Neutral Citation Number: [2024] EWCA Civ 568

Case No: CA-2024-000574

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Sir Anthony Mann (sitting as a Judge of the Chancery Division)
[2024] EWHC 565 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LADY JUSTICE ELISABETH LAING

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Between :

NEBAHAT EVYAP İŞBILEN	**Claimant/ Respondent**
- and –	
(1) SELMAN TURK	**Defendant/ Appellant**
(2) SG FINANCIAL GROUP LIMITED **(3) BARTON GROUP HOLDINGS LIMITED** **(a company incorporated in the British Virgin Islands)** **(4) SENTINEL GLOBAL ASSET MANAGEMENT INC** **(a company incorporated in the Cayman Islands)** **(5) SENTINEL GLOBAL PARTNERS LIMITED** **(a company incorporated in the Cayman Islands)** **(6) AET GLOBAL DMCC** **(a company incorporated in Dubai)** **(7) FORTEN HOLDINGS LIMITED** **(a company incorporated in Jersey)** **(8) FORTEN LIMITED** **(9) HEYMAN AI LIMITED** **(in liquidation)** **(10) GARY BERNARD LEWIS**	**Defendants**

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Dan McCourt Fritz KC and Andrew Gurr (instructed by **Peters & Peters Solicitors LLP**) for the **Respondent**
James Counsell KC and Helen Pugh (instructed by **Janes Solicitors**) for the **Appellant**

Hearing dates: 9 & 10/05/2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 22/05/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison :

Introduction

1. Mr Selman Turk appeals, as of right, against an order made by Sir Anthony Mann committing him to prison for 12 months as a result of five breaches of an order for disclosure that Sir Anthony found proved to the criminal standard. A sixth alleged breach was not proved to that standard.

Background

2. The order was made in the context of a substantial dispute (which has yet to be tried) between Mr Turk and Mrs Işbilen. Mrs Işbilen is a Turkish lady in her 70s whose husband has fallen foul of the authorities in Turkey and who has been imprisoned there. She wished to get herself and her considerable assets (tens of millions of pounds worth) out of Turkey and asked Mr Turk, a former Goldman Sachs banker, for his assistance in both those respects. So far as her assets are concerned her claim is that he was asked to make sure they were safe, and no more. He duly assisted her in both those endeavours, and she now resides in this country.

3. The claim itself arises out of what happened to her assets. Mrs Işbilen claims that in breach of his limited instructions he applied $30-$40m of her assets in ways that went beyond his instructions, a large part of them in the direction of various entities in which he is said to have an interest. This claim is a claim to retrieve those assets, their traceable proceeds and/or compensation (putting the matter broadly). There are also other substantial claims for breach of fiduciary and other obligations in relation to other moneys. Mr Turk claims that the instructions were not as limited as Mrs Işbilen says they were and all that he did was proper, within his instructions, and with the fully informed consent of Mrs Işbilen who herself authorised the documents which effected the disposal of her assets. One of the authorised investments was an investment in the Sentinel Fund, which was in part controlled by Mr Turk. He says that payments both into and out of that fund were made with Mrs Işbilen's knowledge and consent. The other defendants to the action are the claimed recipients of funds and one individual (Mr Lewis) who is a director of some of the companies, is sued as a recipient of some of the moneys.

The Miles order

4. Having started these proceedings, Mrs Işbilen made a without notice application for a freezing order, which was granted by Miles J on 4 March 2021 (the "Miles order"). The order was made against (among others) Mr Turk as First Respondent and Barton Group Holdings Ltd ("Barton") as Third Respondent.

5. The disclosure obligation was contained in paragraph 16 of the Miles order; but in order to understand it, it is necessary to set out paragraph 15:

> "15. Until further order of the Court, the First, Second, Fourth and Fifth Respondents must not move or in any way dispose of or deal with or diminish the value of:

(1) any asset constituted by or derived from the whole or part of the transfers and bank payments identified in Schedule D to this Order as having been received by the relevant Respondent; and

(2) any asset constituted by or derived from the transactions listed in Schedule E to this Order (Such assets shall be referred to in this order as the "Traceable Proceeds").

FURTHER DISCLOSURE AND DELIVERY UP

16. On service of this Order, the First, Second, Fourth and Fifth Respondents (and each of them) must, to the best of their knowledge and ability forthwith:

(1) inform the Applicant's solicitors in writing of the current value, nature and location of the Traceable Proceeds and the name or names in which the Traceable Proceeds are held;

(2) to the extent that the information referred to in subparagraph (1) immediately above is not within the relevant Respondent's knowledge they must inform the Applicant's solicitors in writing of the identities, addresses and any other contact details known to them of any person who is or might reasonably be expected to be in possession of the information referred to in subparagraph (1) above;

(3) insofar as the Respondent has transferred the Traceable Proceeds to any other person or entity, the Respondent must inform the Applicant's solicitors in writing of (a) the date of the transfer, (b) the purpose of the transfer, and (c) the identity of the transferee, stating, in the case of a company, where it was incorporated and where its registered office is, and in the case of an individual, stating where that individual currently resides or works or can otherwise be found;

(4) the assets (if any) that were acquired in whole or in part by the Traceable Proceeds."

6. Paragraph 17 stated:

"On service of this Order the Third Respondent must, to the best of its knowledge and ability forthwith:

(1) inform the Applicant's solicitors in writing of the current value, nature and location of any asset constituted by or derived from the whole or part of the transfers and bank payments identified in Schedule F to this Order (the "Barton Assets") and the name or names in which the Barton Assets are held;

(2) to the extent that the information referred to in subparagraph (1) immediately above is not within the relevant Respondent's knowledge they must inform the Applicant's solicitors in writing

> of the identities, addresses and any other contact details known to them of any person who is or might reasonably be expected to be in possession of the information referred to in subparagraph (1) above;
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> (3) insofar as the Respondent has transferred the Barton Assets to any other person or entity, the Respondent must inform the Applicant's solicitors in writing of (a) the date of the transfer, (b) the purpose of the transfer, and (c) the identity of the transferee, stating, in the case of a company, where it was incorporated and where its registered office is, and in the case of an individual, stating where that individual currently resides or works or can otherwise be found;
>
> (4) the assets (if any) that were acquired in whole or in part by the Barton Assets."

7. Schedule E was in these terms:

> "1. Any purported loan(s) taken by the First Respondent from the Applicant, including but not limited to the two transfers to the First Respondent listed in Schedule D, and any transactions entered into using funds from any and all such purported loans.
>
> 2. Any and all investments made by Sentinel Global Fund A LP that were made using monies transferred from Mrs İşbilen or assets derived from such monies, and the traceable proceeds of such investments.
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> 3. Any and all transactions entered into using funds redeemed or redirected from Sentinel Global Fund A LP."

8. Paragraph 18 of the Miles order stated:

> "18. Within 48 hours after being served with this Order the First Respondent must:
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> (1) to the best of his knowledge and ability inform the Applicant's solicitors in writing of the location, form, status current or last known whereabouts of any assets which are owned in whole or in part by the Applicant (legally, beneficially or otherwise), or the traceable proceeds thereof;
>
> (2) inform the Applicant's solicitors in writing of the details of any bank accounts (including the number, name, reference and/or any other unique identifier of each account) in his name and/or to which he is a signatory and/or that he controls; and
>
> (3) provide to the Applicant's solicitors any reconciliation in relation to Sentinel Global Fund A L.P. that is within his control."

9. Paragraph 19 described the assets which were caught by paragraph 18. Paragraph 20 required Mr Turk "as soon as reasonably practicable, and in any event within 48 hours after service of this order" to deliver up certain documents, ledgers and books.

10. By paragraph 21 of the Miles order, an affidavit "setting out and verifying" the information required by paragraphs 16 to 19 of the Miles order was to follow within 5 working days (Thursday 18 March) which was also the return date.

11. The timetable set by the Miles order thus followed a well-recognised pattern. Under paragraphs 16 and 17 the information was to be supplied "forthwith." In this context "forthwith" means on service of the order (11 March) or as soon as reasonably practicable thereafter: *Varma v Atkinson* [2020] EWCA Civ 1602, [2021] Ch 180 at [57]; *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, 359G. Under paragraph 18 the information (to the best of Mr Turk's knowledge and ability) was to be supplied within 48 hours (13 March); and a confirmatory affidavit was to be supplied five days later (subsequently extended to 22 March).

12. Paragraphs 16 and 18 were obligations of Mr Turk himself, while paragraph 17 was an obligation of Barton alone.

13. The order was served on Mr Turk on the evening of 11 March. It was accompanied by a letter from Peters & Peters (Mrs Işbilen's solicitors) which the judge considered to be "a readily comprehensible and appropriately accurate account" which Mr Turk could be expected to understand. Mr Turk consulted solicitors (Bivonas) almost immediately. Correspondence from Bivonas followed in the next few days. Some disclosure of Mr Turk's personal assets was made on 15 March. Peters & Peters replied on the same day complaining of shortcomings in that disclosure. A meeting between Bivonas and Mr Turk took place on the following afternoon to discuss the issues raised by Peters & Peters. On 17 March Bivonas instructed Mr Shepherd to appear as counsel for Mr Turk, on the return date set for 18 March. Mr Shepherd raised a number of questions, and pointed out that what was required was to take each paragraph of the disclosure provisions setting out what had been provided and when and how that complied with the order. As part of his preparations Mr Shepherd prepared a schedule in the form of a table which summarised the compliance and disclosure required and the compliance which had taken place to date together with the complaints (or some of them) raised by Peters & Peters. He raised queries in different colours and the table was then used on further occasions when leading counsel became involved. Where questions were raised the answers, or some of them, were recorded on the face of later versions of the table.

14. Mr Bechelet of Bivonas replied that evening. In the course of his reply he said:

> "I have sat with him read out the Miles order and gone through assets identified by the Claimant and anything else he needs to disclose, these were set out in my letter of 15 March approved by ST and subsequently the affidavit albeit unsworn.
>
> I recited the Miles Order in the letter."

15. The judge found that Mr Bechelet did what he said and went through the Miles order and explained what was required. There were further email exchanges between Mr Shepherd and Mr Bechelet late into that evening and early on the following day. Mr

Shepherd was "struggling to see" how it could be said that Mr Turk had complied with the order in full; and he produced an updated version of his schedule. Early in the morning Mr Bechelet also emailed Mr Turk raising further questions; although the judge observed that that email "does not really begin to scratch the surface of what was required to address the proprietary disclosure issues".

16. On the return date on 18 March Mrs Işbilen's counsel (Mr McCourt Fritz KC) made extensive reference to what was said to be Mr Turk's culpable failure to comply with the disclosure obligations. Mr Shepherd accepted that there were "some gaps in the existing disclosure" and that "there have been areas of non-compliance". Following submissions, Ms Pat Treacy (sitting as a deputy High Court Judge) continued the freezing provisions of the Miles order subject to extending time for compliance with the requirement to swear an affidavit to 22 March. No further order for disclosure was made on that date. On 25 March she made an order (with the consent of Mr Turk) for his cross-examination on his disclosure, which in due course took place. On both those hearings Mr Turk was represented by counsel.

17. Immediately following that hearing Mr Shepherd sent an email to Mr Turk on which Mr Counsell KC places particular reliance. In it Mr Shepherd advised Mr Turk to instruct different solicitors because the correspondence sent by Bivonas failed to comply with the disclosure requirements of the Miles order. He added:

> "I had real concerns from emails exchanged that Mr Bechelet had not taken instructions from you regarding the requirements of para 16 and 18. It was also clear from our discussions over the short adjournment that you were not aware of the full extent of the disclosure requirements under these provisions."

18. The upshot was that Mr Shepherd was sacked, and Mr Turk chose to continue to instruct Bivonas. On the day after the return date (19 March) Mr Iain Quirk QC was instructed to act. Bivonas set about drafting a proof, a draft disclosure affidavit and a list of questions for Mr Turk. Work continued over the weekend. Mr Turk was sent a long list of questions that needed to be answered; and a Zoom meeting took place on Sunday 21 March. The judge found that it was "an inevitable inference that the list of questions was gone through, as was the Schedule of compliance, in such a way as to demonstrate the sort of exercise that was needed in relation to compliance with paragraphs 16, 17 and 18 of the Miles order." An affidavit was served on the following day; but it was not suggested that it amounted to compliance with the paragraphs of the Miles order that were the subject of the committal application.

19. As time went on further material was supplied by Bivonas.

20. Having conducted further investigations Mrs Işbilen's advisers considered that Mr Turk's disclosure was so inadequate that on 18 March 2022 they obtained a search and seizure order from Mr David Halpern QC, again sitting as a deputy judge of the High Court. This revealed significant documentation. Being still unsatisfied about the disclosure, Mrs Işbilen launched this application for committal on 7 November 2022.

The committal application

21. The application notice in support of that application alleged that Mr Turk had breached paragraphs 16 to 20 of the Miles order in the respects set out in that notice. There was no allegation that Mr Turk was in breach of paragraph 21 of the Miles order. The allegations were particularised in relation to each count in a separate document prepared at the judge's request.

22. In paragraph 10 of his witness statement Mr Turk accepted that he had not in fact made all the disclosure required by the Miles order. His defence was that he had not understood the full import of the order; and that any failure to comply with it was unintentional or accidental. The judge rejected both those defences.

23. Having found that Mr Turk had committed contempt by failing to comply with the Miles order, the judge sentenced him to 12 months' immediate custody. During the progress of this appeal, I granted him conditional bail.

Grounds of appeal

24. The first six grounds of appeal relate to the judge's finding that Mr Turk was in contempt of court. Some of those grounds are substantive, and some procedural. The remaining five relate to the sentence. I will take them in what I consider to be the logical order (which is not the order in which they were presented).

Was the trial unfair? (Ground 4)

25. Mr Turk is a sufferer from ADHD for which he is prescribed medication. Mr Counsell submitted that this was relevant to two aspects of the case: (a) the fairness of the trial process and (b) whether Mr Turk understood the Miles order. If the trial was unfair, then it goes almost without saying that the judge's order must be set aside. So this ground of appeal must come first. As the application progressed towards a hearing, and in view of the psychiatric evidence, the judge allowed Mr Turk to have an intermediary to assist him.

26. The psychiatric report was provided by Dr Gupta. He was asked, among other things, whether reasonable adjustments should be made to improve Mr Turk's understanding and engagement with the contempt application. He recommended the appointment of an intermediary; and an intermediary was duly appointed. Dr Gupta in effect provided the high level report. The intermediary dealt with the practicalities. In her written report the intermediary (Ms Edita Ficzová) had recommended a number of reasonable adjustments to the usual procedure in order to accommodate Mr Turk's ADHD. Among the recommendations were that:

    i) Mr Turk would need the assistance of the intermediary for the duration of the court process;

    ii) There should be a break every 45 minutes of sufficient duration to allow Mr Turk to leave the court building;

    iii) All questioning of him should be by short and to the point sentences; and

    iv) His cross-examination should not exceed one day.

27. Mr Counsell said that the judge was wrong to rely on his own impression and observation of Mr Turk's behaviour in the witness box. In practice he implicitly rejected the only expert evidence about Mr Turk's disability. To do so without that evidence being tested was procedurally unfair: *Griffiths v TUI UK Ltd* [2023] UKSC 48, [2023] 3 WLR 1204. As a result, the hearing proceeded contrary to the intermediary's recommendations. I consider that this criticism is ill-founded. I do not consider that the judge was wrong not to follow all the written recommendations of the intermediary. The judge followed the procedure recommended in PD 1A paragraph 8 (and the Ministry of Justice Procedural Guidance Manual) by holding a "ground rules" hearing at the beginning of the hearing. The transcript shows that there was a detailed discussion between the judge and the intermediary (Ms Catherine Stewart) who repeatedly expressed her agreement and satisfaction with the judge's proposals for the conduct of the hearing. At the end of the discussion he asked Ms Stewart whether there was anything else that she wanted to raise, and she said "no". The only request to which the judge did not accede was the request to confine Mr Turk's cross-examination to one day. The judge took the view that it would not be fair either to Mrs Işbilen (in presenting her application) or to Mr Turk (in defending himself against the accusations of contempt) to confine the cross-examination as suggested. At the end of the discussion, the judge summarised the ground rules thus:

> "Questions will be short and simple. You [i.e. Ms Stewart] will speak to Mr McCourt Fritz [counsel for Mrs Işbilen] about the nature of the questioning. There will be breaks which will be around the hour mark for probably about the ten minute mark, but we will see where we go. You are to be here all day and you are to raise any concerns through Mr Counsell and to sit yourself where necessary. I think those are the ground rules."

28. In view of the discussion between the judge and Ms Stewart, who was there specifically to deal with the conduct of the hearing, I do not consider that it can fairly be said that the judge departed from the expert evidence.

29. In his judgment the judge dealt with the trial process as follows:

> "[9] Mr Turk obtained a psychiatrist's report which disclosed that he suffered, and has all his life suffered, from Attention Deficit Hyperactivity Disorder (ADHD), for which he is on medication, and has been for some years. For present purposes the principal effect is said to be that Mr Turk is apt to lose focus on any given intellectual task at hand. Since these proceedings were served on him he has suffered from anxiety and low mood. The result of all that it was said that he was entitled to the services of an Intermediary in order to assist him in making relevant adjustments so that he could more fairly cope with the proceedings in court and in order to assist the court and the advocates in dealing with him. Having considered the material, and so far as it fell to me to do so (which I was told it did, especially in terms of funding) I allowed him to have an intermediary, and Miss Catherine Stewart attended as that intermediary on most days, with colleagues attending on two occasions when she could not.

> [10] In accordance with established procedures, a Ground Rules Hearing took place at the start of the proceedings before me. The point had been taken so late that it was not possible to have such a hearing before then. It was established that Mr Turk would have necessary breaks in his giving of evidence which would be slightly more frequent, and slightly longer, than would otherwise have been the case, and that a close eye would be kept on whether he was getting into difficulties. Miss Stewart attended the hearing in order to assist the court and the advocates, and occasionally (but not often) sought to drawn relevant matters to the attention of the court, which she did (by arrangement) through Mr Counsell. She spoke to Mr McCourt Fritz before he started cross-examining and he was thus able to understand how the nature of his questioning would have to be tailored in order to make proper adjustments for Mr Turk. From time to time I checked with Miss Stewart and her colleagues that she had no concerns, and they indicated that they did not.
>
> [11] I am quite satisfied that those measures resulted in a hearing that was fair to Mr Turk's condition and that he was not disadvantaged. I saw no signs that the nature of his condition meant that he was disadvantaged, and having studied him closely when he was giving his evidence it was apparent to me that he seldom lost focus on what he was being asked, or in the giving of his evidence, apart from one short lapse when he struggled for a word and said he had lost focus, and a very few occasions when it was apparent that he was looking at the wrong document in the witness box without appreciating it and without saying so. In that latter respect he was no more lost or unfocused than many other witnesses who get similarly temporarily lost and who do not claim to suffer from ADHD. I am as satisfied as I can be that he understood all the questions (except where he indicated that he did not) and understood what he was being asked about at all times."

30. The judge returned to the topic at [61]:

> "Mr Turk was cross-examined thoroughly over the course of two and a half days (albeit that he had more extensive breaks than normal within that time, which extended the period). As I have already observed, he did not demonstrate a key feature of his ADHD, which is a tendency to lose focus, to any significant extent. He manifested a clear understanding of the questions put to him and any elements of uncertainty or confusion were no more than afflict other witnesses who do not have his condition. Where he did not understand a question he was capable of asking for clarification, and the sort of occasions on which he might have understood, or did misunderstand, a question were no more than one sees of many witnesses without his condition. I am quite satisfied that his ADHD in no material way impaired his giving

> of evidence. I am also satisfied that he demonstrated a good grasp of the facts and what he saw (and could remember) of the details of complex transactions."

31. The transcript also shows that the judge invited Ms Stewart, at various times during the course of the evidence, to intervene if she saw anything amiss. She did not; and neither did her replacement (Ms Chloe Selby) nor Mr Turk's legal team.

32. So far as the judge's assessment of Mr Turk's evidence is concerned, the correct position is as explained by Carr J in *Maitland-Hudson v Solicitors Regulation Authority* [2019] EWHC 67 (Admin):

> "[83] …There is no blanket rule that a court (or tribunal) must ignore what it sees and hears in court. [*Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101, [2018] 1 Costs LR 103] was a very extreme case on its facts. The first instance judge there essentially completely disregarded the medical evidence without giving any reasons and substituted it with his own opinion that the claimant in that case was not genuine.
>
> [84] It is quite legitimate for a court to take account of its own assessment of a litigant's capacity to participate effectively in its overall assessment of the evidence before it, including the expert medical evidence, if it considers it appropriate to do so. No court is ever bound to accept the expert evidence before it, even if that evidence is agreed; see for example *Levy v Ellis-Carr and others* [2012] EWHC 63 (Ch) at [36] (endorsed in *Hayat* at [38]). A court or tribunal is entitled to weigh up the medical evidence against all of the other material available to it. If it intends to depart from the conclusion of an expert or experts, it needs, of course, to exercise caution. It also needs to bear in mind that litigants with, for example, mental health illness may mask their problems or not understand that it may not be in their best interests to continue. It must also give reasons for its conclusion."

33. In his concurring judgment Green LJ said at [129]:

> "Nothing in that judgment creates a principle which precludes a court rejecting expert evidence before it, and preferring its own evaluation. The criticism in *Solanki* of the Judge below flowed from the fact that in the face of prima facie credible medical evidence, the judge gave no reasons to explain why he rejected that evidence and preferred his own inconsistent view. In the absence of a reasoned and logical explanation the judge's conclusions appeared irrational. At base expert evidence is like any other evidence and when a judge must take a decision based upon an expert opinion the judge must assess its probative value by weighing it against all of the other evidence in the case that bears upon the issue in question. I would view this as trite. Indeed, it is routine when a judge directs a jury in a criminal case

> to instruct the jurors that expert evidence is like any other evidence and that the jury is entitled to reject it if such a course is in their view appropriate. The judge will (or should) guide the jury on the probative value of the expert evidence but the jurors as the triers of fact are ultimately entitled to reach their own conclusions on the facts."

34. In my judgment, that is precisely what the judge did in setting the ground rules, and commenting on Mr Turk's evidence. I therefore reject the submission that the hearing was unfair.

Appeals on findings of fact

35. The judge's conclusions on the question of contempt were that on five of the six alleged contempts, Mr Turk was in breach of the order for disclosure and deliberately so. These are findings of fact. There is a high hurdle in challenging a trial judge's finding of fact for reasons that I have set out elsewhere: *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2]. That approach applies with equal force to an appeal against findings of fact made in proceedings for contempt of court: *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [53].

Is more required than a breach of the order? (Ground 1)

36. It is accepted that Mr Turk failed to make the disclosure required by the Miles order. Mr Counsell submitted to the judge that there was a difference between being in breach of an order and a contempt of court. At least where the alleged contempt is an omission to do something, it must be proved (to the criminal standard) that the omission was intentional, even if the alleged contemnor does not realise that the omission is a breach of the order. If the omission is not intentional, then even though it might be a breach of the order, it is not a contempt. The judge rejected that distinction. He considered that breach and contempt in this context were synonymous, although whether the breach (rather than the omission) was deliberate was relevant to sanction.

37. Mr Counsell argues that in order to amount to a contempt, there must be both disobedience to a court order (in criminal terms, the *actus reus*); and a particular state of mind (in criminal terms, the *mens rea*). Mr Counsell's argument focusses on the latter. In support of the distinction between breach and contempt Mr Counsell relies on the statement of principle by Proudman J in *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) at [20]:

> "A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not

> necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

38. As Mr Counsell correctly pointed out, this formulation has been approved by this court in both *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 at [25], and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357 at [13]. In the latter case, having cited the quoted extract, Warby LJ went on to say:

> "as indicated by the last sentence of this citation, it is enough that the alleged contemnor intended to perform the act, rather than doing it by accident."

39. But the contemnor's precise state of mind was not in issue in those cases. Mr Counsell also referred to the judgment of Christopher Clarke J in *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm) in which the judge said at [150]:

> "In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: *Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors* [2009] EWHC 1445 (QB). There can be no doubt in the present case but that the judgment debtors have at all times been fully aware of the orders of this court. It is not and could not sensibly be suggested that the conduct of which complaint is made was casual or accidental or unintentional."

40. It is the first of the quoted sentences in which Christopher Clarke J set out what is required to be proved. That was the view taken by Nugee LJ in *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) at [26]:

> "What needs to be proved is as set out in *Masri* (paragraph 19 above), that is, as well as the acts or omissions which constitute the breach, knowledge on the part of the respondent of (i) the order and (ii) the facts which make the conduct a breach."

41. In *Varma v Atkinson* [2020] EWCA Civ 1602, [2021] Ch 180 Rose LJ put it this way at [54]:

> "… once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach. In *Pioneer*, Lord Nolan (with whom Lord Mustill, Lord Slynn of Hadley and Lord Jauncey of Tullichettle agreed) quoted from the opinion of Lord Wilberforce in *Heatons Transport (St Helens)*

> *Ltd v Transport and General Workers'* Union [1973] AC 15 to explain the policy behind the principle (p 479G of *Pioneer*):
>
> "The view of Warrington J [in *Stancomb*] has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.""

42. It is plain from the quoted passage in *Heatons Transport* that whether disobedience was more than casual or accidental is relevant to the question of penalty for disobedience, not to the breach. This is borne out by *Fairclough v Manchester Ship Canal Co* [1897] WN 7. Lord Russell CJ said:

> "We desire to make it clear that in such cases no casual or accidental and unintentional disobedience of an Order would justify either a commitment or sequestration. Where the Court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negatived any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, he would not take the extreme course of ordering either of commitment or of sequestration."

43. Those observations were plainly directed to the appropriate punishment for contempt. If there was no contempt at all, there would be no occasion to make the defendant pay costs (see e.g. *Knight v Clifton* [1971] Ch 700).

44. To similar effect, Warby LJ said in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357 at [58]:

> "These authorities indicate that… (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non-compliant with the order; (3) there is no further requirement of *mens rea*, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt."

45. That is borne out by the decision of this court in *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 at [79] in dealing with an argument that the contemnor's subjective understanding of the injunction was relevant. Popplewell LJ said:

> "However the true principle, in my view, is that where the court decides what the order means, and upon that construction the defendant's conduct breaches the order, the defendant is in contempt. That is the principled consequence of the relevant

> ingredients of civil contempt, as summarised in *Masri*, and in particular that the defendant need not intend to breach the order; all that need be established is that the defendant intended to carry out the conduct in question and that such conduct amounts to a breach of the order, objectively construed. Subjective understanding or intention in relation to the meaning of the order is logically irrelevant to the existence of a civil contempt because there is no requirement of an intention to breach it."

46. He added at [82]:

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

47. The importance of Mr Turk's knowledge is emphasised by the terms of the Miles order itself, which requires Mr Turk to make disclosure "to the best of his knowledge". Thus, if Mr Turk knew fact X (which was relevant to compliance with the order, whether he realised its relevance or not, and whether he realised that he was required to disclose it or not) and failed to disclose fact X, there would be both a breach of the order and a contempt. If he did not know that fact X was relevant, or did not realise that the order required him to disclose fact X, that could, in my judgment, go only to the appropriate penalty. In my judgment the judge was right to reject Mr Counsell's argument.

48. Moreover, the principal difficulty for Mr Turk, in advancing this argument, is that the judge found that a number of the proven breaches of the order *were* deliberate. If, therefore, his factual findings stand, the nuances of the correct test for the mental element go nowhere.

Were the breaches deliberate? (Grounds 1 (c), 2 and 4)

49. It is contended that the judge was wrong to find beyond reasonable doubt that Mr Turk's breaches were deliberate. First, is said that Mr Turk was not properly advised by his then lawyers about what he needed to do in order to comply with the order. Second, it is said that Mr Turk's ADHD, coupled with the lack of proper advice, meant that he did not understand what he needed to do in order to comply. Third, it is said that the judge considered those questions by reference to the wrong time. As mentioned, it is common ground that an obligation to do something "forthwith" means to do that thing as soon as reasonably practicable. Mr Counsell argued that any breach by Mr Turk of the order would have been complete by the date at which it was reasonably practicable to comply; and nothing that he did (or failed to do) thereafter could have operated retrospectively to create a breach where none had existed before. If a defendant has failed to comply with a deadline imposed by court order, there is no additional or continuing breach arising out of a continued failure to comply: *Re Jones* [2013] EWHC 2579 (Ch), *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) at [72]. The analysis in *Kea* was followed by Morris J in *The All England Lawn Tennis Club (Championships) Ltd v Hardiman* [2024] EWHC 787 (KB) where the judge analysed the position as amounting

to a single act of contempt plus a failure to purge the contempt by belated compliance with the order. Mr Counsell argued that the latest relevant time for this purpose was the return date (18 March). The critical question was what Mr Turk knew and understood then.

50. At [30] the judge said:

> "The order of Miles J was served on 11th March 2021. That triggered an obligation to disclose some of the disclosable material "forthwith", which means "as soon as reasonably practicable". 48 hours was applicable to paragraph 18. An affidavit "setting out and verifying" the disclosable information was to follow within 5 working days - Monday 18th March - which was also the return date. By consent that latter date was extended to 22nd March 2021 by an order of Ms Pat Treacy made on the return date. That order repeated the penal notice on the original order. I agree with Mr McCourt Fritz that that is the most important date by reference to which one has to assess whether there was a breach or not, though one must not lose sight of the fact that there was a prior obligation to make less formal disclosure under Miles J's order in relation to the obligation to disclose material "forthwith", which means "as soon as reasonably practicable"."

51. Mr Counsell argued that in that paragraph the judge was wrong to say that 22 March was the relevant date. The obligation to file an affidavit was mandated by *paragraph 21* of the Miles Order. But the application notice alleged no breach of paragraph 21. The breaches alleged were breaches of paragraphs 16 to 20 of the Miles order; and not of paragraph 21. As Jackson LJ said in *Inplayer Ltd v Thorogood* [2014] EWCA Civ 1511 at [39]:

> "A judge hearing a committal application should confine himself or herself to the contempts which are alleged in the application notice. If the judge considers that other alleged contempts require consideration, the correct course is to invite amendment of the application notice and then provide any necessary adjournment so that the respondent can prepare to deal with those new matters."

It was not, therefore, open to the judge to make a finding about Mr Turk's state of knowledge and understanding by reference to the date when the affidavit had to be filed. He should have confined himself to the prior obligations to make less formal disclosure that he identified.

52. Both *Re Jones* and *Kea Investments* concerned orders to do something by a specified date. In *Jones* the obligation was to deliver children into the care of their father at a specified place at a specified time and date. In *Kea* the obligation was to use best endeavours to serve and file specified information by a specified time and date. I accept that any breach of the obligation imposed by paragraph 18 of the Miles order did impose an obligation to do something by a fixed deadline (48 hours after service of the order). But I do not consider that paragraph 16 can be interpreted so rigidly. What is reasonably

practicable depends on the nature of the obligation to which it is attached. In the case of a wide-ranging obligation to provide information, some of the information may be readily to hand, while other parts of it may require reasonable inquiries to be made or documents to be searched and collated. I do not consider that it is possible to interpret such an obligation so as to require all the information to be delivered in one package all at the same time.

53. Moreover, it is an unattractive position for a defendant to take to say that I could have complied with the order by such and such a time (because it was reasonably practicable to do so); but in fact I did not, so now I need do nothing more.

54. In *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm), [2017] Bus LR 1634 a contract imposed an obligation to use all reasonable endeavours to obtain senior debt finance and to procure the restart of mining activities on or before a specified date. One of the issues was whether the obligation expired on the specified date. Leggatt J held that it did not. He said at [75]:

> "When a contract imposes an obligation to do something by a particular date, this does not usually mean that the obligation expires on that date. For example, if a seller agrees to deliver goods to the buyer on or before a specified date, this would not normally be understood to mean that, if the goods are not delivered by that date, a once and for all breach of contract occurs at that time, after which the seller is no longer under any obligation to deliver the goods. Rather, the ordinary understanding would be that, once the specified date has passed, there is a breach that continues until such time as the goods are delivered (or the obligation ceases, for example because performance is waived or the contract is terminated). An undertaking to use all reasonable endeavours differs from an unqualified undertaking such as an obligation to deliver goods in that failure to achieve the relevant objective by the specified date does not by itself mean that there is a breach of contract. But it seems to me equally unreasonable (absent some special factor) to regard failure to achieve the objective by the given date as a reason for releasing the party which has given the undertaking from any further performance."

55. The Court of Appeal in Singapore took a similar view: *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16, [2014] BLR 658 at [103]-[104]. The obligation does not evaporate once the deadline has passed. To that extent, therefore, the obligation is a continuing one.

56. Although those were cases about contracts, I do not think that any different principle applies where the obligation is created by a court order. In *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241, [2012] 1 WLR 350 the relevant defendant was ordered to provide written answers to certain questions by 10 August 2010. He failed to do so. Jackson LJ had no difficulty in referring to "continuing breaches" [52], "a continuing failure to disclose" [55] (iii) and "continuing breach" [56].

57. In *Therium (UK) Ltd v Brooke* [2016] EWHC 2421 (Comm) Mr Brooke was ordered to the best of his ability to cause or procure a payment into court by 3 May 2016. It was argued on his behalf that the relevant period of time within which his conduct fell to be scrutinised was up to 3 May 2016 and no further, because the order was to be construed as limiting the obligation to use the best of his abilities to that period. Once the 3 May 2016 deadline had passed, it was argued, Mr Brooke was under no continuing obligation to do anything. Popplewell J rejected that argument. He said at [31]:

> "Although my conclusion does not depend upon it, I have little hesitation in rejecting this argument. The order was in common form requiring something to be done by a particular time. Such an order imposes a continuing obligation to carry out the required activity. The temporal qualification identifies the time which is allowed for performance before the respondent will be in breach of the order. It does not, however, put an end to the continuing obligation or prevent the respondent from being in continuing breach if there is non-compliance by the stated time. The obligation on Mr Brooke was to continue after 3 May 2016 to use the best of his ability to cause and procure Cable Plus to transfer the funds into Court."

58. I agree. In *McKay v The All England Lawn Tennis Club* [2020] EWCA Civ 695 on 9 July 2019, the court ordered a ticket tout by no later than 4.30 pm on 11 July (unless the court otherwise ordered) to make a witness statement detailing transactions in which he had been involved. By the return date on 11 July Mr McKay had not been served with the order; but it was continued "until further order". There was no further fixed deadline for the making of the witness statement. Mr McKay did not supply the required information, despite indications that the claimant would apply to commit him for breach of the 9 July order and several informal extensions of time for compliance, so in September a committal application was made, relying on his failure to comply with the order of 9 July. Henderson LJ said at [80]:

> "As a practical matter, any defendant who is personally served with both the original order and the continuation order made on the return date can be under no misapprehension about the need for him to comply immediately with the relevant requirement, subject only to any extensions of time for compliance which he may be able to agree with the claimant or obtain from the court. That was in substance the position in the present case, in which Mr McKay clearly understood that he had a continuing obligation to make a witness statement in accordance with the order originally made by Nicklin J on 9 July 2019 and continued by him on 11 July — hence the extension of time for compliance sought by him, and agreed by Wimbledon. I do not think it was necessary for Wimbledon to go back to the court to get a further order fixing a specific future date for compliance before it could found committal proceedings on Mr McKay's continued failure to produce such a statement."

59. In his concurring judgment Hickinbottom LJ said at [119]:

> "By an Order of 9 July 2019, continued on 11 July 2019, Mr McKay was required to give disclosure of (amongst other things) those with whom he had unlawfully traded Wimbledon Championship tickets, in the form of a signed statement supported by a statement of truth. In making that statement, his right not to self-incriminate was expressly catered for in the order. He has been aware of that obligation since 10 July 2019, and certainly since he was personally served with the 9 July 2019 Order on 16 July 2019. It is a continuing obligation which he himself acknowledged when he sought extensions of time in which to comply with it."

60. In my judgment there are a number of ways to reconcile these two lines of authority which in substance amount to the same thing. First, it might be said that the breach (and hence the contempt) is complete by the time the deadline expires, but it becomes a contempt sufficiently serious to warrant punishment (what Mr McCourt Fritz called a "committable contempt") if, once the deadline has passed, the person in default does nothing to put that default right. Second, the order might be analysed as imposing a continuing obligation, albeit one that does not give rise to a fresh contempt on every day during which the breach continues. The third analysis is that there is no continuing obligation but there is a continuing breach.

61. Accordingly, I do not accept that the judge was wrong to say that 22 March was the relevant date. He was not considering any allegation of breach of paragraph 21 of the Miles order. He was using 22 March as the date by which to test Mr Turk's understanding of what paragraphs 16 to 20 of the Miles order required him to do, in order to determine whether the pre-existing breaches merited punishment. That date was relevant because at the first return date on 18 March Mr Turk, through his counsel, had asked for an extension to time in which to comply with the order, and one was granted until 22 March.

62. In addition, like the judge, I would endorse what Nugee LJ said in *Kea* at [43] about the nature of an obligation to use best endeavours to achieve some end (or, as in this case, to do something to the best of one's knowledge and ability):

> "Ms Jones also submitted that there were two ways in which a person could breach an obligation to use best endeavours. One is if the person has not been genuine in his efforts to achieve the required objective; the other is if the person, even if acting in good faith, has failed to do everything that he reasonably could. I accept this submission. A failure even to try to comply honestly and bona fide with the obligation must be a breach of it; but given the accepted equation of a best endeavours obligation with an obligation to take all reasonable steps, I agree that a person who bona fide tries to comply, but does not in fact take all the steps which it would be reasonable for him to do, is also in breach. That is not to say of course that whether or not there had been a genuine but insufficient attempt to comply might not be very relevant to the way in which the Court ought to dispose of the application to commit, but it would not in my view prevent there being a breach."

63. At this point, it is as well to recall the basis on which the judge found Mr Turk to have committed the proven contempts. He said at [296]:

> "I add one final item of explanation. As I have pointed out, my findings about Mr Turk's shortcomings are not findings that he should have appreciated *and achieved* the full level of disclosure required of him in the time limits provided by the Miles order and its extension by Ms Treacy. If Mr Turk had properly set about providing the level of information which he ought to have set out then it would have taken him some time to assemble and analyse the information available to him - more than the handful of days that he had. That was, of course, not apparent to the claimant at the time. It is apparent now that more is known of the complexity of Mr Turk's dealings with moneys. My findings are based on his not really embarking on the exercises he should have embarked on at all. He simply (for the most part) did not conduct them. That is where his contumaciousness lies." (Original emphasis)

64. In my judgment, the judge was entitled to find the contempts proved on that basis.

The judge's findings about Mr Turk's understanding

65. The judge considered the chronology in immense detail. I have summarised it above. It is also relevant to note that in his psychiatric report Dr Gupta said in terms that Mr Turk had the "ability to comprehend the order". In reaching his conclusions about Mr Turk's understanding the judge took into account Mr Turk's oral evidence, which he was fully entitled to do. In evaluating Mr Turk's evidence, he considered the extent to which Mr Turk's understanding might have been impaired by his ADHD, as he was also entitled to do. He considered Mr Turk's understanding at various points in the chronology.

18 March 2021

66. The judge found at [267] that on 18 March Mr Turk's understanding was as follows:

> "Despite the fact that one would have expected Bivonas to have explained the order to Mr Turk and made him understand it, it appears that his understanding was lacking. That is surprising, because I consider it to be the case that Bivonas would not just ignore the proprietary disclosure orders, and they must have discussed them with him. However, it is apparent that when Mr Shepherd discussed the matter with Mr Turk he got the clear impression that Mr Turk had not hitherto understood what he needed to do, or at least not fully. I consider that at this time he had not fully grasped his obligations. However, having seen how Mr Turk conducts himself in the witness box I consider him to be an intelligent man who was capable of understanding the sort of thing that he had to do, and that his apparent failure to grasp matters was likely to be combination of the magnitude of the task as it must have appeared, casualness (he was a "relaxed guy") an element of wilful blindness. This is not the same as the sort of

> lack of focus which he claimed to have. It was an unwillingness to face up to what he had to do."

67. Thus even at 18 March the judge found that there was an element of wilful blindness and an unwillingness to face up to what he had to do.

21 March 2021

68. The judge said at [280]:

> "In sum, therefore, I do not accept that by the end of this part of the process Mr Turk did not understand the sort of thing that the Miles order required of him. He was an intelligent man capable of setting up and operating commercial financial structures and was proposing to open a bank. He had an understanding of money and its deployment. He had, or investigated having, a finger in various business pies. He was capable, by himself, of understanding the order and what it required. If he had not fully grasped that when the order was served on him, or for a little while thereafter, it will have become apparent to him as a result of what happened at the return date and the subsequent attempts to produce a compliance affidavit. If his lawyers had not adequately explained matters to him in the initial phases (which I do not consider to be the case) the requirements clearly emerged later - see in particular the list of questions. His ADHD condition might have had some limited part to play in the initial stages, and I have noted a later remark by Mr Litovchenko in an email to Mr Quirk dated 14th April 2021 to the effect that Mr Turk "loses his attention frequently and sidetracks" (not something which was observable in his prolonged cross-examination), so it was a condition which was operating. However, it is a condition which is and was under control with his medication and a loss of focus is not in my view a good explanation for his failure to put in place proper tracing exercises generally. I consider that he did not comply with the order not because he did not understand what was required, but because he did not wish to comply or to face up to what he understood he had to do."

69. Once again the judge's finding was that Mr Turk did not wish to comply.

Overall conclusion

70. The judge's overall findings about Mr Turk's understanding were these. He said at [284]:

> "… I therefore conclude, first, that the solicitors and counsel instructed by Mr Turk well understood the obligations he was under in relation to the disclosure provisions in the order. They were not difficult for a professional to understand. Second, I find that while there may be no record of a positive explanation given

> in terms of a note actually recording the giving of paragraph by paragraph by paragraph advice, I find that appropriate advice was given to Mr Turk about what he had to do. That will have been at various stages, as appears above. The absence of a clear record of what any of them actually said, and the absence of a written letter of detailed advice, is no doubt explained by the fast-moving nature of the exercise. Its absence is not a powerful indication that the advice was not given."

71. The judge said at [285]:

> "That means that the question boils down to whether Mr Turk understood, whether from advice or from his own reading, or both, what he had to do under the order. I find that *by the time he was required to comply with his proprietary asset disclosure obligations by filing his affidavit, at the latest*, Mr Turk had a general understanding of his disclosure obligations under the paragraphs of the Miles order which are relevant to this application, and that he could and should have deployed that understanding to work through the disclosure exercise required. So far as he did not fully appreciate it then, then it will have emerged over the ensuing period. *He simply did not want to comply fully*. I accept that the complexity of Mrs Işbilen's affairs and the dispositions of her money (for most of which Mr Turk must have been responsible or in which he was involved) meant that that would be an onerous and time-consuming exercise, but he knew enough about what was required to enable him to embark on it and carry it through. If it be said now that it would not have been practical to carry it out within the limited timeframe provided by the order, or even its extension on the return date, that would be a reason for seeking a further extension, not for not carrying out the exercise. It is not a reason for doing as little as Mr Turk did. These difficulties were no real part of Mr Turk's defence in this application; as I have observed, Mr Counsell accepted the breaches alleged were breaches if (as happened) he lost on relevant construction points." (Emphasis added)

72. He added at [286] that in reaching his conclusion, he had taken into account the absence of any positive record of explanations given; and that Mr Turk had waived privilege over his previous legal team's records. But, he said it did not raise "reasonable doubt when placed alongside the analysis and probabilities I have set out above".

Was the judge entitled to make these findings? (Ground 1 (c))

73. Mr Counsell mounted a full scale attack on these findings. First, he said Mrs Işbilen bore the burden of proving beyond reasonable doubt that Mr Turk had been properly advised. That burden was not discharged; and it was perverse of the judge to find that advice had been given particularly since he made that finding in the light of "probabilities". Second, in drawing inferences the judge failed to apply the correct principle, namely that in relation to an essential part of the case the inference must be

compelling. In particular the judge wrongly assumed that Bivonas must have acted competently, when there was strong evidence (particularly in the shape of Mr Shepherd's email of 18 March) to show that they did not. In effect, the judge reversed the burden of proof by requiring Mr Turk to prove that he had not been advised.

74. I am by no means convinced that the burden lay on Mrs Işbilen to prove that Mr Turk had been properly advised. The burden lay on her to prove that Mr Turk had failed to comply with the order; and that the failure was not accidental. His understanding of the order was, as I have said, relevant to the seriousness of the contempt, not to whether it had been committed at all. But I will assume, for the sake of argument, that she was required to prove that Mr Turk had been properly advised. If so, then, as Mr Counsell accepted, Mr Turk had an evidential burden to discharge.

75. There is no doubt that the judge was fully aware that the burden lay on Mrs Işbilen to prove the elements of the alleged contempts beyond reasonable doubt. He so directed himself at [22] (i) and (ii); and at various parts of his judgment he held that he was not able to say beyond reasonable doubt that a particular allegation had been proved (e.g. [145], [152], [210] and [240]). I do not accept that the judge lost sight of this important principle in summarising his conclusion about Mr Turk's understanding at [286], particularly since he rejected in terms the proposition that the matters on which Mr Counsell relied did not raise a "reasonable doubt". Although the judge's references to "probabilities" was perhaps unfortunate, it will not bear the weight that Mr Counsell seeks to place on it: compare *JSC BTA Bank v Ablyazov (No 8)* [2013] 1 WLR 1331 at [51].

76. As far as inferences are concerned, the judge correctly directed himself at [22] (v) that in relation to an essential element of the case, the inference must be compelling in order to be justified.

77. It must not be forgotten that the ultimate question for the judge was not whether or not Mr Turk had been *fully* advised. It was whether Mr Turk had been *sufficiently* advised in order to begin the process of disclosure as required by the Miles order. Moreover, the judge's conclusion is not, in my view, appropriately described as an inference. It was a finding of fact based on the contemporaneous documentation and Mr Turk's own evidence. The judge did not simply assume that Bivonas had acted competently. He based his finding both on what Bivonas had said to Mr Turk and also what he had been told (and asked) by his successive counsel.

78. It is also pertinent to bear in mind some of the judge's findings about Mr Turk. One of the contested payments in connection with ground 2 was a payment of $275,000, in relation to which Mr Turk disclosed an invoice. The judge found at [140]:

> "I am quite satisfied that at the time of the order, and when he came to give such disclosure as he gave, he knew of the payment made and did not want to disclose its true purpose which made the invoice a false one. On 8th June 2021 Mr Litovchenko, the solicitor at Bivonas who was then acting for Mr Turk, emailed him with a list of questions, one of which was a question as to what advisory services Alphabet provided under the Pegasus invoice. There is no evidence that any answer was given to that.

> I conclude that that is because Mr Turk knew then that there was no good answer and did not want to give one."

79. Another payment relating to the same ground was a payment of £768,743, which Mr Turk did not disclose. The judge found in relation to that payment at [155]:

> "There is plainly a breach of the order by Mr Turk personally in respect of this payment. It was a disposition of Mrs Işbilen's assets effected by Mr Turk and which he has not disclosed in any form. In this instance that breach is not merely technical. It is substantive. I also consider it is serious because I find, beyond reasonable doubt, that Mr Turk knows and knew what that payment was for and has decided to pretend he has forgotten."

80. In my judgment the challenge to the judge's finding fails.

Hawale payments (Ground 5)

81. This ground of appeal relates to a number of payments made by Mr Turk or entities he controlled in favour of AET Global DMMC, a UAE incorporated company. The fact of the payments was not disputed. As the judge recorded at [158] (i):

> "Mrs Işbilen's case is that Mr Turk effected them without proper consent. He says they were made on her fully informed instructions but he does not deny involvement. Resolving that issue is no part of this application. This application is concerned with the disclosure that Mr Turk did or did not make about them."

82. The alleged breaches were, indeed, all about disclosure. As the judge recorded at [161] Mr Turk only disclosed two invoices relating to these payments, one on 16 April 2021 and the other on or about 25 June 2021. The first of these purported to be an invoice for €1.1 million for building and decorating works to an Istanbul villa. In the letter from Bivonas disclosing it, they asserted that it showed clearly that it was for works carried out on Mrs Işbilen's villa. The judge commented at [163]:

> "Thus the invoice was produced as genuine. That must have been on the instructions of Mr Turk, who must have produced it to the solicitors. The following paragraph contains an indignant rebuttal of the suggestion that any produced documents were not genuine, which in the light of what has happened in relation to this Ground is an ironic juxtaposition."

83. The second invoice was referred to in Mr Turk's Defence where it was said to be a payment for refurbishment works on Mrs Işbilen's property in Turkey. The Defence was, of course, verified by a statement of truth. In other words, Mr Turk's stated position was that the invoices accurately described what the payments were for. The judge went on to say:

> "[165] That explanation was not contradicted by Mr Turk at the summary judgment application last year. At that hearing

> submissions were made as to the implausibility of that explanation, bearing in mind that Mrs Işbilen was distancing herself and her assets from Turkey, and was hardly likely to be spending money on property there on some unspecified villa. There was no attempt at that hearing to meet that point, though it might be said that it was not a natural forum for Mr Turk to advance any riposte to that. The allegation that the invoices were false was clearly made in Mr Tickner's supporting affidavit in this application sworn on 7th November 2022 (a long time before the summary judgment hearing).
>
> [166] Then, for the first time, in his witness statement in this application signed on 7th August 2023 Mr Turk changed his story in relation to these payments. He said that these payments were "Hawale", which is a Turkish expression for a payment to be made to a third party in another country through an intermediary in a different country order to conceal the true source of the money from outsiders. The invoices were said to have been created in order to give the paying bank a reason for making the transfer. His witness statement said that all payments in issue in this Count were Hawale, together with others appearing in a table of payments, but at the beginning of his evidence he corrected that - only some were Hawale, and the others were repayment of "investment". Of those relevant to this action he said that the two payments from Barton were not Hawale but were repayment of an investment that Mr Erdem had made. This was despite the fact that the bank entry for one of the payments said "Advisory fee" and the other said "Payment of invoice". He accepted that neither of those descriptions was accurate but that he had told the accountant to put them in. It was more convenient than having to produce the correct documents, which would take time. In order to justify the entries there will have been sham invoices; he accepted that sham invoices would be created because that was easier.
>
> [167] This evidence is significant in terms of credibility because it shows that Mr Turk was prepared to be dishonest in these matters, and did not seem to think that there was anything wrong in this conduct because AET would know what it was being repaid for. It is also significant because I consider it to be a lie and I do not consider that I was being told the full truth about these particular payments. His evidence made no real sense in a commercial world, and no honest sense in a commercially honest world."

84. The judge went on to consider other evidence about disguised payments in order to evaluate whether they could be said to have been Hawale. He concluded that Mr Turk's explanations were not credible; and that the description of the payments as Hawale was "a recent fabrication".

85. Mr Counsell's attack on this part of the judgment relies on the principle that where an application for contempt of court is brought during the currency of civil proceedings, the court hearing the application should not decide the truth or falsity of allegations which are to be determined at trial. In *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182, [2021] 1 WLR 992 at [233] Arnold LJ approved the observations of David Richards J in *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch) at [80]:

> "Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair number of cases, the allegations are well-founded. … In general the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under CPR Pt 32.14."

86. Those observations were directed to a case in which the contempt alleged was the making of false statements, not to a case of breaches of court orders. The former is a criminal contempt in so far as it interferes with the administration of justice. The latter is not. In fact, in *Daltel* the application for committal was allowed to proceed.

87. I do not consider that the principle has any direct application to the kind of contempt under investigation in this case. Moreover, as the judge was at pains to point out, Mr Turk's Defence (verified by a statement of truth) did not allege that the particular payments that the judge was considering were Hawale payments. Thus, as the statements of case stand at the moment, that issue is *not* one that will be determined at trial. Although Mr Counsell suggested in the course of his reply that paragraph 2 of Mr Turk's Defence pleaded the Hawale nature of these payments, that argument is unsustainable. Paragraph 2 asserts that the various payments were authorised but says nothing about their nature. On the contrary paragraphs 85 to 87 plead the positive case that the payments were made for refurbishment of Mrs Işbilen's property in Turkey (i.e. the very explanation that Mr Turk abandoned in his evidence).

88. Mr Counsell's fall-back position on this aspect of the case was that it was unnecessary for the judge to embark on the question whether the payments were or were not Hawale. Even if they were Hawale, the judge found that the disclosure obligations had been breached. The fallacy in this submission is that it was Mr Turk who put in issue the question whether the payments were Hawale as a defence to this count. Once he had done so it was incumbent on the judge to deal with that defence.

89. Mr Counsell had two subsidiary lines of attack on the judge's findings on this point. First, he pointed out that Mrs Işbilen had chosen not to give evidence. Accordingly, it was not possible to put to her Mr Turk's case that these payments were Hawale payments made with her knowledge and consent; and that, in addition, there was no direct evidence to contradict Mr Turk's own testimony in that regard. Second, he said that the judge was wrong to place any reliance on what Mr Turk had said or not said in the summary judgment application.

90. So far as the first point is concerned, Mr Turk's obligation was to make disclosure of what he knew about all relevant money flows; not merely of unauthorised money flows. Even if Mrs Işbilen had given evidence and had (contrary to her case) accepted that the payments were Hawale, that would not have absolved Mr Turk from compliance with his obligations. Moreover, in relation to count 9 he raised the same argument, namely that a payment was Hawale. Mrs Işbilen did in fact give evidence in relation to that payment in the original application for the freezing order. Mr Turk accepted that he had read that evidence. Had he wished to cross-examine Mrs Işbilen on that evidence he could have applied to do so.

91. So far as the second point is concerned, the judge was testing Mr Turk's late "Hawale explanation" not merely against what he had said or not said in the course of the summary judgment application; but also against what had been said by solicitors acting on his instructions and what had been pleaded in his defence. The facts surrounding those payments would have been within Mr Turk's own knowledge; and, if true, it would have been expected that they would have emerged before he made his witness statement in response to the committal application.

92. In addition, it must not be overlooked that the ultimate issue for the judge on this point was not whether the payments were or were not Hawale, but whether Mr Turk had complied with his disclosure obligations. The judge found that even if the payments were Hawale payments, Mr Turk had still failed to comply with his disclosure obligations. This is shown by two extracts from his judgment:

> "[175] The money paid out of Mrs Işbilen's accounts were undoubtedly once her assets, but once paid out they no longer clearly were. Liability under this head must depend on his failure to disclose the last known whereabouts of the moneys or their traceable proceeds. I find that there was a breach of this obligation. At one level the last known whereabouts was AET, and in relation to two of the payments Mr Turk disclosed that fact, after a fashion, when he disclosed the invoices. Indeed, Mrs Işbilen already knew the moneys went to AET, from her own records. However, those payments had a purpose and that purpose will certainly have been known to Mr Turk. That purpose will have reflected on the last known whereabouts. *If the purpose was Hawale, the last known whereabouts will have been the ultimate recipients. If those recipients were not known to Mr Turk or could not be remembered by him (the latter of which is plausible) then the last known whereabouts would have been an "unknown recipient", with an explanation.* If the purpose was something else then it is inevitable that Mr Turk will have known something about the ultimate recipient. Thus disclosure of the last known whereabouts would have required some disclosure of purpose where the purpose was not to benefit AET beneficially. In those circumstances a response which identified AET as the last known whereabouts of the moneys would have been glib and inadequate. I am satisfied that Mr Turk knew something more of where the money went or was likely to go.

> [176] Virtually none of that was disclosed by Mr Turk. All he disclosed was two invoices which actually mis-stated the purpose and therefore the last known form and whereabouts. On any footing AET was not the last known whereabouts." (Emphasis added)

93. He added at [177]:

> "I find that the breaches alleged under (ii), (iii) and (iv) have been established. In relation to these payments (which are made out of sums specified in the Miles order) Mr Turk should have disclosed where the payments had gone because they would have been Traceable Proceeds within paragraph 16(1), and should have disclosed the date of the transfer, its purpose and the identity of the transferee under paragraph 16(3). He made no attempt to do any of those things. *He has now said that the payments were Hawale payments. If that is right then he ought to have disclosed the identity of Mr Erdem as being the person who would know to where the moneys had been transferred under paragraph 16(2); he did not do so*." (Emphasis added)

94. I would reject this ground of appeal.

Was Mr Turk liable in his capacity as a company director? (Ground 6)

95. Mr Turk was not the only respondent to the application for the freezing and disclosure order. There were also a number of companies of which he was either a director or the sole director. Although those companies were respondents to and named in the Miles order, Mr Turk was the only defendant to the committal application.

96. The general principle is not in doubt. This court explained in *Attorney General of Tuvalu v Philatelic Distribution Corp Ltd* [1990] 1 WLR 926:

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

97. This statement of principle was applied by this court in *ADM International* at [53] in which the court held that the principle was one of substantive law, and continued to apply even after the extensive revision of the CPR.

98. In my judgment the same principle applies where a company is ordered to do something. The director is under a duty to take reasonable steps to ensure that the order is obeyed. This a duty that falls on a director personally, and is not merely a vicarious

liability for the defaults of the company. It is part of what Popplewell LJ called the "responsible persons liability principle" in *ADM International*.

99. Although Mr Counsell submitted that the judge did not apply this test, I consider that he did. The point arises in relation to two companies. The first was Sentinel Global Partners Ltd (SGP) and the second was Barton. The judge described these companies at [16]. SGP was a Cayman company of which Mr Turk was the sole shareholder and a director. Barton Group was a BVI company of which Mr Turk was a director and the sole shareholder. As a BVI company the identity of its directors is not publicly available.

100. In relation to SGP the main breach of the disclosure obligation was Mr Turk's failure to disclose bank statements. Mr Turk's evidence in his witness statement was that he did not disclose them because he thought that they were in an inaccessible SGP email account. He also said that he had carried out searches of his email accounts using keywords. He did not say that he thought another director was to provide the information. As it turned out, however, the bank statements were available to him on his personal Hotmail account which was only discovered as a result of the search order. The judge dealt with this comprehensively at [184] to [196]. His conclusion at [195] was:

> "I am therefore unable to accept Mr Turk's evidence that he made a bona fide attempt to get information required about the SGP payments but failed innocently to appreciate that he had ABC Banking Corporation documents in this account. I do not accept he made any real attempt to look for those documents, and therefore did not search to the best of his ability; or alternatively he found them and decided to do nothing about them. I do not accept his evidence that, having found Sentinel documents as a result of a "Sentinel" search, he overlooked their significance."

101. The judge found that these failures were breaches of paragraphs 16 and 18 of the Miles order (both of which were personal obligations directed to Mr Turk).

102. So far as Barton is concerned, the breach alleged was a breach of paragraph 17 of the Miles order which was directed only at Barton. Mr Turk's potential liability was as a director of Barton in accordance with the principle set out in *Attorney General of Tuvalu*. The judge approached the question on the basis that Mr Turk had an obligation to comply with that paragraph as a director of Barton (see [122]).

103. Mr Turk's evidence was that he had tried to disclose relevant information or that he did not realise that he had to do more. Again, he did not allege that he thought some other director was making the required disclosure. The judge said at [76]:

> "So far as … Barton is concerned, …he … knew he had been a director at the time of the relevant transactions, knew there was no other director in the same position as him, and came to understand that he was a director at the time of the order. In those circumstances the order clearly conveys that he had to do what he could to comply with the Barton paragraph even though the

> order did not say he was required to make disclosure as a director."

104. He added at [90] (iv):

> "I add at this point that his statement of unawareness as to whether Barton had given any disclosure was disingenuous. While there was another director she was not an active one. Barton was Mr Turk's company, and if anything had happened about disclosure within Barton she would inevitably have let Mr Turk know. Indeed, the impression given by Mr Turk's evidence is that that other director would have been incapable of conducting any real form of disclosure exercise."

105. It is, to my mind, clear that the judge applied the right test, even though he did not in terms refer to *Attorney General of Tuvalu*.

106. The next point under this ground of appeal is that the penal notice endorsed on the Miles order was insufficient to fix Mr Turk with personal liability for breaches of the order by those companies. That penal notice was in the following form:

> "IF YOU SELMAN TURK DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.
>
> IF YOU SG FINANCIAL GROUP, BARTON GROUP HOLDINGS LIMITED, SENTINEL GLOBAL ASSET MANAGEMENT, INC AND/OR SENTINEL GLOBAL PARTNERS LIMITED DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND BE FINED OR HAVE YOUR ASSETS SEIZED
>
> ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENTS (OR ANY OF THEM) TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED"

107. A penal notice is defined by CPR 81.2:

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

108. Mr Counsell argues that what this means is that if it is intended to fix a company director with personal liability for that company's disobedience of an order, the penal notice must say so in terms. The penal notice did not comply with CPR rule 81.2 because it contained no reference to Mr Turk's potential exposure to punishment for breaches by the companies. The references to a director or other officer serve to emphasise the point that the penal notice must make it clear that the director in question may be held in contempt in relation to breaches committed by the company. Although Mr Turk was a party to the proceedings, that makes it more, not less, important that the penal notice is clear that he can be held liable for breaches of obligations by corporate defendants.

109. In support of that contention, he relies on the decision of Luxmoore J in *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87. In that case the relevant part of the judgment assumed that an order had been made against a company ordering the return of certain shares within 14 days of the date of the order. The order was served on the company but not until after the time for compliance. Nor did the order contain *any* penal notice. Luxmoore J referred to the rules then in force and said:

> "It is to be noticed that the form of the memorandum is not in any sense a rigid form. It may be altered so long as the effect is in substantial accord with the form. This must give such latitude as is necessary to meet the facts of the particular case. The object of the indorsement is plain - namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences."

110. He continued:

> "But in practice the Courts have always required that the order to be enforced should be personally served on the director before it would be enforced against him by attachment. … In my judgment, the order so served should, as a preliminary to its enforcement against the directors, be indorsed with a notice to the effect of the memorandum prescribed by Order XLI., r. 5, including in it the name of the particular director served. So far as my experience goes this has been the practice in the Chancery Division."

111. He regarded this (and certain other objections) as "purely technical".

112. That, of course, was a case in which the directors were not themselves personally required to do anything and were not parties to the action.

113. *Masri v Consolidated Contractors International Co SAL* [2010] EWHC 2548 was part of a long-running dispute. An application for committal was made against Mr Wael Khoury who, it was alleged, was a shadow director of a company bound by the order. He had not been named in the penal notice. It was submitted on his behalf at [38] that it was "an essential procedural protection to name the director in the penal notice before any enforcement steps can be taken" and that the committal application should be struck out. Blair J rejected that submission. He distilled the principles at [40] of which three are relevant for present purposes:

> "(4) The first of these prerequisites relates to service. Subject to the power of dispensation, by r.7(3) an order requiring a body corporate to do or abstain from doing an act is not to be enforced by way of an order of committal against a director or other officer unless a copy of the order has been served personally on the officer against whom the order of committal is sought. Service on the officer has to be before the expiration of the time within which the body corporate was required to do the act.
>
> (5) The second prerequisite relates to the penal notice. By r.7(4), in the case of an order requiring a body corporate to do or abstain from doing an act, there must be prominently displayed on the front of the copy of the order a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment of any individual responsible.
>
> (6) Thus, the rule does not require an individual director to be named. However, although not required by the rule, there is authority that as a matter of practice the order served should, as a preliminary to enforcement against the directors, be indorsed with a penal notice including in it the name of the particular director served (*Iberian Trust Ltd v Founder's Trust and Investment Co* [1932] 2 KB 87, at 97–8, Luxmoore J; the case concerned an earlier version of the rule; and see the form of words in the current White Book at sc45.7.6)."

114. But he went on to say that the court had power to dispense with the penal notice; and that the discretion to do so must be exercised in a way that in all the circumstances best reflects the requirements of justice. At [41] Blair J repeated his concern that Mr Khoury had not been named in the penal notice. He concluded at [43]:

> "… although failure to name Mr Wael Khoury may be very material, it is not in fact a stated prerequisite in RSC O.45, r.7, being described (as I have said) as good practice in *Iberian Trust*. To the extent that it is required … the court may dispense with service of a copy of an order under r.7(7) if it thinks it just to do so, and may proceed to consider the application to commit notwithstanding the omission."

115. I note that when Christopher Clarke J heard the substantive application for committal, he directed that the application against Mr Wael Khoury should be dealt with after he had given judgment: [2011] EWHC 1024 (Comm) at [2]. It is not therefore known whether in the result the lack of a penal notice in his case was ultimately waived.

116. In *McKay* this court dispensed with personal service of an injunction on the ground that Mr McKay "knew perfectly well what he had been ordered to do."

117. The form of a penal notice is discussed in paragraph 81.4.5 of Civil Procedure (the White Book). The editors make a number of suggestions about forms of penal notice; but the paragraph opens with the statement that it has always been understood that the

form of a penal notice prescribed by rules of court was not in any sense a rigid form, and that it may be altered as is necessary to meet the facts of the particular case, so long as it is in substantial accord with the form.

118. In *Olympic Council of Asia v Novans Jets LLP* [2023] EWHC 276 (Comm), [2023] 1 WLR 1462 an application for committal was made against Mr Gringuz who was an officer of Jets LLP in respect of alleged breaches of an injunction by the latter. The injunction did not contain a penal notice warning to a director or officer of Jets that they might be held in contempt of court; nor did it mention Mr Gringuz. Foxton J held at [60] and [61] that the court continued to have the power to waive a defect in a penal notice; and would do so if satisfied that no injustice had been caused to the respondent to the application by the failure to include a penal notice in the stipulated terms. At the hearing in that case at which the order was made there had been some discussion about whether Mr Gringuz should be named in the order. But when a draft order was submitted to the judge she ordered that the reference to Mr Gringuz should be struck out. In those circumstances, although he had the power to waive compliance with the requirement of a penal notice, Foxton J declined to do so. He said at [66]:

> "Even allowing for the fact that Mr Gringuz has not given evidence, as he might have done, to explain his understanding … I do not feel able to "waive" the absence of a penal notice in this case, *not because of its absence per se*, but because the circumstances of its absence provide a reasonable basis for concluding that the court had determined that the Body Corporate Provision could not be engaged in relation to Mr Gringuz. I cannot be satisfied that reversing that position now would not involve an injustice to Mr Gringuz." (Emphasis added)

119. The existence of the power to waive defects was confirmed by this court in *Business Mortgage Finance 4 plc v Hussain* [2022] EWCA Civ 1264, [2023] 1 WLR 396 at [77].

120. In the present case, the judge dealt with the question of the penal notice in a number of ways. At [73] the judge said:

> "I do not consider that *Iberian* has much to do with the present case. If one looks at what the present order does, in both substance and form, it has the following elements:
>
> (i) There is a penal notice directed at Mr Turk personally, in addition to the notice directed to the various companies.
>
> (ii) Mr Turk was a principal defendant in the action and described as the main wrongdoer in the supporting affidavit.
>
> (iii) Mr Turk was an actual subject of paragraphs 15 and 16 of the order. He was bound by the restraint in paragraph 15 whether he might be acting as director or not, and was bound by the disclosure obligations in whatever capacity he might have held knowledge.

> (iv) He was actually a director of two of the companies who were the subject of paragraph 16 (SGP and Barton) and the only company which was the subject of paragraph 17 (Barton)."

121. He went on to say at [74]:

> "Properly read, it is plain that the disclosure obligations in paragraph 16 were directed at Mr Turk in whatever capacity he might have held the knowledge. The idea that he could hold knowledge, or gain knowledge, as director of one of the companies but could somehow say that he was not obliged to disclose it because there is no particular reference to him as a director of that company is rather absurd. One way or another, the order in that paragraph is directed at him, and there is a penal notice directed at him which makes plain the effect of non-compliance. That makes sense in the context of an action which is based on the fact that he was a person entrusted with the claimant's money (which is an agreed matter even though the scope of the obligation is disputed) and which is based on the premise that she does not know what has happened to it Mr Turk does or should."

122. In relation to paragraph 17 of the Miles order (which was directed to Barton alone) he then made the finding at [76] which I have quoted.

123. In addition, the judge said that if there was a technical defect in the penal notice he would have waived the defect because it had not caused any prejudice to Mr Turk. He came to that conclusion essentially because, as he explained at [77], there was no actual confusion in Mr Turk's mind about his liability to disclose in relation to Barton or SGP matters or in the minds of his solicitors. Mr Turk never considered that his compliance was somehow affected by uncertainties about whether he was a director of either company.

124. In my judgment the first fallacy in Mr Counsell's argument is that, with the exception of count 2, 3 and 8 (which related in part to paragraph 17 of the Miles order directed to Barton alone) Mr Turk was not being punished for breaches of the disclosure obligations by the companies. He was being punished for his own breaches of those obligations. As the judge correctly said at [74], he was required to disclose information within his knowledge, irrespective of the capacity in which he had that knowledge. That was a personal obligation directed to Mr Turk himself, as the judge also said at [73](iii). In relation to count 2 it was also his personal obligation to take the steps required by *Attorney General of Tuvalu,* and the judge found that he understood that. Moreover, since the order was directed to Mr Turk personally, there could have been no injustice to him in waiving the defect in the penal notice (if there was one).

125. As Blair J said, naming a director in the penal notice is not an essential procedural protection before any enforcement steps can be taken, although it is good practice to do so (at least where the identity of the directors is known). But even if it was, the judge was entitled to take the view that any defect was one which had caused no injustice and therefore could be waived. That is a highly fact-sensitive evaluation, which the judge carefully considered at [77]. Contrary to Mr Counsell's submission, I do not consider

that there needs to have been a formal application to that effect before the power to waive the defect can be exercised.

126. I would reject this ground of appeal.

Was the judge wrong not to adjourn the sanctions hearing? (Ground 7)

127. The judge handed down his substantive judgment at a short hearing on 5 March 2024. Mr Counsell submitted to him that he should adjourn the sanctions hearing until after the resolution of the underlying proceedings. The reason for that was that until the underlying dispute had been determined, it was not possible to know what harm had been caused to Mrs Işbilen as a result of Mr Turk's breaches of his disclosure obligations. She might, for example, have had the relevant information already from other sources. The harm which she had actually suffered would be a critical factor in determining the appropriate sanction. The judge did not rule on that submission at that point, but adjourned the hearing until the following day, 6 March. Mr Counsell renewed the submission, which the judge rejected. He said:

> "[4] I reject that submission. The present harm is obvious. Mrs Işbilen was entitled to have the information provided by Mr Turk and not receiving it from him was harm enough. She was entitled to have the court order obeyed without argument and without having to wait until trial and it would be inappropriate to wait so long when she was entitled to have the information at an interim stage.
>
> [5] At the adjourned hearing today Mr Counsell revisited the matter in the context of sentencing and submitted that it was not known whether and to what extent Mrs Işbilen has received the information from others since then. Again, even if she has received some of the information since then (and it is apparent from the evidence that she has deployed that she has some of it, in that part of the tracing routes have been revealed) that is no reason for adjourning to see how much else she might have on an absence of harm basis. If she has some information from elsewhere in the meanwhile, then she should not have had to do that. She should have been given it my Mr Turk under the order."

128. Mr Counsell submits that the judge wrongly elided harm to the court in not having its orders obeyed (which is inherent in every case of a breach of a disclosure order) and the harm actually caused to the claimant by the breach (which may vary according to the facts).

129. The harm actually caused by breach of a disclosure order, he said, is a critically important factor in arriving at the appropriate sanction. If Mrs Işbilen had authorised the payments (especially the Hawale payments as Mr Turk contended) then there is force in Mr Turk's evidence that he did not disclose information which he thought Mrs Işbilen already had.

130. Whether or not to adjourn the sanctions hearing was essentially a case management decision for the judge. Of course, an appeal court may intervene if the judge has adopted

an erroneous principle in reaching that decision, but otherwise the matter is one for the judge's discretion. The judge considered that Mrs Işbilen had suffered harm in not having been given the information that Mr Turk had been ordered to give.

131. The judge is not alone in that view. In *Khawaja v Stefanova* [2023] EWCA Civ 1201 the defendant had failed to comply with disclosure orders. It was argued on her behalf that the disclosure obligations were very burdensome, that some of the complaints were purely technical, and that it was difficult to identify real harm to the claimant. Nugee LJ said at [35]:

> "So far as harm or prejudice is concerned, failure to comply with the Orders of the Court to provide information is almost always likely to be prejudicial. Mr Howard said that where information had now been disclosed it could be seen that in many cases it was not of great importance after all. But that does not seem to me an answer. Some of the information not disclosed was of some potential significance; but quite apart from this, the prejudice comes in the very fact of not providing disclosure. That is likely, in a case such as the present, to prevent the litigation from proceeding smoothly; it is also almost bound to exacerbate the other party's suspicions and make the litigation both more difficult and more expensive to resolve. Moreover Richard Smith J found that the effect in the present case was to prevent Mr Khawaja from taking steps to preserve his position, and that too seems to me to have been a justifiable conclusion."

132. Foxton J took the same view in *Olympic Council of Asia* at [52].

133. Disclosure obligations are included in a proprietary freezing order so that the claimant can identify the whereabouts of assets in order to formulate a proprietary claim to them in the underlying proceedings. To wait until the conclusion of the proceedings before proceeding to sanction would deprive the claimant of much of the benefit of the obligations particularly where (as here) the defendant has not yet fully complied with his obligations.

134. In the present case the judge said nothing about the interest of the court in seeing that its orders are obeyed; and I do not consider that Mr Counsell is right in saying that the judge conflated the two. On the judge's findings (which he was entitled to make) Mr Turk had deliberately failed to disclose information about the whereabouts of very substantial sums of money which had belonged to Mrs Işbilen. I consider that he was entitled to proceed to sanction on the basis of the facts that he had found.

Was the judge wrong to impose the sanction that he did? (Grounds 8 to 11)

135. By the time of the sanctions hearing, Mr Turk and both his father and ex-wife had made witness statements. Those statements revealed that Mr Turk's mother had multiple sclerosis and was disabled. Mr Turk and his father were her carers. She regularly took 10 different medications, which needed to be administered to her, because she could not do it herself. She also needed to be catheterised several times a day which, again, she could not do for herself. Although Mr Turk's father is formally her carer, he has a full time job as a consultant at Southend University Hospital. Mr Turk himself is, in

practice, her carer during the day. Mr Turk's mother is a devout Muslim and her religious beliefs mean that the private places on her body cannot be touched or looked at by anyone except close relatives whom she cannot marry. Mr Turk did, however, say that on days when he had to attend court or a conference, either his father had to take days off, or care from other members of the family had to be organised, which was complicated. Mr Turk also spoke of his depression and mood swings; and he also gave some evidence about the difficulties he would face in preparing for the main proceedings if he were committed to prison.

136. The judge sentenced Mr Turk to an immediate custodial sentence of 12 months. In arriving at that sentence, the judge considered and directed himself by reference to a number of authorities. These included *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] EWCA Civ 392; [2019] 1 WLR 3833; *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367; *Discovery Land Co LLC v Jirehouse* [2019] EWHC 2264 (Ch); *JSC BTA Bank v Solodchenko*, *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch); *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Comm); *SRA v Khan* [2022] EWHC 45 (Ch) and *Khawaja v Stefanova*. I do not consider that it can plausibly be said that the judge did not have the correct legal framework in mind.

137. The approach of an appeal court to a sanction imposed for contempt of court was explained by this court in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, [2019] 4 WLR 65 at [37]:

> "In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge: (i) Made an error of principle; (ii) Took into account immaterial factors or failed to take into account material factors; or (iii) Reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge."

138. The question is not, therefore, whether we would have passed the same sentence as the judge; and we should be reluctant to interfere with his assessment after a lengthy trial in which he heard witnesses.

139. Mr Counsell's first criticism is that the judge was wrong not to suspend the sentence. First, he says the judge was wrong to take the view that a suspended sentence was "no sentence". Second, he says that suspension "may be appropriate where immediate imprisonment would have a serious effect on others, such as children or vulnerable adults in the contemnor's care." Third, he submits that an immediate custodial sentence is a matter of last resort in civil contempt cases where the principal aim is (or should be) securing compliance with court orders rather than punishment: *Wright v Rogers* [2022] EWCA Civ 1658, [2023] 4 WLR 9 at [28] and [30]. The first and third submissions really run together.

140. As far as the first submission is concerned, the quoted remark does not appear in the judge's judgment, but was a partial and selective quotation of what he said during the course of submissions on 5 March. During the course of his submissions, Mr Counsell argued that any custodial sentence should be suspended, apparently without any

conditions attached. The judge asked what was the point of suspension if there were no conditions attached, because the defendant would be entitled to know in what circumstances the sentence would be activated. The judge went on to say that "if there are no conditions attached, then suspending it is the same as not imposing one at all because it is hard to see how it could ever be invoked". After Mr Counsell declined to suggest any conditions, the judge remarked "A suspended sentence would be no sentence effectively because it could never be invoked."

141. In support of his submission Mr Counsell referred to *Wilkinson v Lord Chancellor's Department* [2003] EWCA Civ 95, [2003] 1 WLR 1254. In that case a non-molestation order had been made against a father in family proceedings. He was found to have been in breach of the order. He was sentenced to a term of imprisonment of eight months, suspended on the terms of a fresh non-molestation order with a power of arrest attached. The question for the court was whether he needed permission to appeal against a suspended sentence of imprisonment or whether he was entitled to appeal as of right. It was in that context that Hale LJ made the observations at [57] on which Mr Counsell relies:

> "Although a suspended committal does not immediately deprive the contemnor of his liberty, therefore, it hangs a sword of Damocles over his head which puts his liberty at much greater risk than did the order which he has been found to have breached. To the extent that there is any doubt about the meaning of the rules, it should be resolved in favour of the citizen whose liberty is thus put in jeopardy. In our judgment, therefore, a suspended committal order is a committal order for the purpose of CPR r 52.3(1)(a) and may be appealed without permission."

142. Reliance on those observations to advance Mr Counsell's submission deprives them of their context. It is plain from what Hale LJ said at [55] and [56] that she was considering a case in which a sentence of imprisonment was suspended on terms breach of which would enable the court to activate the sentence. The judge's concern was the efficacy of a suspended sentence which could never be activated (or which could be activated in wholly undefined circumstances).

143. As far as the third submission is concerned, the judge directed himself at [12] that the object of committal is both to punish conduct in defiance of the court's order as well as having a coercive effect. But he said at [23]:

> "Mr Turk did not suggest that he could somehow remedy his non-compliance in relation to the grounds that were in issue in these proceedings and the sentence in this case is going to be punitive only."

144. This is a puzzling remark. The judge did not say that Mr Turk had remedied his non-compliance. In view of his finding in the main judgment about the alleged Hawale payments ("I find that Mr Turk knew something more about where the money went or was likely to go"), that could not have been his view. On the contrary, at 16 (f) of his sentencing remarks he said that Mr Turk had still not indicated that he would set about the proper exercise of addressing the detailed requirements of the order. So, a suspended

sentence would have a coercive effect in encouraging Mr Turk, albeit belatedly, to comply with his disclosure obligations.

145. The important point about Mr Counsell's second submission is that suspension *may* be appropriate where the contemnor has caring responsibilities; not that it *must* be. In *Sellers v Podstreshnyy* [2019] EWCA Civ 613 for example, this court reduced a nine-month sentence for the breach of two freezing orders to one of six months' imprisonment in light of the effect the contemnor's imprisonment was having on her 13-year-old son. However, the disruption to the relationship between mother and son did not justify the suspension of the sentence. It is equally appropriate for the sentencing court to take into account caring responsibilities in fixing the term of imprisonment, rather than going to suspension. In *Liverpool Victoria Insurance Co* this court said at [69]:

> "The court must, finally, consider whether the term of committal can properly be suspended. In this regard, both principle and the case law to which we were referred lead to the conclusion that in the case of an expert witness, the appropriate term will usually have to be served immediately, and that one or more powerful factors justifying suspension will have to be shown if the term is to be suspended. We do not think that the court is necessarily precluded from taking into account, at this stage of the process, factors which have already been considered when deciding the appropriate length of the term of committal. Usually, however, the court in deciding the length of the term will already have given full weight to the mitigation, with the result that there is no powerful factor making it appropriate to suspend the term. If the immediate imprisonment of the contemnor will have a serious adverse effect on others, for example where the contemnor is the sole or principal carer of children or of vulnerable adults, that may make it appropriate for the term to be suspended; but even then, as the *Bashir* case [2012] ACD 69 shows, an immediate term—greatly shortened to reflect the personal mitigation—may well be necessary."

146. The judge recorded at [20] to [21] the various personal matters that had been urged on him, including particularly the health of Mr Turk's mother and his caring responsibilities for her. He said at [22]:

> "Having considered the matter carefully, I do not consider that those personal factors justify the suspension of the custodial sentence that I would otherwise pass. The mother's situation has given me most pause for thought, but her son's conduct is too serious for that to weigh conclusively against the imposition of an unsuspended sentence. I have, however, taken it into account in considering the length of the term of the imprisonment to be imposed."

147. At [30] having set out the sentence that he would have imposed but for the mother's health conditions, he made it clear that he had reduced the sentence by 6 months. I can see no error of principle in that respect.

148. In considering the punitive element of a sentence for breach of an order for disclosure, the judge referred to previous cases. In *JSC BTA Bank v Solodchenko* Jackson LJ referred to a number of decisions at first instance and said at [51]:

> "What they show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year. For example, Mr Shalabayev was recently sentenced to 18 months' imprisonment for his continuing failure to make disclosure, as required by a freezing order which the bank obtained when joining Mr Shalabayev as fourteenth defendant in the present action…"

149. In his summary at [55] he said:

> "From this review of authority I derive the following propositions concerning sentence for civil contempt, when such contempt consists of non-compliance with the disclosure provisions of a freezing order:
>
> (i) Freezing orders are made for good reason and in order to prevent the dissipation or spiriting away of assets. Any substantial breach of such an order is a serious matter, which merits condign punishment.
>
> (ii) Condign punishment for such contempt normally means a prison sentence. However, there may be circumstances in which a substantial fine is sufficient: for example, if the contempt has been purged and the relevant assets recovered.
>
> (iii) Where there is a continuing failure to disclose relevant information, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor."

150. This summary is plainly directed towards breaches of disclosure orders. In *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35 Rix LJ said at [42]:

> "… it must now be accepted that the attack on the administration of justice which is made when a freezing order is breached usually merits an immediate sentence of imprisonment of some not insubstantial amount."

151. In *Asia Islamic Trade* Popplewell J said at [7]:

> "A breach of a freezing order, and of the disclosure provisions which attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount."

152. In *Discovery Land* Zacaroli J said at [19]:

> "Turning then to the disclosure obligations, I similarly consider that the failure to comply with these obligations necessitates an order for committal. Disclosure obligations in aid of a freezing injunction are of the greatest importance to enable a claimant and the court to police the injunction and enforce it against third parties. That is particularly so where the injunction is in aid of a proprietary claim and the claimant is seeking to discover what has happened to money which should have been held for it but has been dissipated."

153. In the light of these authorities, I do not consider that the judge can be said to have erred in principle fixing the length of the sentence.

154. Mr Counsell's next attack submits that the judge failed to take into account Mr Turk's attempts to comply with the order. He provided information; gave evidence (thus waiving his right to silence) and attended for cross-examination; and waived privilege over his legal advice. When Mrs Işbilen applied for and obtained the search order, the deputy judge described Mr Turk as having been "very co-operative". Mr Turk had been prepared to make admissions about shortcomings in his disclosure and did so at an early stage in the proceedings. The judge dealt with these matters at [16] (c) to (e) of his judgment. In short, he considered that there was no early admission of contempt; nothing amounting to co-operation in relation to any of the breaches; but Mr Turk did accept at the hearing that his disclosure had shortcomings, and subsequently expressed contrition for the breaches. The judge noted at 16 (f) however that Mr Turk had "still not indicated that he will set about the proper exercise of addressing the detailed requirements of the order". The judge took all these matters into account, but he gave them little weight. That, in my judgment, was a matter for the judge's evaluative decision and is not something where the appeal court should intervene.

155. The last substantive point is that Mr Counsell says that the judge failed to give adequate weight to matters of personal mitigation. There is no doubt in my mind that the judge did take these matters into account. Indeed, they caused him to reduce by 6 months the sentence he would otherwise have passed. This criticism is without foundation.

156. Finally, Mr Counsell says that the sentence was manifestly excessive. But that submission is based on the alleged errors in the judge's approach which I have rejected. I reject the submission that the judge made an error of principle, or that he failed to consider relevant matters. The question then is whether, even though he adopted the correct approach, his sentence is plainly wrong in that it was outside the range of decisions reasonably open to the judge. There is no "tariff" in sentencing for breach of disclosure orders; but as Jackson LJ said in *Solodchenko* a breach normally attracts an immediate custodial term measured in months and may well exceed a year. In *Solodchenko* itself this court imposed a sentence of 21 months. In the present case the judge considered what sanctions he would have imposed on each count if it stood alone. But he then considered what he described as "an overall pattern of disobedience" which, in effect, amounted to an aggravating factor. He then had regard to the personal mitigation because of which, as I have said, he reduced the sentence he would otherwise have passed by 6 months.

157. In *Templeton* the judge had imposed an immediate prison sentence for breaches of a freezing order. Having considered a number of authorities and principles, on appeal to this court Rix LJ said at [44]:

> "In these circumstances, subject to issues of personal mitigation and the absence of any finding of actual harm, I do not consider that there is anything wrong with the sentences of immediate imprisonment which the judge has handed down, or with their length. The breaches of the freezing order were committed in the context of serious commercial frauds: they were deliberately undertaken, almost immediately, in a brazen attempt to avoid the consequences of the potential discovery of those frauds; they were persisted in over a significant length of time; and they amounted to nothing less than an attempt to remove the impeached business of Motorcare from the restraint of the court's freezing order into clear open country where the phoenix of Motorcare Elite could fly with impunity."

158. He continued at [49]:

> "In my judgment, serious as these unregretted, unpurged, contempts have been, and meriting the sentences handed down by the judge, it is not necessary to require those sentences to be served in the form of immediate custody. It is not only for the purpose of encouraging or rewarding the purging or remedying of contempt that the option of suspending sentence exists, and if the judge thought it was, in my respectful opinion, he erred. As it is, the appellants' prison terms were shortened by the judge because of his appreciation of their personal mitigation. They retain that benefit."

159. He concluded at [50]:

> "This is perhaps a merciful conclusion, especially in the light of the absence of any apology or public regret: nevertheless, in a matter which above all concerns the public interest of the courts in policing the due administration of civil justice, and where no private harm has been proved to have been actually inflicted on the complainant, Templeton, I was ultimately persuaded, by the possibly irremediable hardship which Mr Thomas or Mr Panesar's family might suffer, that the proper course lay in mercy rather than justice."

160. Like Rix LJ I can see nothing wrong with the sentence that the judge passed. But even so, it is clear from *Templeton* that this court can go down the road of mercy rather than justice. I would be willing to take a few steps down that road and suspend the term of imprisonment imposed by the judge. In reaching that conclusion, in addition to the factors considered by the judge I also take into account (a) the fact that Mr Turk was in fact incarcerated for approximately three weeks until he was released following the grant of bail (the equivalent of a six-week sentence); (b) the fact that the proceedings are ongoing, Mr Turk has no legal representation, and that there will be undoubted

difficulties in attempting to conduct his defence from prison and (c) most importantly, it will give Mr Turk a last chance to comply belatedly with his disclosure obligations, which will be harder for him to do if he is in prison.

161. I would not, however, suspend the sentence unconditionally. Accordingly, I would suspend the sentence for three months beginning on the date this judgment is handed down. If at the end of that period there is still substantial non-compliance by Mr Turk with his disclosure obligations, then the sentence may be activated.

The application for permission to cross-appeal

162. By a Respondent's Notice filed on 2 March 2024 Mrs Işbilen asks for permission to appeal against two of the judge's findings on contempt of court which he found either not to have been proven; or not proven to the extent alleged by Mrs Işbilen. She also asks for permission to appeal against the length of the sentence, on the basis that if the judge had found the additional contempts proved, the sentence would have been longer.

163. It is legally possible for a claimant to appeal against a committal order with permission; but such appeals are rare and have generally concerned a judge's refusal to find any contempt proven: see *JSC BTA Bank v Ereschenko* [2013] EWCA Civ 829 at [38]. One powerful factor which the court must bear in mind in deciding whether or not to grant permission is the risk to a defendant of double jeopardy: *Government of Sierra Leone v Davenport* [2002] EWCA Civ 230 at [31].

164. In my judgment we should only grant permission to appeal if a decision on the contempts which the judge found not to have been proven (or not proven to the full extent) would result in a longer term of imprisonment.

165. The substantive grounds of appeal are that the judge misunderstood the full width of Mr Turk's disclosure obligations in relation to count 1 (which the judge found not to have been proved to any significant extent) and count 8 (which the judge found to be proved in part). The judge applied the same interpretation of the Miles order to both count 1 and count 8.

166. In relation to count 1, Mr Turk gave some disclosure in relation to the money flows with which that count was concerned. Although his disclosure was not "fulsome" the judge was satisfied that he made disclosure "to an appropriate extent". In relation to count 8, although the judge found that Mr Turk's disclosure was inadequate, he did not consider that he was required to make the fuller disclosure for which Mrs Işbilen contended. The judge's interpretation of Mr Turk's obligations in relation to that count cannot be described as untenable. If (as the judge found) Mr Turk complied with the order on a reasonable interpretation of it, then even if that interpretation turns out to have been wrong, a breach will not result in imprisonment: *ADM International* at [82] (cited above).

167. It is always open to Mrs Işbilen to seek a new order from the court which makes it abundantly clear what additional disclosure she seeks.

168. In addition, one of the important principles of sentencing is the "totality" principle; that is to say that the overall sentence is proportionate to the offender's overall conduct. It is clear that in selecting the sentence to be imposed, the judge had regard to Mr Turk's

"overall pattern of disobedience". I do not consider that there is any real prospect that if another two instances of contempt were added to those that the judge found to have been proved Mr Turk's overall pattern of disobedience would have been significantly worse.

169. In my judgment, therefore, there is no real prospect that the court would increase the term of imprisonment.

Result

170. I would refuse permission to cross-appeal. I would allow the appeal to the extent of suspending the term of imprisonment imposed by the judge on the terms I have proposed but otherwise dismiss it.

Lord Justice Moylan:

171. I agree.

Lady Justice Elisabeth Laing:

172. I also agree.