Neutral Citation Number: [2024] EWCA Civ 643

Case No: CA-2023-002525 & CA-2023-002527

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Butcher
[2023] EWHC 2624 (Comm)
[2023] EWHC 3271 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2024

Before:

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE MALES
and
LADY JUSTICE ELISABETH LAING

- -

Between:

1) COMMERCIAL BANK OF DUBAI PSC **2) HORTIN HOLDINGS LIMITED** **3) WESTDENE INVESTMENT LIMITED** **4) LODGE HILL LIMITED** **5) VS 1897 (CAYMAN) LIMITED**	**Respondents/ Claimants**
- and -	
1) ABDALLA JUMA MAJID AL SARI **2) MAJID ABDALLA JUMA AL SARI** **3) MOHAMED ABDALLA JUMA AL SARI** **4) FAL OIL CO LLC** **5) INVESTMENT GROUP PRIVATE LIMITED** **6) IGPL GENERAL TRADING LLC** **7) GLOBE INVESTMENT HOLDINGS LIMITED** **8) MENA INVESTMENT HOLDINGS LIMITED** **9) MAS CAPITAL HOLDINGS LIMITED** **10) HAMAD SAIF HAMAD ABDALLA ALMHEIRI**	**Appellants/ Defendants**

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Helen Pugh (instructed by **Janes Solicitors**) for the **First Appellant**

James Leonard KC and **Charlotte Elves** (instructed by **Janes Solicitors**) for the **Second Appellant**
Anthony Peto KC and Andrew Trotter (instructed by **Jones Day**) for the **Respondents**
The **Third to Tenth Defendants** did not take part in the appeal and were not represented

Hearing date: 23 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 12 June 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 MALES:

1. This is an appeal by Abdalla Juma Majid Al Sari and his son, Majid Abdalla Juma Al Sari, against the order of Mr Justice Butcher committing each of them to prison for 24 months for contempt of court. The appellants were referred to at the hearing as 'Abdalla' and 'Majid' respectively and I shall adopt the same course. The contempts which the judge found to be proved against them consisted of multiple failures to comply with the disclosure requirements of a worldwide freezing order granted by Mrs Justice Cockerill on 18th February 2022 and continued by Mr Justice Calver on 11th March 2022.

2. The appellants challenge both the findings of contempt and the sentence imposed on them. However, the principal submission made on their behalf is that they were not validly served with notice of the hearing on 4th October 2023 at which they were found to be in contempt. They did not attend, and were unrepresented at, that hearing, although they did have notice of the later hearing on 20th November 2023 at which the sentence of imprisonment was imposed and were represented at that hearing by counsel.

Background

3. In 2012 the first respondent, the Commercial Bank of Dubai ('the Bank'), commenced proceedings in Sharjah to recover substantial debts from the first to fifth defendants. Those proceedings resulted in a judgment for the equivalent of about £87 million issued by the Sharjah Federal Court of First Instance in March 2016. Attempts to challenge this judgment on appeal finally ended on 26th April 2021 with a ruling by the Sharjah Federal Court of Appeal finding (among other things) that a letter purportedly signed by Majid was a fabrication.

4. As a result of enforcement proceedings in the BVI, in April 2021 the Bank took control of the shares in the second to fourth respondents ('the BVI companies'), special-purpose vehicles formerly controlled by Majid and his brother, the third defendant ('Mohamed'). The BVI companies owned properties in London said to be worth about £9 million at that time, including a luxury apartment known as 'the Bridge Apartment'. The Bank caused the BVI companies to bring proceedings to obtain possession of the Bridge Apartment, which was only finally obtained in September 2023.

The worldwide freezing orders

5. On 18th February 2022 the Bank and the BVI companies (together 'the claimants') issued proceedings here to enforce the Sharjah judgment and to claim damages against the defendants. They applied for and obtained a worldwide freezing order against each of the defendants, including the appellants. The order was continued at the return date on 11th March 2022. The orders required the appellants, in summary:

   (1) to disclose all of their assets worldwide with a value exceeding £50,000, together with all bank accounts and companies over which they had control, whether directly or indirectly, within 24 hours;

   (2) to disclose the location of all 'Asset Documents' (defined to mean documents evidencing the existence or balance of bank accounts and assets exceeding £50,000 in value) within 48 hours;

(3) to disclose any disposals of assets to related parties or disposals made at an undervalue between 1st October 2015 and 18th February 2022 within five working days;

(4) to identify any third parties holding Asset Documents, also within five working days;

(5) to deliver up any Asset Documents in their custody or possession within seven working days;

(6) to serve a confirmatory affidavit, including details of any asset subject to an attachment or similar order in the United Arab Emirates, also within seven working days; and

(7) to give written instructions to third parties holding Asset Documents to deliver them up, and to deliver up copies of those instructions, within five days of the continuation order.

6. At the same time as making the without notice freezing order, Mrs Justice Cockerill made an order ('the First Service Order') for alternative service of 'the claim form, particulars of claim, all orders of today's date and all other documents in these proceedings'. Service on Abdalla was permitted by post to his address at PO Box 6600, Sharjah, UAE. Service on Majid was permitted by post to his address at PP No: A-0088444 Shj Villa 719-721-723, Sharjah, UAE and by email to majid@faloil.co.ae. In addition the claimants were required to notify the appellants of the proceedings by delivering the claim form, particulars of claim, all orders made on 18th February 2022, their skeleton argument and all other documents in the hearing bundle for the without notice application to two firms of lawyers in Dubai and Sharjah which had acted for the appellants.

7. The claimants served the freezing order by the alternative means specified in the First Service Order on 23rd February 2022, but the appellants and other defendants sought to evade service. The appellants or persons acting on their behalf sought to do this by hanging up telephones, refusing deliveries, refusing to authorise 'read receipts' to emails, and denying that they worked for Al Sari companies. A representative of the claimants' solicitors spoke to Abdalla on the telephone, but he said that he did not want to hear what she would say, asked her to speak to his legal representative, and declined to say who that representative was. More seriously, a junior member of the claimants' solicitors who had delivered documents to the law firm in Dubai was threatened in Whatsapp and voice messages: the threat was to call the police with an allegation that the files left contained drugs.

8. Neither the appellants nor the other defendants made any effort to comply with the disclosure obligations in the freezing order. At the return date hearing on 11th March 2022, when the appellants were represented by leading counsel instructed by Charles Russell Speechlys LLP ('CRS'), Mr Justice Calver observed that they had 'taken steps to avoid being served with these proceedings', had 'simply ignored' their disclosure obligations, and had offered 'no apology and no suggestion that they are going to comply'. He described an affidavit by Majid ('Majid 1') as 'entirely inadequate'.

9. On 11th March 2022 Mr Justice Calver made a further order ('the Second Service Order'), without notice to the defendants, expanding the provision for alternative service made by Mrs Justice Cockerill. His order provided, among other things:

> 'Pursuant to CPR 6.15(2), the steps taken by the Claimants to notify the Defendants of the Service Documents are deemed to be good service. The Claimants have permission to serve all further documents in these proceedings by any or all of the following alternative means, in addition to or alternatively to those set out in paragraph 3 of the Service Order (as amended):
> …
>
> 2.2 the First Defendant: by sending the documents and/or a link to them by WhatsApp and/or text message to [a telephone number ending '4488] …'

10. Accordingly the effect of the Service Orders was that the claimants had permission to serve 'all further documents in these proceedings' on Abdalla by WhatsApp and/or text message to the '4488 number and on Majid by sending them to the majid@faloil.co.ae email address.

11. On 14th April 2022 CRS indicated that they were instructed that their clients wished to comply with their asset disclosure obligations and proposed to do so by 28th April. Instead of doing so, however, they made an application to the court in Sharjah seeking to prevent the freezing order from being enforced against them. That application was dismissed.

12. Eventually, on 13th May 2022 the appellants filed a second affidavit by Majid ('Majid 2') in purported compliance with their asset disclosure obligations. In reality, however, the affidavit consisted more of explanations why they could not or would not comply: that they had no interest in various companies apart from being appointed as their manager; that their assets in the UAE were subject to attachment orders which rendered them valueless; and that they could be exposed to penalties in the UAE for disclosing information confidential to the companies which they managed. Apart from this, they neither provided any disclosure nor gave any explanation for failing to do so.

The contempt application

13. On 12th May 2022 the claimants issued an application to commit the defendants, including the appellants, for contempt of court. The application was served on CRS. So too was an application for summary judgment. On 16th June 2022 Mrs Justice Cockerill determined that the summary judgment application would be heard before the committal application. The appellants had also issued an application challenging the jurisdiction of the English court which had to be dealt with. The summary judgment application was then listed for 4th October 2023 and the committal application was listed for 6th and 7th December 2023.

14. The appellants made a number of requests for extensions of time for the filing of evidence in response to the contempt application, but in the event filed no such evidence. Nor did they file any evidence in response to the summary judgment application.

15. On 28th February 2023 the appellants' solicitors, CRS, came off the record.

16. On 10th February 2023 the claimants made an application for directions in the summary judgment application, the result of which was that Mr Justice Butcher made an unless order, which was followed by the grant of summary judgment on 10th May 2023. The appellants did not attend the hearing of their jurisdiction challenge on 13th – 14th June 2023, which was dismissed.

17. Mr Justice Butcher also brought forward the date for hearing the committal application to 4th October 2023, as that date would no longer be needed to hear the summary judgment application. His order bringing forward the date for the committal application ('the Listing Order') was served on Abdalla by text message to the '4488 number and on Majid by email to majid@faloil.co.ae, as provided in the Service Orders. In error, however, the date notified was 3rd and not 4th October 2023, although this was corrected by giving notice by text and email that the hearing would in fact take place on 4th October 2023.

The liability hearing

18. The appellants did not attend the hearing on 4th October 2023 and were not represented. Nor were any of the third to sixth defendants, although the seventh to ninth defendants were represented by counsel. As they had previously been represented by CRS, the appellants and the fourth to sixth defendants were referred to as 'the CRS defendants'.

19. The judge began by considering whether it was appropriate to proceed in the absence of the CRS defendants. He did so by reference to the checklist initially set out in the family case of *Sanchez v Oboz* [2015] EWHC 235 (Fam) which has since been applied in commercial cases such as *Navig8 Chemical Pools Ltd v Nu Tek (HK) PVT Ltd* [2016] EWHC 1790 (Comm) and *ICBC Standard Bank Plc v Erdenet Mining Corporation LLC* [2017] EWHC 3135 (QB) at [53]:

> '(i) Whether the respondents have been served with the relevant documents, including notice of this hearing;
>
> (ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;
>
> (iii) Whether any reason has been advanced for their non-appearance;
>
> (iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present; [i.e. is it reasonable to conclude that the respondents knew of or were indifferent to the consequences of the case proceeding in their absence?]
>
> (v) Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;
>
> (vi) The extent of the disadvantage to the respondents in not being able to present their account of events;

> (vii) Whether undue prejudice would be caused to the applicant by any delay;
>
> (viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;
>
> (ix) The terms of the 'overriding objective' [including the obligation on the court to deal with the case justly, including doing so expeditiously and fairly and taking any step or making any order for the purposes of furthering the overriding objective].'

20. Applying these criteria, and looking at the matter overall, the judge was satisfied that it was appropriate to proceed. In particular, he was satisfied not only that the CRS defendants had been served with the committal application, but also that they were aware of the hearing.

21. He considered next whether the contempts alleged had been proved, noting that asset disclosure is often an important aspect of a freezing order because it is the only means by which an applicant can police compliance with the order, and that the burden was on the claimants to prove contemptuous non-compliance with the order to the criminal standard. He added that it was also necessary for the court to be satisfied to the criminal standard that the freezing order had been served on the defendants.

22. The judge then explained why he was sure that the freezing order had been served on the defendants in accordance with the First Service Order; that the CRS defendants had not even purported to comply with their asset disclosure obligations until Majid 2 was filed on 13th May 2022; that Majid 2 gave only very limited disclosure; that the reasons given in Majid 2 for declining to give further disclosure were bad ones; that as a result the CRS defendants were in contempt; and that the contempt was deliberate:

> '38. I find, therefore, that there was non-compliance in the respects which I have identified, and I further find that the First to Sixth Defendants are in contempt, by reason of that non-compliance, in the following respects: first, there was contemptuous non-compliance in a timely fashion with the order for asset disclosure. The CRS Defendants were obliged to give asset disclosure but failed to do so by the return date or for up to 12 weeks after their obligations fell due to be performed. Calver J said, in paragraph 15 of his judgment of 11 March 2022 ([2022] EWHC 705 (Comm)) that this was a "serious contempt". I agree. I am sure that the delay was deliberate in order in part to search for a way of avoiding disclosing the relevant assets. That is a conclusion which I reach in light of what has transpired regarding the Sharjah WFO proceedings, the inadequacy of the Defendants' excuses for the delay, the weakness of the arguments for the limits of disclosure ultimately produced in Majid 2, and the propensity of the First to Sixth Defendants to disobey court orders shown by the history of non-compliance in these proceedings.

39. I am also sure that there was contempt in the failure by the First and Second Defendants to disclose assets exceeding £50,000 and their bank accounts. I am sure of this for the reasons set out in Mr Richards' fourth affidavit. In particular I am sure that there was a failure by Abdalla Al Sari to disclose his direct shareholding in Sari Investments LLC. There was a failure by Majid Al Sari to disclose his direct shareholding in IGPL Investments LLC and IGPL. There was a failure by Abdalla and Majid Al Sari to disclose assets or bank accounts of the Al Sari property companies which they managed and which, it is to be inferred for the reasons given in Mr Richards' fourth affidavit, they had power to deal with as their own. In particular they failed to disclose the funds or bank accounts of IGPL GT used to pay CRS' fees, and a yacht owned through IGPL GT. Abdalla Al Sari failed to disclose any assets or bank accounts whether in the UAE or elsewhere; he gave an express refusal to disclose assets in the UAE. I find it highly unlikely that he owns no assets and has no bank accounts. Majid Al Sari refused to disclose any assets in the UAE. He accepts part ownership of the Al Sari home compound. He did not say that there were no such assets, and FAL, IGPL, and IGPL GT, who were also respondents to the worldwide freezing order in their own right, have refused to disclose any assets at all. In those respects I regard there as having clearly been a contemptuous non-compliance with the orders in question.

40. Thirdly, there was a failure to disclose disposals to related parties or at an undervalue. Majid 2 did not purport to make any disclosures of related party or undervalue disposals, as required by paragraph 10(1)(d) of the worldwide freezing order. When the Claimants sought clarification of that, CRS said, by letter of 2 August 2022, that there were no such disposals by Abdalla or Majid Al Sari, considering the terms of paragraph 10(1)(d) of the worldwide freezing order, and, as regards the Fourth to Sixth Defendants, none that they were permitted to disclose. However, as regards the First and Second Defendants, that has not been confirmed on affidavit as it should have been. As regards the Fourth to Sixth Defendants, that letter appears to show that there have been such disposals but they refused to disclose them.

41. Fourthly, in relation to asset documents, under the worldwide freezing order the Defendants were required to give details of where asset documents were located, and the third parties holding such asset documents, as well as to deliver up any asset documents. These obligations were simply ignored. Majid 2 does not purport to comply with these obligations.

42. Therefore, in that respect, as well as the others, I am sure that the First to Sixth Defendants are in contumelious default of the orders of the court.'

23. The judge then adjourned the application for sentencing until 27th October 2023.

Majid 3

24. The claimants notified the CRS defendants of the judge's order finding them in contempt by every means possible, including the alternative means of service on the appellants provided for in the Service Orders. The result was that on 20th October 2023 the claimants' solicitors were contacted by Janes Solicitors, who confirmed on 24th October that they were instructed by Abdalla and Majid only, with instructions to seek an adjournment. The adjournment was granted by Mr Justice Butcher, who also ordered that:

> 'If the First and Second Defendants wish to rely on the assertion that they were unaware of the hearing on 4 October 2023, they shall file and serve any affidavit evidence to that effect on which they seek to rely by no later than 4 p.m. on 10 November 2023, including any statement they wish to make (a) that they were unaware of the 4 October 2023 hearing prior to that date; and (b) as to the time at which and the manner in which they became aware that hearing had occurred.'

25. On 10th November 2023 the appellants served Majid's third affidavit ('Majid 3'). This was sworn on behalf of both appellants. Majid confirmed that he was aware that he had a right to silence in contempt proceedings, but said that it was important that he give the evidence contained in his affidavit. He continued:

> '8. I apologise to the Court (on behalf of myself and my father) for a lack of engagement in these contempt proceedings so far. The truth is, the last contact I had with the solicitors acting for me in the underlying proceedings was in December 2022. From that point onwards, I have been completely in the dark about what has been happening.
>
> 9. I now understand my previous solicitors, Charles Russell Speechly (CRS), came off the Court record in February 2023. As I said above, as far as I can remember my last contact with them came two months previously, on 15 December 2022. At that stage, whilst I was aware that Contempt proceeding had been intimated, I was unaware that Contempt Proceedings had been issued against my father and me.
>
> 10. Since then, neither my father nor I have been aware of any developments in these proceedings. I did not see, nor was I aware of, any correspondence, Court Orders, Applications, or hearings. This includes, for example, the hearing to deal with my application challenging the Court's jurisdiction, which I now understand was dealt with in a hearing by Mr Justice Bright on 13 and 14 June 2023, with a Judgment on 14 July 2023. Had I known that the hearing was taking place, I would have wish to have attended/arranged for representation, as I had understood we had a good case concerning a jurisdictional challenge.

> 11. It is against that background that I was most surprised to receive notification on or around 10th October, after documents were delivered to my house by courier, that on 4 October 2023, the Court held my father and me in Contempt of Court, when we received no notification that the hearing would take place. Had I been aware of that hearing, I would have ensured that I obtained legal representation so that my position could be protected.
>
> 12. Upon becoming aware of the findings against us, my father and I took urgent steps to instruct English solicitors and counsel, which led to Janes Solicitors and Sean Yates attending the hearing on 27 October 2023.
>
> 13. Again, I want to reiterate that had I known about this earlier, I would have instructed solicitors earlier. I understand that Contempt Proceedings are serious, and although we do not live in the UK, my and my father's liberty is at stake. Given that I wish to continue doing business in the UK and would want to travel to the UK for that purpose, it would always have been in my interests to defend myself in these proceedings to avoid any warrant of committal being issued against me.'

The sentence hearing

26. The sentence hearing took place on 20th November 2023. The appellants were represented by counsel, Mr Sean Yates. The remaining CRS defendants did not appear and were not represented. Nor did the third defendant, Majid's brother, Mohamed. In a skeleton argument served shortly before the hearing the appellants argued that the order made in their absence at the liability hearing should be set aside using the court's powers under CPR 39.3; and that the court should find that they had discharged their obligations under the freezing order 'to the extent that they are able'. Developing this latter point, they argued that it had been impossible to comply with the disclosure obligations within the short time allowed by the order. Counsel confirmed at the hearing that the further points which had been made in Majid 2 were no longer relied on.

27. Although the appellants maintained, in accordance with the evidence in Majid 3, that they had not known about the liability hearing on 4th October 2023, they did not suggest that service of the Listing Order by the alternative means provided for in the Service Orders was invalid. On the contrary, they conceded that this was valid service.

28. Mr Justice Butcher dismissed the application under CPR 39.3. He held that the appellants had not acted promptly in making their application, that there was no good reason for their failure to attend the liability hearing, and that they had no reasonable prospect of success on the merits of the committal application. In reaching the conclusion that there was no good reason for the appellants' failure to attend the liability hearing, the judge said that he was 'in no doubt that [Majid 3] contains deliberate falsehoods, seeks to give a wholly misleading impression, and cannot be relied upon'. His explanation for this conclusion was as follows:

> '20. Thus, as I have already set out, Majid 3 contains the statement that, as at 15 December 2022, while he was aware that

Contempt Proceedings had been intimated he was unaware that Contempt Proceedings had been issued against him and his father.

21. That, in my judgment, is patently untrue. The contempt application had been issued on 12 May 2022, the day before Majid 2 was served. It was while CRS were representing the First and Second Defendants; indeed, CRS continued on the record for them for more than 8 months thereafter. CRS's correspondence with the Claimants' representatives indicates quite clearly, and unsurprisingly, that CRS had sought instructions in relation to various matters, and must have made their clients aware of the contempt application, the need to file evidence in response to it and the fees which would be charged in respect of their work on the application. The details are set out in paragraph 10 of Mr Richards's Thirteenth Witness Statement. Equally, the evidence referred to in paragraph 11 of that Witness Statement itself indicates that CRS had brought the contempt application to the attention of their clients.

22. Majid 3 also says that, since 15 December 2022 he had been 'completely in the dark about what has been happening' in these proceedings. This is based on the supposed fact that 'the last contact' he had with CRS was in December 2022; and that he 'now understands' that they came off the record in February 2023; but that he was aware of no developments since December, including the hearing of the Defendants' own jurisdiction challenge which was heard by Mr Justice Bright in June 2023.

23. In my view it is inconceivable that CRS did not communicate with the First and Second Defendants in the period between 15 December 2022 and when they came off the record. When they came off the record, as material available to the Claimants demonstrates, this was on the basis of various breaches of the terms of CRS's engagement by the Al Saris, including non-payment of CRS's fees.

24. I have no doubt at all that, during that period, CRS will have communicated with their clients by means which they had reason to believe would be effective in bringing matters to the clients' attention. If, which I think is unlikely, the First and Second Defendants were unaware of what was being communicated, it must have been because they were taking good care not to see what was in front of them.

25. The statement in Majid 3 that 'the last contact I had with [CRS]' was on 15 December 2022 is thus, I am sure, very misleading. It may be that 15 December 2022 was the last time that he contacted CRS. As I have said, I am sure that it will not have been the last time that they contacted him. As to his

> statement that he was thereafter completely in the dark, I am sure that if he was, which I very much doubt, it was self-imposed darkness.'

29. I note that this explanation was expressed in terms ('I am in no doubt', 'it is inconceivable', 'I have no doubt at all' and 'I am sure') which reflect the criminal standard of proof.

30. The judge was also satisfied that notification of the hearing date of 4th October 2023 by email to the majid@faloil.co.ae address had been effective to bring that date to the appellants' attention:

> '26. The same applies in relation to the period after CRS came off the record. Numerous communications were sent by Jones Day to an email address which had been ordered as effective alternative service. There was no indication that emails to that address were not received. There was a series of notifications produced by Jones Day's server stating that delivery to the recipients or groups was complete. There were no 'unable to send' or other bounce back messages in respect of that email address. Furthermore, Majid 3 does not say that the emails were not received at that address; nor does it say that that the address was inoperative. Indeed, it is very thin on detail generally.'

31. He went on to identify numerous further reasons for concluding that both appellants were aware of the hearing date.

32. Turning to the merits of the contempt application, the judge noted that the appellants' only point was that once it had proved impossible to comply within the deadline allowed by the freezing order, they were not in breach by reason of their continuing failure to comply thereafter. He rejected this argument on multiple grounds: it was not in fact impossible to comply within the deadline; if there had been any difficulties, the appellants should have come to court and requested an extension; there was a continuing failure to comply after the deadline had expired; and the argument that, once the deadline had expired, there was no continuing breach, was obviously wrong. To the extent that the appellants contended that they were prevented from compliance because of UAE law, it was important to realise that this only affected disclosure on behalf of the corporate defendants, not the appellants' own assets; and if there was any genuine difficulty, which was highly doubtful as there was no real risk of the appellants being prosecuted or exposed to penalties, the solution was for the appellants to seek a variation of the order.

33. As to the appropriate sanction, the judge applied the principles identified in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, [2019] 4 WLR 65. He considered that the contempts were very serious, with a number of aggravating factors including the history of the proceedings in which the appellants had sought to evade service and had made a jurisdiction challenge at the hearing of which they had failed to appear, thereby delaying the proceedings, as well as the deliberate falsehoods contained in Majid 3. There was no significant mitigation and only a custodial sentence was appropriate to mark the seriousness of the offending. In the case of the appellants the judge imposed the maximum sentence of 24 months' imprisonment, of which 18

months was the punitive element and six months was intended to encourage belated compliance with the orders. In the case of Mohamed, who had not engaged with the proceedings at all, he imposed a sentence of 21 months, of which 15 months represented punishment.

Submissions on appeal

34. Although the grounds of appeal adopt something of a scattergun approach, the principal submission of Ms Helen Pugh for Abdalla and Mr James Leonard KC for Majid was that service of the Listing Order by the alternative means permitted by the Service Orders was invalid: although those orders permitted service by alternative means of 'all other documents in these proceedings', that did not apply to service in committal proceedings, which represented a distinct phase of the proceedings which is governed by CPR 81 and to which different considerations apply. Those considerations include the penal nature of committal proceedings, the criminal standard of proof which is applicable, and the need for a high standard of procedural fairness. As Lady Justice Carr said in *Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656:

> '79. Contempts of court have traditionally been classified as being either criminal or civil. Proceedings for civil contempt are sometimes described as "quasi-criminal" because of the penal consequences that can attend the breach of an order (or undertaking to the court). They are criminal proceedings for the purpose of Article 6 of the European Convention on Human Rights ("Article 6"). The charges raised have to be clear; the criminal standard of proof applies; and the respondent has a right to silence. There must be a high standard of procedural fairness.'

35. Ms Pugh and Mr Leonard did not submit that service by alternative means was never permissible in contempt proceedings. Rather, their submission was that an order permitting such service in a previous phase of the proceedings did not apply to contempt proceedings, and that the question whether service by alternative means should be permitted in contempt proceedings needed to be specifically addressed by the court in view of the special considerations applicable to such proceedings.

36. Accordingly, as service of the Listing Order was invalid, the judge's order finding the appellants in contempt should be set aside and the committal application should be remitted to the Commercial Court for a fresh hearing at which the appellants would have the opportunity to adduce evidence and be represented.

37. Ms Pugh and Mr Leonard acknowledged that this was a new point not run in the court below, for which permission would therefore be needed. They submitted, however, that it was in the interests of justice for the appellants to be allowed to take the point, which is of some general importance.

38. For the respondents Mr Anthony Peto KC accepted that contempt proceedings needed to be initiated by personal service or service on a party's solicitors in accordance with CPR 81.5, and that if this was not possible, a specific application to permit service of the committal application by alternative means would be necessary. In the present case, as the appellants accepted, the committal application had been validly served on CRS,

who at that time were still on the record as their solicitors. Mr Peto submitted, however, that once the committal application had been validly served, the previous Service Orders applied to permit service by alternative means of any further documents in the committal proceedings, including the Listing Order, without the need for any further order. He relied on *Frame Investments Ltd v Airh Ltd* (26th May 1988, unreported) as a case showing that the court would dispense with the requirement for personal service in 'very exceptional circumstances'.

39. Finally on this question, Mr Peto submitted that if the point had been taken below, the respondents would have been able to apply for an order retrospectively validating the service of the Listing Order or dispensing with it pursuant to CPR 6.27 or 6.28 and that such an order would have been made in circumstances where the appellants undoubtedly knew of the hearing date. Accordingly the respondents would be prejudiced if the appellants were now allowed to take this point for the first time on appeal.

Was service of the Listing Order valid?

40. I propose to begin by considering whether service of the Listing Order by alternative means was valid, without prejudice to whether the appellants should be allowed to take the point. As Ms Pugh and Mr Leonard submitted, the point is of some general importance and we heard full argument upon it.

41. Service of an application to commit for contempt is governed by CPR 81.5. The current version of that rule, in force since 1st October 2020 and applicable in the present case, provides as follows:

> '(1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
>
> (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, and alleged contempt is committed—
>
> (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
>
> (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
>
> (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contact application; and the judge shall consider written representations from the parties and determine the issue on the

> papers, without (unless the judge directs otherwise) an oral hearing.'

42. In the present case the contempt application and evidence in support was validly served on CRS as the appellants' solicitors pursuant to paragraph (2) of this rule. CRS did not object in writing and it is therefore to be inferred that they provided the appellants with a copy of the application and supporting evidence and took all reasonable steps to ensure that the appellants understood them.

43. Although CPR 81.5 applies in terms only to the contempt application and evidence in support, basic fairness requires that its provisions should apply equally to other documents which a defendant to the application needs to have in order to defend itself. These include documents such as the Listing Order. Self-evidently, if the defendant does not know when the hearing will take place, it cannot properly defend itself. Accordingly such documents must either be served personally, or must be served on the defendant's legal representative on the record, or an application must be made for a direction 'otherwise in accordance with Part 6', which may include an order for service by alternative means or even, in an appropriate case, that service be dispensed with.

44. In principle, I would hold that such an application must be made in the contempt proceedings, and that it is not sufficient that an order for service of 'all other documents' by alternative means has been made in an earlier phase of the proceedings. I accept the submission, summarised at [35] above, that because of the 'high standard of procedural fairness' required in contempt proceedings, it is necessary for the court to consider specifically whether service by alternative means is appropriate to bring the documents in question to the defendant's attention in proceedings (or a phase of proceedings) which are essentially penal and where their liberty is at stake.

45. The cases cited to us do not directly determine this question, but their general tenor is in accordance with the view which I have reached.

46. *Chiltern District Council v Keane* [1985] 1 WLR 619 was a case under RSC Order 52, rule 4, which required personal service on the alleged contemnor of the notice of motion and affidavit in support, but with a power to dispense with service if the court thought it just to do so. This court held that the rule applied equally to an order fixing a date for an adjourned hearing of the application. Sir John Donaldson MR, who described the alleged contemnor's case as one which 'totally lacked the ingredient of merit', nevertheless said:

> 'I can for my part well understand that Goulding J … came to the conclusion that there was a strong probability … that Mr Keane in fact knew perfectly well that the hearing was to be on 1 February. But what is said by Mr Munby is that, however that may be, where a hearing is adjourned to a date to be notified, the new date must be notified to the alleged contemnor by personal service. It is quite different if the court adjourned to a date of which the defendant is told in court.
>
> I think that is right, because the reasons for requiring personal service of the notice of motion in the first place apply equally to an adjourned hearing if it is not merely a continuation of the

> hearing, but consists either of a revival of the notice of motion, as was the case in *Aldous v Whetton* (unreported), 29 November, 1978; Court of Appeal (Civil Division) Transcript No. 78 of 1978 or, as here, an adjournment to a date to be fixed.'

47. The court did not consider whether it was appropriate to exercise the power to dispense with service, perhaps because there were other problems with the notice of motion in any event.

48. *The Eastern Venture* [1985] 1 All ER 923 concerned oral examination of a judgment debtor under RSC Order 48, rule 1. The debtor attended the hearing, which was then adjourned, initially until 6th June 1983 but subsequently, by amendment of the order, to 4th August 1983. Although the debtor was represented by solicitors and counsel, the order adjourning the hearing to 4th August was not served personally on him. When he did not attend, he was held to be in contempt. This court held that, under the rules as they then stood, personal service of the order adjourning the hearing to 4th August was required. Lord Justice Dunn emphasised that:

> ' … committal for contempt of court is an extreme remedy and, whatever the relationship between the solicitors may be and whatever knowledge in fact the person to be proceeded against for contempt of court has, none the less the committal proceedings will be bad unless the rules are strictly complied with. The reason for this of course is that committal proceedings are not like civil actions for breach of contract: they concern the liberty of the subject.'

49. It would not be productive to attempt to analyse the similarities or differences between the Rules of the Supreme Court and the current regime under the CPR. What matters for present purposes is the emphasis on the material difference between ordinary civil actions seeking private law remedies and quasi-criminal proceedings for contempt seeking the committal of a defendant to prison, even when made in the course of ordinary civil proceedings.

50. *Frame Investments Ltd v Airh Ltd* (26th May 1988, unreported) is the case relied on by Mr Peto as showing that the court will dispense with the requirement for personal service in 'very exceptional circumstances'. The defendant, a solicitor, who was represented, failed to comply with an order to deliver up his passport and did not attend a hearing at which he was due to be cross-examined, claiming to be unwell. The judge adjourned the hearing, whereupon the defendant left the country, in breach of an order that he should not do so. The judge imposed a prison sentence for contempt. Months later, the defendant appealed, contending that the order sentencing him to prison was bad because there had been no personal service on him of the date of the adjourned hearing.

51. After referring to *Chiltern District Council v Keane* [1985] 1 WLR 619 and the unreported case of *Aldous v Whetton*, Lord Justice O'Connor recognised that there might be 'very exceptional circumstances' which would make the requirement for personal service inapplicable; but in any event, if that was wrong, on the facts of the case the court would exercise its express power to dispense with such service. Lord Justice Bingham also recognised the possibility that exceptional circumstances might

render the requirement for personal service in the rules inapplicable, but would also if necessary have exercised the power to dispense with such service. Lord Justice Taylor described the case as 'strikingly exceptional', agreeing that it was an appropriate case to exercise the power to dispense with service.

52. Thus a majority of the Court of Appeal was prepared to hold that, under the then existing County Court Rules which were in materially the same terms as the then applicable Rules of the Supreme Court, the requirement for personal service did not apply in 'exceptional' or 'very exceptional' circumstances, albeit that this was unnecessary for the decision as the straightforward route for dismissing the defendant's appeal was to exercise an express power to dispense with service. I would respectfully suggest that this unreported case, which in any event is not binding as to the position under the current rules, plainly reached the right result on the facts, but cannot be regarded as allowing the court to disregard the requirements of the rules as to service merely because a case can be characterised as 'exceptional' or 'very exceptional'. That would introduce unacceptable uncertainty which is entirely unnecessary when the court already has express power to order service by alternative means or even, in an appropriate case, to dispense with service.

53. In more recent times, *ICBC Standard Bank Plc v Erdenet Mining Corporation LLC* [2017] EWHC 3135 (QB) was a case decided under the pre-2020 version of CPR 81. As in this case, an order had been made for service of 'any documents' in relation to the proceedings, which in *Erdenet* were to be served on the defendant's solicitors. The issue was whether this avoided the then applicable requirement in CPR 81 for personal service of a committal application on the defendant. Disagreeing with previous first instance authority, Mrs Justice Cockerill held that it did not, 'particularly bearing in mind that when one moves into the regime of committal/sequestration, one moves into a different regime which has specific rules'.

54. Although this case turned on the terms of the then applicable CPR 81, the underlying principle is the same: committal proceedings are different from ordinary civil proceedings and, if an order for service by alternative means is to apply in committal proceedings, the court needs to have given specific consideration to the appropriateness of that course, bearing in mind what is at stake in such proceedings. However, on the facts, Mrs Justice Cockerill was prepared to dispense with the requirement for personal service of the contempt application: the application had in fact been served on the defendant's solicitors; the defendant was aware of it and had a reasonable opportunity to present its case; and the defendant's decision not to instruct those solicitors in relation to the contempt application was a tactical attempt to frustrate the claimant's attempts to secure compliance with the court's order.

55. Thus *Erdenet* demonstrates a strict approach to the need for valid service, mitigated by the court's power in an appropriate case to dispense with such service.

56. For these reasons I would hold, if it is open to the appellants to take the point, that service of the Listing Order on them by the alternative means specified in the Service Orders was invalid. Those orders permitting service of 'any other documents' by alternative means did not apply to orders or other documents in contempt proceedings. That conclusion, however, is without prejudice to the court's power to order service by alternative means or to dispense with service pursuant to CPR 6.27 and 6.28, so long as that power was exercised specifically for the purpose of the contempt proceedings.

57. If it is right that service of the Listing Order on the appellants was invalid, their application under CPR 39.3 was unnecessary and misconceived. That rule applies only where there has been a hearing in the absence of a party who has been validly served under the rules: *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252, [2007] 1 WLR 962. It is therefore unnecessary to say anything more about the CPR 39.3 application save that, if the rule had applied (as it would have done on the basis of the appellants' concession below that they had been validly served), I can discern no error in the judge's dismissal of the application.

Should the appellants be allowed to take the point?

58. I turn now to the question whether the appellants should be allowed to take the point that service of the Listing Order by the alternative means specified in the Service Orders was invalid in circumstances where they conceded in the court below that the service was valid.

59. The circumstances in which the court will allow a new point of law to be taken for the first time on appeal were summarised by Lord Justice Popplewell in *ADM International Sarl v Grain House International SA* [2024] EWCA Civ 33, itself a contempt case:

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

60. The 'cases cited above' were *Pittalis v Grant* [1989] QB 605, *Singh v Dass* [2019] EWCA Civ 360 at [15] to [18] and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 at [23] to [28]. See also, for completeness, *Rhine Shipping DMCC v Vitol SA* [2024] EWCA Civ 580, handed down on the same day as the hearing of this appeal, at [23] to [25]. Taken together, the cases demonstrate that a factor of particular importance is whether, if the point had been taken in the court below, the case would have been run differently by the other party.

61. In my judgment five points are of critical significance in assessing where the interests of justice lie in this case. The first is that the judge was undoubtedly right to find, for the reasons which he gave, that the purported service on Abdalla by text to the '4488 telephone number and on Majid by email to the majid@faloil.co.ae address was effective to bring to the appellants' attention the date of the liability hearing. In brief summary: there was no suggestion that Abdalla's telephone was no longer in use; on the contrary, the '4488 number had been given as the contact number for both appellants in proceedings in Sharjah; there was no evidence of any difficulty in delivering documents to Majid's email address; on the contrary, there was positive evidence that the email address was still in use and was monitored; and the evidence was that the appellants lived close to each other and were in close contact. Moreover, these were not the only means adopted by the claimants to ensure that the appellants were notified of the hearing date.

62. In addition, Abdalla was represented by a different firm of solicitors, Acuity Law Ltd, in proceedings relating to the Bridge Apartment and those solicitors were aware of the hearing date of 4th October: although they were not instructed in the contempt proceedings, it was highly likely that they would have told Abdalla or Majid (who held a power of attorney for his father) about it.

63. None of these matters were addressed in Majid 3, which merely contained a wholly implausible claim to have been 'completely in the dark' since December 2022, despite the terms of the judge's order when granting an adjournment of the sentencing hearing.

64. Accordingly, notwithstanding the invalidity of the service, sending the Listing Order in this way achieved all the objects which valid service is intended to ensure. It enabled the appellants to instruct solicitors, to adduce evidence, and to be present at the hearing if they had wished to do so. Their choice to do none of these things was deliberate, all of a piece with their attempts throughout these proceedings to frustrate the freezing order against them.

65. Second, if the point had been taken below, the respondents would have had an unanswerable case that service of the Listing Order should be dispensed with pursuant to CPR 6.28: see the discussion at paragraph 6.28.1 of the White Book 2024, which suggests that (in contrast to an application to dispense with service of an initiating document under CPR 6.16 which expressly requires 'exceptional circumstances') an application under CPR 6.28 does not require 'exceptional circumstances'. As it was, because the validity of the service of the Listing Order was conceded, there was no need for any such application to be made. Accordingly the appellants will not be prejudiced if they are not allowed to take the point in this court: if they had taken it below, it would have been met by an application to dispense with service and would not have availed them.

66. Third, if the appeal had now to be allowed and the case was remitted to the Commercial Court to reconsider the question of contempt, with a further potential appeal as of right to this court, the claimants would be prejudiced by the resulting substantial delay, while the appellants would be rewarded by their playing of tactical games.

67. Fourth, although their deliberate absence from the liability hearing meant that they did not adduce any evidence in response to the contempt application, they have now adduced the evidence on which they wish to rely in the form of Majid 3. That evidence was considered by the judge for the purpose of the CPR 39.3 application and for the purpose of sentence. The case which the appellants wish to make was, therefore, fully before the court, but the judge rightly regarded their evidence as deliberately false. It is not a situation, therefore, where the appellants had no opportunity to advance their case. They had such an opportunity, but chose not to take advantage of it at the 4th October 2023 hearing. They then had, and did take advantage of, a second opportunity to make the case they wished to make. They did so by attempting to mislead the court with a false case, but the judge saw through it.

68. For these reasons, although there was some faint reference to Article 6 of the ECHR at the hearing, there is no possible infringement of the appellants' Article 6 rights in this case.

69. Fifth, the only suggestion of further evidence which the appellants might wish to adduce is evidence of UAE law to support their assertion that it would have been unlawful for them to disclose information about the assets of the companies which they controlled. However, the judge dealt comprehensively with this issue. In his liability judgment he said this:

> '37. The third reason [for not producing documents given in Majid 2] was, as I have said, a reference to UAE confidentiality rules. The legal opinion relied on asserted that Abdalla and Majid Al Sari could be exposed to penalties under the UAE Penal Code, or consequent civil liability, for disclosing information confidential to the companies of which they were the managers. However, in the first place, I am not satisfied that, even if that were the case, it would be a justification for non-compliance with the disclosure orders in the worldwide freezing order, and the continuation order. If well-founded at all, it would have been a basis to have sought a variation or amendment to the worldwide freezing order or continuation order. Secondly, there is good reason to believe that it is a wrong view of the law, because disclosure is not prohibited under the relevant UAE provision if it is permitted by law, and that, in the view of Mr Al Zarouni, the expert whose report has been exhibited by the Bank, would include the orders of a foreign court. Thirdly, even if the legal opinion were correct, the risk of prosecution of Abdalla or Majid Al Sari would appear to rest on the fanciful suggestion that the Al Sari companies under their control would refuse to authorise the disclosure, which is particularly unrealistic in circumstances where three of the companies are themselves the subject of the worldwide freezing order and required to give disclosure.'

70. In his 20th November 2023 judgment, dealing with a complaint by the appellants that the Bank's expert, Mr Al Zarouni, was not independent, the judge explained that his findings of contempt did not depend on UAE law:

> '48. The second [argument] related to the supposed lack of independence of Mr Al Zarouni. The complaint is that Mr Al Zarouni lacked independence because he had previously been instructed on various other matters by the Al Saris. In my judgment the complaint goes nowhere. My decision of 4 October 2023 did not depend on findings as to UAE law. The primary basis of my finding in para. 37 was that, even if there were an argument that Abdalla and Majid Al Sari could have been exposed to penalties under the UAE Penal Code, that would not have been a justification for non-compliance, as opposed to seeking some variation or amendment of the order. I also found that there was no real risk of prosecution even if there were some possible penalty under UAE law.'

71. Accordingly further evidence of UAE law would not assist the appellants.

72. Taking these points together, I have no doubt that the appellants should not be permitted to take the new point on appeal.

Other matters

73. As I have explained, the grounds of appeal adopt something of a scattergun approach, but Ms Pugh and Mr Leonard focused their submissions at the hearing on the service issues which I have addressed. I would add, however, that I can see no merit in any of the grounds of appeal. This was a clear case of contempt by the appellants and the judge's reasoning and conclusions to that effect are unassailable.

Sentence

74. The appellants did not challenge the principles summarised in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, [2019] 4 WLR 65 which the judge had applied. These include the need to consider both culpability and harm, as well as aggravating and mitigating factors, in a context where breach of a court order is always serious, because it undermines the administration of justice, so that a prison sentence is likely to be necessary. Moreover, because the maximum sentence of two years is comparatively short, that maximum is not reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.

75. The appellants' only real challenge to the sentence of 24 months' imprisonment imposed on them by the judge was a disparity argument. The submission was that there was no justification for imposing a greater sentence on them than the sentence of 21 months imposed on Mohamed: they had at least engaged with the proceedings to some extent, while Mohamed had simply ignored them.

76. I would reject this submission. As noted in *Archbold, Criminal Pleading, Evidence and Practice* (2024) at para 5A-99, disparity 'is generally a difficult ground on which to achieve a reduction in sentence' in criminal cases. What matters is whether the sentence imposed on the particular defendant is appropriate in the circumstances of the case. If it is, the fact that a somewhat lesser sentence was imposed on a co-defendant in a broadly similar position does not matter. The same approach should apply in contempt cases. In my judgment this case can fairly be regarded as falling within the most serious category of contempt cases and the sentence which the judge imposed on the appellants was fully justified.

77. Ms Pugh criticised the judge's treatment of the way in which the appellants had conducted the litigation as an aggravating factor. However, I would accept the submission of Mr Andrew Trotter, junior counsel for the claimants who dealt with this aspect of the case, that the appellants' conduct did indeed aggravate their contempt. For example, the way in which they had issued a jurisdiction challenge and then done nothing to advance it while seeking numerous extensions of time had delayed the summary judgment and contempt applications, while the deliberate falsehoods in Majid 3 had attempted to mislead the court and to delay further the resolution of the contempt application. While in general the fact that a contemnor has attempted unsuccessfully to defend himself against the contempt allegation does not amount to an aggravating factor

for the purpose of sentence, the way in which that defence has been conducted may do so in some circumstances. This is such a case.

Conclusion

78. For these reasons I would dismiss the appeal.

LADY JUSTICE ELISABETH LAING:

79. I agree.

LADY JUSTICE NICOLA DAVIES:

80. I also agree.