Neutral Citation Number: [2011] EWCA Civ 1241

Case No: A3/2010/2730

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
MRS. JUSTICE PROUDMAN
HC10CO2462

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2011

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE CARNWATH
and
LORD JUSTICE JACKSON

- -

Between :

JSC BTA Bank	**Claimant**
- and -	
(1) ROMAN VLADIMIROVICH SOLODCHENKO	**Defendants**
(2) PAUL KYTHREOTIS	
AND OTHERS	

- -
- -

Mr. Stephen Smith QC and Ms. Emily Gillett (instructed by **Hogan Lovells International LLP**) for the **Claimant**
The second defendant was not present or represented

Hearing dates : 10 October 2011

- -

Approved Judgment

Lord Justice Jackson :

1. This judgment is in five parts, namely:

Part 1 Introduction

Part 2 The Facts

Part 3 The Appeal to the Court of Appeal

Part 4 The Law

Part 5 Decision.

Part 1. Introduction

2. This is an appeal by a claimant against the refusal by the High Court to impose any sentence, other than an order for costs, upon a defendant who was in contempt of court.

3. Section 12 of the Contempt of Court Act 1981 specifies that the maximum sentence which the High Court can impose upon committal for contempt is two years imprisonment.

4. In this judgment I shall use the following abbreviations:

> "The bank" means JSC BTA Bank, the claimant in this action and the appellant in the present appeal.
> "Mr Kythreotis" means Mr Paul Kythreotis, the second defendant in this action and the respondent in the present appeal.
> "Hogan Lovells" means Hogan Lovells International LLP, the bank's solicitors.
> "Holman Fenwick" means Holman Fenwick Willan, Mr Kythreotis' solicitors between April and July 2011.
> "The July order" means the worldwide freezing order made on 23rd July 2010 and sealed on 26th July 2010, as set out in Part 2 below.
> "BVI" means British Virgin Islands.

5. After these brief introductory remarks I must now turn to the facts.

Part 2. The Facts

6. The bank is incorporated in the Republic of Kazakhstan. Between 2005 and February 2009 Mr Roman Solodchenko was chairman of the bank's management board and Mr Mukhtar Ablyazov was chairman of the bank's board of directors.

7. Mr Kythreotis is a British citizen aged 44 and living in Cyprus. He is a lawyer by training. He is in the business of providing corporate nominee services through Starport Management Ltd and PKM Management Ltd.

8. The companies whose affairs Mr Kythreotis has administered include five companies registered in the BVI. They are Celina Holding Investments Ltd, formerly Bubris Investments Ltd ("Bubris"); Shoreline Investment Holdings Ltd, formerly Granta Investment Holdings Ltd; Nafazko Investments Ltd ; Olofu Investments Ltd; Mymana Holdings Investments Ltd, formerly Kyma Investment Holdings Ltd. I shall refer to those five companies collectively as "the BVI companies".

9. In June 2008 the BVI companies sold or purported to sell certain securities to Alfa Equity Investments Ltd ("Alfa Equity"). The existence of these transactions appears not to be in dispute between the parties to this appeal, in view of documentation disclosed by Mr Kythreotis. They have been referred to as "the June transactions" and I shall use that term.

10. In February 2009 the bank, which was in financial difficulties, came into public ownership. The Kazakh Government acquired 75% of the bank's shares in return for a substantial cash injection. Following that change of ownership, there were substantial changes in the bank's management. Both Mr Solodchenko and Mr Ablyazov were dismissed.

11. The bank, under new ownership and new management, began to investigate what it believed to be the substantial and fraudulent depredation of its assets. The bank then commenced a number of actions, including the present proceedings, in order to recover its losses.

12. The following is a brief summary of the bank's claim in this action. In January 2009 Mr Solodchenko arranged for certain bonds belonging to the bank, worth about US $290 million, to be used to fulfil the obligations of the BVI companies under the June transactions. The bank received no consideration for this loss of its assets. Thus the payments received by the BVI companies under the June transactions, totalling about US $290 million, represented money belonging to the bank. The BVI companies transferred that money to four further companies, namely Mabco Inc, Calernen Finance Inc, Astrogold Corp ("Astrogold") and Grundberg plc. They have been referred to as "the further recipients", an expression which I shall adopt. Where the money went after that is still under investigation.

13. The bank seeks to recover its losses against all who were involved in the misappropriation of its assets. In particular, it alleges that Eastbridge Capital Ltd ("Eastbridge") gave instructions for the incorporation of the BVI companies and for many of the subsequent fraudulent transactions. It alleges that Mr Kythreotis implemented many of those transactions with full knowledge of the fraud, that he was a director of Bubris and Astrogold, and that he backdated documents in order to conceal the true beneficial ownership of the BVI companies. It alleges that Mr Syrym Shalabeyev, Mr Aleksandr Udovenko and Mr Anatoly Ereshchenko were directors of Eastbridge and closely involved in the fraud; and that Park Hill Capital Ltd ("Park Hill") took over the business of Eastbridge as from January 2010. The bank alleges that Mr Ablyazov is the ultimate undisclosed beneficial owner of both the BVI companies and the further recipients; and that Mr Ablyazov, using his senior position in the bank, facilitated the transfer of valuable assets from the bank to the BVI companies.

14. The bank commenced this action in July 2010 against Mr Solodchenko as first defendant, Mr Kythreotis as second defendant, the BVI companies as fourth to eighth defendants and the further recipients as ninth to twelfth defendants. There was also a third defendant, Mr Jason Hercules (a business associate of Mr Kythreotis), but he has now dropped out of the action. Subsequently, as and when further information became available, Eastbridge, Mr Shalabeyev, Mr Udovenko, Park Hill, Mr Ereshchenko and Mr Ablyazov were joined as thirteenth to eighteenth defendants.

15. On 23rd July 2010 the bank, without notice, applied for and obtained a worldwide freezing order, a proprietary injunction and related relief against the second defendant, Mr Kythreotis. The order was sealed on 26th July and served on Mr Kythreotis on 29th July. Paragraph 5 of the order stated that the frozen amount of Mr Kythreotis' assets was US $68,286,517. The order also contained disclosure provisions. Mr Kythreotis was required to provide details of his assets over $10,000 in value and to answer a series of questions set out in schedule D to the order ("the schedule D questions"). The schedule D questions sought pertinent information about the transfer of money/securities from the bank to the BVI companies, thence to the further recipients and beyond. The specific transactions to which the schedule D questions related were set out in schedule C to the order ("the schedule C transactions"). These comprised the June transactions, the payment of monies by Alfa Equity to the BVI companies, the payment of monies by the BVI companies to the further recipients, the subsequent payment of those monies by the further recipients to others, the transfer of securities from the bank to the BVI companies and from the BVI companies to Alfa Equity. Mr Kythreotis was required to provide written answers to the schedule D questions together with supporting evidence within seven working days, i.e. by 10th August, and to verify the information by affidavit within ten working days, i.e. by 13th August 2010. I shall refer to these obligations imposed by the freezing order as "the disclosure obligations".

16. On the return date, 6th August 2010, none of the defendants was present or represented. Mr Justice Newey continued the worldwide freezing order until trial or further order and directed that the disclosure obligations should remain in force.

17. Mr Kythreotis did not comply with the disclosure obligations by the due dates. Accordingly, on 25th August the bank applied to commit Mr Kythreotis for contempt. On 27th August that application was served on Mr Kythreotis and he was notified of the hearing date, namely 21st September.

18. On 20th September 2010 (the day before the hearing) a firm of solicitors, Byrne & Partners LLP, contacted Hogan Lovells and stated that they were instructed on behalf of Mr Kythreotis. On the same day they served a draft affidavit of Mr Kythreotis, in which he admitted his failure to comply with the disclosure obligations and apologised to the court for that failure. Mr Kythreotis stated that he would now set about complying with his disclosure obligations and he expected that he would be able to do so by 28th September.

19. The committal proceedings duly came on for hearing on 21st and 22nd September 2010 before Mrs Justice Proudman ("the judge"). Mr Kythreotis did not attend but was represented by counsel. Mr Kythreotis admitted through counsel that he had acted intentionally in disregard of the July order and thus was in contempt of court. He

asked for time to purge his contempt, namely until 28th September. The judge in her judgment of 22nd September 2010 identified the matters which had to be proved in order to establish contempt and held that they had been proved. Accordingly, she made a finding that Mr Kythreotis was in contempt. She adjourned the question of sentence until 29th September, principally in order to see whether Mr Kythreotis would fulfil his promise to make disclosure.

20. Neither party appealed against that decision. Unsurprisingly, Mr Kythreotis did not challenge the finding of contempt and the bank did not challenge the decision to adjourn sentence for a week.

21. On 28th September 2010 (the day before the adjourned hearing) Mr Kythreotis served his second affidavit together with a quantity of documents. Mr Kythreotis maintained that he had simply provided nominee services in respect of the BVI companies and that he had no personal involvement in the various transactions. He asserted in paragraph 68 that the hard copy documents which he was disclosing represented "his entire knowledge" of the schedule C transactions. He also gave certain information about the beneficial ownership of the BVI companies.

22. The hearing on 29th September 2010 was adjourned until 19th October, in order to allow time for (a) consideration of the new material and (b) Mr Kythreotis to disclose certain further material as ordered by the judge.

23. On 18th October 2010 (the day before the adjourned hearing) Mr Kythreotis served his third affidavit. That affidavit supplemented the information previously provided and corrected certain errors in his second affidavit. Mr Kythreotis also explained that the proceedings had had a damaging effect upon his business and had caused him to incur very substantial costs. He repeated his apologies for his initial non-compliance with the July order.

24. The adjourned hearing duly took place on 19th October 2010. Mr Kythreotis did not attend but was represented by counsel. There was considerable argument as to whether or not Mr Kythreotis had by then, albeit belatedly, complied with his disclosure obligations. Mr Stephen Smith QC for the bank submitted that the disclosure given by Mr Kythreotis was incomplete and inaccurate. Mr Paul Stanley QC for the respondent submitted that Mr Kythreotis had made full disclosure and thus had purged his contempt. The judge reserved her judgment.

25. On 2nd November 2010 the judge delivered her reserved judgment, which is now reported as *JSC BTA Bank v Solodchenko* [2010] EWHC 2843 (Ch), [2011] 1 WLR 906. The judge held that she should sentence Mr Kythreotis on the basis that the contempt had been purged, without making any finding as to whether there had been full and proper compliance with the disclosure obligations: see paragraph 65. The judge referred to the matters urged in mitigation. She noted that the bank had not proved any specific prejudice caused by the delay, although it had been set back by some two months in its enquiries. She noted that the contempt was deliberate, but on the other hand Mr Kythreotis had subsequently co-operated by answering the schedule D questions and "providing a huge amount of disclosure at very substantial expense". The judge concluded that the costs incurred by Mr Kythreotis in making disclosure coupled with his liability for the costs of the committal proceedings were "punishment

enough". Accordingly the judge imposed no sentence for Mr Kythreotis' contempt, beyond ordering him to pay costs on an indemnity basis.

26. The bank was aggrieved by the judge's failure to impose any substantive sentence for the contempt which had been proved. Accordingly it appealed, with permission, to the Court of Appeal.

Part 3. The Appeal To The Court of Appeal

27. By an appellant's notice dated 23rd November 2010 the bank appealed to the Court of Appeal against the judge's failure to impose any substantive sentence for contempt of court. The principal ground of appeal was that the judge had erred in dealing with Mr Kythreotis on the basis that he had purged his contempt. Mr Kythreotis resisted the appeal on the grounds that the judge's decision was correct both for the reasons which she gave and for additional reasons, as set out Mr Stanley's skeleton argument dated 11th January 2011.

28. On 7th March 2011 the bank issued an application to adduce fresh evidence at the hearing of its appeal, pursuant to CPR rule 52.11 (2). This application was based upon material which the bank had obtained since the hearing on 19th October 2010. The application was supported by the twelfth affidavit of Mr Christopher Hardman (a partner at Hogan Lovells) sworn on 2nd March 2011. Mr Hardman exhibited a number of documents which the bank had obtained from Cyprus. On the basis of that material, Mr Hardman contended that Mr Kythreotis had presented false evidence to the judge and it was now clear that Mr Kythreotis had not purged his contempt. In particular, it appeared that Mr Kythreotis had backdated documents, in order to conceal the true beneficial ownership of the BVI companies.

29. On 9th March 2011, two days after that application was issued, Byrne & Partners ceased to act for Mr Kythreotis. On 5th April Mr Stanley wrote to the Court of Appeal withdrawing the skeleton argument which he had previously signed on behalf of Mr Kythreotis.

30. On 6th April 2011 Holman Fenwick Willan ("Holman Fenwick") came onto the scene as the new solicitors instructed by Mr Kythreotis. The Court of Appeal adjourned the hearing of the appeal, which had been listed for 12th to 14th April, in order to allow Mr Kythreotis' new legal team time to prepare the case. On 14th April the Court of Appeal granted the bank permission to adduce the proposed fresh evidence and directed that Mr Kythreotis should serve any evidence in response by 5th May.

31. On 5th May 2011 Mr Kythreotis served an affidavit in response to the bank's fresh evidence. Although not numbered, this was Mr Kythreotis' fourth affidavit and I shall so refer to it. In his fourth affidavit Mr Kythreotis admitted that his earlier evidence had been false and said that this was because he was "a frightened man". He alleged that he had been subject to threats, surveillance and intimidation by other defendants. Mr Kythreotis admitted that he had an "enormous" email archive, which he had not previously disclosed.

32. I will quote just three paragraphs from Mr Kythreotis' fourth affidavit:

> "42. Unfortunately I bent under this duress and allowed Affidavits to be sworn in which I gave false evidence that I learned of Mr. Sadykov's beneficial ownership of the relevant BVI companies in May 2010, asserted that I received a letter from Mr. Sadykov in which he said that he was the beneficial owner of the relevant BVI companies in or around May 2010 (it was received by me in September 2010) and omitted to make any reference to the September 2010 instructions, and omitted to make any reference to Mr. Shalabayev.
>
> 43. Also, although I do not positively remember this, I surmise that I would have also instructed my employees to make documents available to Byrne & Partners which documents did not include references to Mr. Shalabayev but did include the executed Sadykov documents less the September instructions.
>
> 44. I greatly regret that I did this and offer my sincere apologies to the Court for allowing the false evidence contained in paragraph 48 of my Second Affidavit to be put forward in my name".

33. At a directions hearing on 20th June 2011 Carnwath LJ ordered Mr Kythreotis to give disclosure in accordance with the original order of 26th July 2010 by 4th July 2011.

34. On 4th and 7th 2011 July Mr Kythreotis' solicitors delivered thirteen ring files of material derived from the email archive. In two affidavits sworn on 27th June and 8th July Mr Kythreotis asserted that he was having difficulty in funding the disclosure exercise. I shall refer to these affidavits as his fifth and sixth affidavits.

35. In his sixth affidavit Mr Kythreotis described the emails recently disclosed as "the first cut" in respect of the period 28th February 2008 to 21st October 2010. In neither his fifth nor his sixth affidavit did Mr Kythreotis set out any answers to the schedule C questions or any corrections to his previous answers to those questions.

36. On 14th July 2011 Mr Hardman swore his sixteenth affidavit. He exhibited a number of documents, which he contended showed that Mr Kythreotis' recent evidence was false in important respects. In particular, he produced an email dated 12th October 2010 in which Mr Kythreotis was asserting a claim for £4.5 million against Mr Shalabeyev and Mr Ablyazov.

37. A few days after receipt of Mr Hardman's sixteenth affidavit, Holman Fenwick applied to come off the record. They duly did so on 20th July.

38. The appeal was listed for hearing on Thursday 21st July 2011. At 3.37 p.m on 20th July Mr Kythreotis applied by email from Cyprus for an adjournment of the hearing. At the hearing on 21st July the court reluctantly granted an adjournment, in view of the fact that Mr Kythreotis had become unrepresented at a late stage. The court, of which I was a member, gave three separate judgments explaining why it was granting an adjournment, despite the bank's opposition.

39. In the course of her judgment Arden LJ, who was presiding at the hearing on 21st July, said this:

> "We are not today dealing with any application for evidence to be heard by video link. If the respondent wishes to make such an application, he should do so as quickly as possible by notice to the appellants and to this court. This court has video link facilities, but I am informed by an officer of this court that it does not have funding for video linking from any overseas base. So the question of how it would be funded if the court gave permission would have to be considered, and suitable arrangement made".

40. Owing to the intervention of the long vacation, the appeal did not come back for a hearing until Monday 10th October 2011.

41. During that period of eleven weeks Mr Kythreotis did not make any further disclosure. He did not lodge any further evidence or submit any skeleton argument. Indeed Mr Kythreotis did not make any further move until Friday 7th October, which was the last working day before the hearing. On that date Mr Kythreotis sent an email to the court referring to a number of privileged matters and making allegations against Hogan Lovells. He asserted that he had purged his contempt by the disclosure given in July 2011. Mr Kythreotis stated that he had fears about coming to London for the hearing. He added that, if it would assist, he was "happy to appear via video link for the hearing next week". The court considered a redacted version of this document, omitting all reference to privileged matters.

42. Self-evidently, it was impossible at that late stage for Mr Kythreotis to appear by video link on 10th October, because Mr Kythreotis had taken none of the steps identified as necessary by Arden LJ in her judgment of 21st July. In those circumstances the hearing on 10th October proceeded without Mr Kythreotis being present or represented.

43. At the hearing on 10th October Mr Smith on behalf of the bank accepted that it was no longer necessary for the court to determine whether the judge had been correct in her decision on the basis of the evidence before her, although he maintained his criticisms of that decision. Instead, he concentrated his submissions on the fresh evidence from both parties before the court. He submitted that it was now clear that Mr Kythreotis had not purged his contempt at the time of the hearing on 18th October 2010. Therefore the judge had dealt with the case on a false basis. The Court of Appeal should set aside the judge's decision and impose an appropriate prison sentence.

44. Before addressing the issues before the court, I must first review the relevant law.

Part 4. The Law

45. The form of contempt which is in issue in the present case is non-compliance with a court order. This is civil contempt. The nature and scope of civil contempt is clearly described in *Arlidge, Eady & Smith on Contempt* (third edition, 2005) at chapter 12. The sentence for such contempt performs a number of functions. First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances, it

provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question.

46. In *Lightfoot v Lightfoot* [1989] 1 FLR 414 a freezing order in matrimonial proceedings required the husband to pay money received into a solicitors' joint account. When he subsequently received £30,000, he did not pay that into the joint account but instead withdrew most of the money for himself. The Court of Appeal upheld a sentence of 18 months imprisonment. Lord Donaldson MR, with whom Butler-Sloss LJ agreed, said this at 416-417:

> "Sentences for contempt really fall into two different categories. There is the purely punitive sentence where the contemnor is being punished for a breach of an order which has occurred but which was a once and for all breach. A common example, of course, is a non-molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category.
> There is a second category which I might describe as a coercive sentence where the contemnor has been ordered to do something and is refusing to do it. Of course, a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing, but nevertheless, it also has a coercive element.
> Now, it is at that point that it is necessary to realize that in earlier times the courts would in such circumstances have imposed an indefinite sentence. That is to say a man would be committed to prison until such time as he purged his contempt by complying with the order. Under the Contempt of Court Act 1981 a limit has been placed on such sentences, that limit being 2 years. It would be consistent with the previous practice of the courts and give full effect to the modification required by statute if courts considered imposing a 2-year sentence when the contemnor was in continuing and wilful breach of court orders. Whilst there might be cases in which such a sentence would be disproportionately severe, any wilful defiance of the court and its orders is necessarily a very serious offence and if the contemnor is aggrieved he has a remedy in his own hands – he can seek his immediate release by ceasing his defiance, complying with the order and thereby purging his contempt."

47. In *Taylor Made Golf Company Inc v Rata & Rata* [1996] FSR 528 the defendants failed to comply with an *Anton Piller* order requiring the disclosure of information, service of affidavits and delivery up of articles and documents. Despite those breaches, it appears from the report that the plaintiff's solicitors succeeded in obtaining the relevant information and articles through other means. Both defendants admitted contempt and expressed contrition. Laddie J imposed what was for the defendants a swingeing fine, namely £75,000. At 536 he said:

> "During the course of this application it seemed to me that the penny was beginning to drop as far as these defendants were concerned. I think that they probably now realise the threat of imprisonment is real and that if they breach a court order in the future they probably can expect no mercy. For the moment, it is therefore not necessary for me to impose any custodial sentence but, on the other hand, the breach here was so serious that it must be reflected in a significant financial penalty on the partnership".

48. The fine in *Taylor* was not intended to coerce belated compliance with the *Anton Piller* order. The purpose of the fine was to punish the defendants for past conduct and to deter them from acting in breach of any future court orders.

49. In *Shalson v Russo* (Chancery Division, 9th July 2001) numerous contempts were proved. They comprised past breaches of a search order, past breaches of the disclosure provisions of a freezing order and continuing breaches of those disclosure provisions. Neuberger J imposed a total sentence of two years imprisonment. This included a number of concurrent sentences of six weeks in respect of past breaches. The judge explained that his objective was to maximise the incentive for future compliance. Because of the way in which this sentence was structured, the defendant would be able to apply for remission of 96 weeks of the sentence (i.e. two years less six weeks) in the event that he subsequently gave full disclosure.

50. In the ten years since *Shalson* there have been many contempt cases involving breaches of freezing orders. I have carefully studied all those first instance decisions which have been cited (a) by the bank or (b) by Mr Kythreotis in his initial skeleton argument for the appeal.

51. I shall not attempt to catalogue all those first instance decisions. 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: see Briggs J's ruling dated 27th June 2011: [2011] EWHC 819 (Ch).

52. Sometimes, in the case of continuing breaches, judges impose the maximum two year sentence but draw attention to the court's power to vary or discharge the sentence if the defendant makes disclosure. See, for example, *JSC BTA Bank v Stepanov* [2010] EWHC 794 (Ch) at [23].

53. Court of Appeal guidance on sentencing for this category of contempt is more sparse. However, in *Daltel Europe Ltd (In Liquidation) v Makki* [2006] EWCA Civ 94 the Court of Appeal upheld sentences of 12 months for a number of breaches of search and seizure orders and dishonestly verifying a statement of truth. The court referred to *Shalson* with apparent approval. The court accepted that some instances of non-disclosure are less serious than others.

54. In *Lexi Holdings plc v Luqman* [2010] EWCA Civ 1116 the Court of Appeal upheld sentences totalling 18 months for a number of contempts. Each contempt involved concealing or failing to disclose relevant information in an attempt to prevent recovery of the proceeds of fraud. Stanley Burnton LJ observed that these sentences might be regarded as "modest, possibly even lenient having regard to the conduct involved".

55. 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.

56. In the case of continuing breach, out of fairness to the contemnor, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches and (b) what portion of the sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive, but not binding upon a future court.

57. It should also be noted that what the court is passing is a nominal sentence. The actual time spent in prison will be less, because of remission, possible release on tagging and so forth. The court does not have regard to those factors in determining the proper sentence in any case.

58. Aided by this review of authority, I must now reach a decision in respect of the present appeal.

Part 5. Decision

59. The judge's sentencing decision was based upon the assumption that by the 2nd November 2010 (the date of judgment below) Mr Kythreotis had purged his contempt. It is clear from the fresh evidence and indeed from Mr Kythreotis' admissions that that assumption was incorrect. It therefore follows that the judge's decision cannot stand.

60. It would be wasteful of costs and serve no useful purpose to remit this case to the judge so that she can pass sentence on the true basis. This court is now seized of the case and in possession of all relevant facts. The proper course is for this court to determine what was the proper sentence for contempt as at 2nd November 2010 on the basis of the true facts, as opposed to the false evidence which Mr Kythreotis presented to the judge.

61. Cutting away the mass of detail which occupies the ten ring files before us, the pertinent facts are these:

(i) The contempt which the judge found proved was Mr Kythreotis' failure to comply with the disclosure provisions of the July freezing order during the period 29th July to 22nd September 2010.

(ii) In the pretence of purging his contempt, Mr Kythreotis made certain disclosure in late September and early October 2010.

(iii) In fact the disclosure which Mr Kythreotis made in September and October 2010 was misleading. His affidavit sworn on 28th September contained deliberate lies. Furthermore Mr Kythreotis concealed the existence of a huge archive of relevant emails.

(iv) Mr Kythreotis through instructions to his counsel on 18th October 2010 asserted that he had purged his contempt. In fact, as Mr Kythreotis (but not his counsel or solicitors) well knew, far from purging his contempt he had aggravated that contempt by putting forward false evidence.

62. Mr Kythreotis states that he was induced to make false disclosure because he was intimidated and threatened by other defendants. That assertion is inconsistent with Mr Kythreotis' email dated 12th October 2010. In that email he was demanding payment of £4.5 million from Mr Shalabayev and Mr Ablyazov, who are two key defendants for present purposes.

63. I reject the suggestion that Mr Kythreotis' false evidence and withholding of documents was induced by duress. In my view the present case conforms to the not uncommon paradigm in which the respondent to a freezing order deliberately refuses to comply.

64. Although Mr Kythreotis has been driven to disclose further emails, it is plain that he has not yet (a) provided proper answers to the schedule D questions or (b) disclosed all relevant documents, as required by paragraph 13 of the July order. This is therefore a case of continuing non-compliance.

65. In my view the proper sentence in the circumstances of this case is 21 months imprisonment.

66. The next question which it is appropriate to address in this case is what portion of that sentence should be served in any event as punishment for past non-compliance and what portion might be reduced or discharged in the event of prompt and full compliance in the future.

67. In *Shalson* Mr Justice Neuberger made the point that the shorter the punitive element of the sentence, the greater the incentive on the contemnor to comply by disclosing the information required. I agree. On the other hand there is also a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element of the sentence both punishes the contemnor and deters others from disregarding court orders.

68. In the present case Mr Kythreotis's contempt has been aggravated by his deliberately placing false evidence before the court at the sentencing hearing and misleading the judge.

69. In my view the punitive portion of the sentence in respect of Mr Kythreotis' past non-compliance should be nine months imprisonment. It should be made clear to Mr Kythreotis that it will be open to him in the event of prompt and full compliance with the disclosure provisions of the freezing order in the future to apply to the court to vary the sentence of 21 months imprisonment. However, it is the view of this court that any variation which may be made on that account should not reduce the sentence to less than nine months. This indication is not binding upon any future court, but I hope it will be of assistance if there is an application to vary the sentence

70. Let me now draw the threads together. If my Lords agree, the order of the judge will be discharged and there will be substituted a sentence of 21 months imprisonment.

Lord Justice Carnwath:

71. I agree.

The Master of the Rolls:

72. I also agree.