("EHP").

60. The advice of EHP demonstrated the following, namely:

(1) although at its inception Luxembourg made a declaration opposing service of judicial documents through postal channels to persons in Luxembourg, they withdrew this by a note dated 2 June 1978 so that service through postal channels is allowed in Luxembourg in accordance with the provisions of The Hague Convention and in particular Article 10;

(2) in Luxembourg courts, service of Luxembourg proceedings occurs generally through a huissier de justice (a Luxembourg bailiff), but where this does not occur the court itself may convene the parties via postal channels,

(3) as regards the service of documents by electronic means whilst it is correct that The Hague Convention and Luxembourg law do not mention the service of documents by electronic means, it does not expressly prohibit the service of documents by such means because there is no Luxembourg law provision that would render service by electronic means unlawful;

(4) where service takes place as a result of the act of a foreign court internal Luxembourg law provisions will not apply to the service of documents.

61. No provision of the kind referred to in respect of Swiss law in the *Sky One* has been identified in Luxembourg law. It therefore follows that on the evidence before the court there is nothing to show that service by e-mail from the UK to Luxembourg pursuant to an alternative service order of the English court is illegal under Luxembourg law.

62. It therefore follows that there is no evidential foundation for an argument to the effect that the service in this case contravened the law of Luxembourg. It therefore follows on the evidence that the service of the WFO was not illegal or ineffective.

63. The next stage of the analysis is to apply the law in *Hadkinson*. The effect is that the obligation to comply with an order is uncompromising. It extends even to cases where the person affected by the order believes it to be irregular or even void. It will apply even where there are grounds to set it aside including, for example, a case where there has not been full and frank disclosure made to the court. In those circumstances, it behoves a respondent to an order to obey the order until such time as it has been set aside by the court.

64. It therefore follows that even if it had been the case that there was legislation such as that in Switzerland rendering the making or service of the WFO illegal, the order or the service thereof would not necessarily be incapable of enforcement until such time as it was set aside by the Court. In Arlidge and Parry on the Law of Contempt at paras. 9-430 - 9-440, the view is expressed that orders have to be observed until set aside, save in the most extreme of cases. How far that goes does not arise for consideration in this case since the evidence is that there has been nothing illegal about the alternative service order or the service thereafter.

65. Having considered illegality as above, it follows that all that remains is the point that the alternative service order or the WFO may be set aside in due course for other reasons e.g. a failure to make full and frank disclosure or a view that alternative service was not justified on the facts of the case as opposed to illegality. I am satisfied to the criminal standard that the possibility that the WFO would stand to be set aside or any belief that the order was null and void is not an answer to an application to commit or seek sequestration of goods.

X Has a contempt been established?

66. It follows that none of the defences advanced by the defendants provide an answer to committal. I am satisfied to the criminal standard that contempts have been established.

67. The four alleged complaints:

(i) I find proven to the criminal standard the first count, namely that the Third Defendant and the Eighth Defendant respectively were in breach of para. 11 of the WFO in failing to inform the Claimant's solicitors of all or any of their assets worldwide exceeding £10,000 by failing to respond to the WFO and to provide disclosure by the required time or at all. They did so knowing about the requirement in para. 11 of the WFO and deliberately not providing the information in the case of the Third Defendant by himself and in the case of the Eighth Defendant through the Third Defendant. They did so despite the Third Defendant and the Eighth Defendant respectively having assets exceeding £10,000 in value;

(ii) I find proven to the criminal standard the second count, namely that the Third Defendant and the Eighth Defendant respectively were in breach of para. 12 of the WFO in that they failed in breach of para. 12 of the WFO to file affidavits confirming the information about their assets which they were required to provide under paragraph 11 of the WFO by the required time as extended by the order of Jay J or at all. They did so knowing about the requirement in para. 12 of the WFO and deliberately not providing the information in the case of the Third Defendant by himself and in the case of the Eighth Defendant through the Third Defendant. They did so despite the Third Defendant and the Eighth Defendant respectively having assets exceeding £10,000 in value;

(iii) The third count is not a count by itself. It says that the Third Defendant and the Eighth Defendant failed to provide the information despite having assets in excess of £10,000 in value, which would have been answer to the first and

second counts. However, this is not the case, and those counts have been found to be proven including that the Third Defendant and the Eighth Defendant respectively had assets at the material time exceeding £10,000 in value. The third count is therefore a part of the first two counts rather than a separate count;

(iv) The fourth count is that the Third Defendant caused or allowed the Eighth Defendant to breach the WFO in the manner set out above. I am satisfied that this was the case since the Third Defendant is and was at all material times the manager (which is the Luxembourg equivalent to a company director) and controlling shareholder of the Eighth Defendant. This has not been a casual omission but a deliberate failure to engage by the Third Defendant. The failure of the Eighth Defendant to provide the information has been at the instigation of the Third Defendant as manager/director responsible for complying the observance of the Eighth Defendant with its obligation to comply with the court order. This is a case not of liability imposed simply because the Third Defendant was the natural person responsible for ensuring that the company observed the injunction of the kind discussed by Popplewell LJ in *ADM International v Grant House International SA* [2024] EWCA Civ 33 ("ADM"). The Third Defendant caused the deliberate failure of the Eighth Defendant by refusing to provide the information for himself and for the Eighth Defendant. I find proven to the criminal standard the contempt of the Third Defendant in respect of the fourth count.

68. In the course of correspondence after the circulation of the draft judgment, the Third Defendant and the Eighth Defendant have sought to argue matters that went beyond typographical corrections and beyond the comment on the case of *ADM* which was invited in the original draft. Whilst it is important to confine points at this stage to usual constraints which apply to judgments at the draft stage, in the circumstances of a contempt application (and not wishing to treat this as a precedent for other cases), the Court now considers the points.

69. First, it was stated that *"evidence was presented that the Luxembourg Penal Code does indeed penalise "usurpation of" or "interference with" official functions, which, in the same way as the Swiss provision, can also extend to interfering in judicial procedures. The Court has rejected this – it would appear – as inadmissible evidence."* What occurred in this regard is that the Luxembourg Penal Code was not referred to in the legal advice of Elisabeth Alves or a Luxembourg lawyer. It was referred to in submissions by Counsel by placing before the Court a provision from the Code in French. It was not translated from French into English. Further, there was no legal commentary from an expert in Luxembourg law as to how it might apply in the instant case. Article 227 reads as follows:

> *"Quiconque se sera immiscé dans des fonctions publiques, civiles ou militaires, sera puni d'un emprisonnement d'un mois à deux ans. »*

70. This has failed to raise a case to the effect that this was an equivalent of the provision of the Swiss provision raised in the Sky One in that:

(1) It was inadequate to present this evidence of foreign law in this way, making barristers resort to Google translate for the word "*immiscé*", translated by on behalf of the Third and Eighth Defendants as "interfere" or "usurp. What was missing was both an authoritative translation and an opinion as to what the provision meant. The evidence of the meaning and effect of Article 227 ought to have been presented as part of a report from an expert in the law of Luxembourg. It was not. This evidence is therefore inadmissible, and the remaining sub-paragraphs are without prejudice to the finding of inadmissibility;

(2) In any event, a prohibition about interfering with or usurping public functions, civil or military, does not have an obvious meaning that would render illegal an order about alternative service of an order of this Court for service by email or the service thereafter by email. It appears to be something different, albeit that it has not been explained what is its meaning and application in Luxembourg law;

(3) The admissible evidence of EHP which is before the Court as set out in para. 60 above shows that the Luxembourg court would not treat service by email pursuant to an order of alternative service of a foreign court as illegal. This was a response to the evidence of Alves and showed specifically how the law in Luxembourg changed in 1978. The Court accepts the evidence of EHP;

(4) Despite the assertion to the contrary on behalf of these defendants, nothing has been raised to the Court other than mere assertion which shows that the wording of the Swiss provision referred to in the *Sky One* is comparable to any provision drawn to the attention of the Court about Luxembourg law. The case is to be distinguished from the *Sky One* (a) in the particular form of service (personal service in Switzerland), (b) in the wording of the provision (see the *Sky One* at p.241 col.1), and (c) in the expert evidence which was presented in order for the Court to rule on the illegality according to Swiss law (see the analysis in *Sky One* at pp241-243). The Court therefore rejects the submission that this case is to be treated like *Sky One* and equivalent to the Swiss legislation.

71. It has been submitted on behalf of the Third and Eighth Defendants in the course of the correspondence since the handing down of the draft that the Third and Eighth Defendants acted on the advice of legal advisers and therefore in good faith. This is not accepted for the purpose of providing a defence to the contempts in that:

(1) There is no evidence from these defendants at this stage. They have chosen not to deploy the evidence. The Court inquired as to the status of the evidence, and the Defendants chose not to deploy the evidence, albeit that they have reserved their right to do so at the stage of consideration of penalty. That is the end of the matter as regards that evidence.

(2) Despite this, in the correspondence now placed before the Court, reference is made to the third affidavit of the Third Defendant. In view of what is said in sub-paragraph (1) above, the Defendants have chosen to deal with the contempt stage (before the question of penalty) without deploying that evidence.

(3) Even if the Defendants were allowed to depart from the above, as to which there is no application, and considering the affidavit as if it were evidence before the Court, the affidavit does not say that advice was received by these Defendants at the time when the information was due to be provided. The reference to legal advice was only that a written legal opinion was "subsequently" obtained. That was months after service of the WFO.

(4) Even if advice had been obtained from a Luxembourg lawyer, and if these Defendants had acted on advice (whatever that was), they still deliberately withheld the disclosure of assets.

(5) It is contended that the Eighth Defendant understood the orders to be in existence but not enforceable since they were not delivered by a court bailiff, without stating when and how the Eighth Defendant had that understanding. Even if the Defendants had a mistaken belief that they were not obliged to provide the information, that would not afford a defence to contempts: at highest, it might afford mitigation at the penalty stage. That is for another time, and would depend on the precise evidence before the Court at that stage. The Defendants have reserved the right to rely on evidence at the penalty stage.

(6) It is said that the subjective understanding of the Defendants might be relevant to a liability based on the natural person responsible test referred to in *ADM*. That submission came as a result of the Court asking whether the natural person responsible test might apply. Following submissions by the parties, it is not that test which applies, but the responsibility of the Third Defendant is (as has been the Claimant's case at all times) based not simply on his being the manager/director, but upon the Third Defendant acting as such and deciding for himself and the Eighth Defendant deliberately not to provide the disclosure ordered. The obligations of disclosure in the WFO are clear and unambiguous.

72. It follows from the above that the first, second and fourth contempts are proven against the Third Defendant to the criminal standard. Likewise, the first and second contempts are proven against the Eighth Defendant to the criminal standard. I have set out above the importance of compliance with disclosure orders. As is reflected in case law where parties have been found in contempt for failure to provide such information, the Courts are willing to exercise punitive powers. If the breaches were mere technicalities such that the contempt jurisdiction was not appropriate, then there would have been consideration as to whether it was inappropriate to invoke the jurisdiction. That has not been said, and it is accepted that in the event the submissions before the Court are not accepted that the Court can find the contempts proven, but that the Third Defendant and the Eighth Defendant would then wish to deploy evidence and advance submissions in respect of penalty.

73. This judgment will now move on to consider consequential matters.

XI Consequential matters

74. As noted above, the Court wished the parties to see the reasons on liability before moving on to penalty. Whilst this will not be dealt with at this stage, there are a number of points to be considered in advance of penalty.

75. First, the Third Defendant and the Eighth Defendant may wish to consider in the period between the handing down of the judgment in draft and the time of the next hearing, and sooner rather than later, what their position is as regards late compliance with the orders for the disclosure of assets. It may be relevant to the position going forward as to what they choose to do at this stage. It remains to be seen whether the Third Defendant and the Eighth Defendant will respectively choose to submit, albeit late, the information and the affidavits which were ordered by the WFO in advance of the next hearing.

76. Second, the Court will require assistance as to whether it should proceed to penalty or direct that the hearing of the application to set aside should first be dealt with. The Court will wish to receive submissions as to whether the merits of the set aside application may be relevant to mitigation. A related question is whether the costs of the application ought or ought not to be reserved pending the application to set aside the injunction.

77. Third, there is the question as to whether the Third Defendant and the Eighth Defendant ought to be able at all to proceed with the set aside application. They were required to make that application a long time earlier than they did. There may be a question as to the effect of a continuing contempt on the ability to move that application. These are matters as to which the Court seeks assistance.

78. Fourth, a related point to the third point is when an application for relief from sanctions should take place. The Claimant had in mind a half day discrete application. It may be that the Court could decide such an application on the consequentials hearing if it is made. It depends on what would have to be considered. It may be that there ought to be a rolled up hearing of the application for relief from sanctions and the set aside application or it may be that there should be a discrete application. The reason for wanting assistance is a concern about the overriding objective and trying to prevent an unnecessary proliferation of hearings if that can be done without causing injustice to either side.

79. Fifth, these considerations are not comprehensive and there may be other matters to consider.

XII Disposal

80. For the above reasons, contempt is proven in respect of the first, second and fourth of the grounds. The third ground is not a separate ground but is a part of the finding in respect of the first and second grounds.

81. The next stage of this matter is for a hearing to be fixed to consider the consequential issues as set out above. That hearing should be fixed for no earlier than 7 days from the date of the formal hand-down of judgment. The Court wishes to thank the parties' Counsel for the assistance which they have given to the Court thus far in this matter.