Neutral Citation Number: [2024] EWCA Civ 268

Case No: CA-2023-000833

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
His Honour Judge Pelling KC (sitting as a Judge of the High Court)
[2023] EWHC 788 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2024

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWISON
and
LORD JUSTICE MALES

- -

Between:

(1) NAVIGATOR EQUITIES LIMITED **(2) VLADIMIR ANATOLEVICH CHERNUKHIN**	**Appellants/ Claimants**
- and -	
OLEG VLADIMIROVICH DERIPASKA	**Respondent /Defendant**

- -
- -

Jonathan Crow CVO, KC and **James Weale** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellants**
Thomas Grant KC and **Caley Wright** (instructed by **Quillon Law LLP**) for the **Respondent**

Hearing dates: 5 & 6 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 20 March 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 against the order of His Honour Judge Pelling KC dismissing the claimants' application to commit Mr Oleg Deripaska to prison for contempt of court. It is the latest round in a bitter war between two adversaries who were once business partners, but now obviously loathe each other, and who each have seemingly unlimited funds with which to pursue the other.

2. The contempt alleged is that Mr Deripaska procured or permitted B-Finance Limited ('B-Finance'), a British Virgin Isles registered company which he controlled and which was the owner of about 53% of the shares in EN+ Group Plc ('EN+'), to vote in favour of a special resolution moving EN+'s domicile from Jersey to Russia. This is alleged to be in breach of an undertaking which Mr Deripaska had given to the court.

3. The judge held that the claimants had failed to prove their allegations to the criminal standard and therefore dismissed the application. I shall refer to the claimants' challenge to this conclusion as the committal appeal.

4. There is also an appeal against the judge's order that the claimants should pay part of Mr Deripaska's costs on the indemnity basis. I shall refer to this as the costs appeal.

Background

5. Much of the background to this appeal is set out in previous decisions of the Commercial Court and of this court, as well as in the judgment below. I shall limit this account to what is necessary in order to understand this appeal. Even so, because it is necessary to examine closely the way in which (as I conclude) the claimants' case has changed, I must describe the history of these proceedings in some detail.

6. In 2005 a joint venture was formed between, on the one hand, Mr Vladimir Chernukhin and his corporate vehicle and, on the other hand, Mr Deripaska and his corporate vehicle, for the development of a valuable site in the centre of Moscow. By December 2010, however, the parties had fallen out and Mr Deripaska staged an armed takeover of the joint venture business. That led to LCIA arbitration proceedings, pursuant to a shareholders' agreement between the parties, which culminated in an award dated 7th July 2017. The arbitral tribunal found the claimants' case proved and directed Mr Deripaska and his company to buy out the claimants' interest in the joint venture company for approximately US $95 million. By subsequent awards the tribunal made orders for payment of interest and costs.

7. The defendant and his company vehicle challenged the award under sections 67 and 68 of the Arbitration Act 1996, but the challenge failed following a five week trial before Mr Justice Teare (*Filatona Trading Ltd v Navigator Equities Ltd* [2019] EWHC 173 (Comm)). It is fair to say that neither Mr Chernukhin nor Mr Deripaska emerged with credit from the trial. An appeal to this court was dismissed on 6th February 2020 (*Filatona Trading Ltd v Navigator Equities Ltd* [2020] EWCA Civ 109) and permission to appeal to the Supreme Court was refused.

8. Meanwhile, on 16th April 2018, after the tribunal had published the substantive award, but before the Commercial Court had heard Mr Deripaska's challenges, the United States Department of the Treasury Office of Foreign Asset Controls ('OFAC') imposed

wide-ranging sanctions on Mr Deripaska and a number of companies controlled by him. These included (1) EN+, a Jersey registered company which was listed on the London Stock Exchange, and (2) B-Finance, a British Virgin Isles registered company which was the owner of about 53% of the shares in EN+. EN+ is the holding company for Rusal, one of the world's largest aluminium producers, and is a major supplier of energy in (among other places) Siberia. The press release issued by OFAC described Mr Deripaska as having acted on behalf of a senior official of the Russian Government and described his activities in lurid terms whose accuracy he disputes.

9. On 19th April 2018 Clifford Chance, the claimants' then solicitors, wrote to Bryan Cave Leighton Paisner ('BCLP'), the solicitors then acting for Mr Deripaska, noting press reports that the imposition of sanctions 'are already having a devastating impact on Mr Deripaska's business interests' and that, among other consequences, EN+ had lost roughly half its value. Clifford Chance expressed concern that 'Mr Deripaska may be taking or planning steps to dissipate his assets and/or repatriate them to Russia, where they will effectively be immune from enforcement' and requested the provision of security for the sums awarded.

10. That security was not provided, so the claimants applied for a worldwide freezing order against Mr Deripaska. The first affidavit of Ms Marie-Emmanuelle Berard of Clifford Chance, sworn in support of that application, stated that:

> 'On 6 April 2018, and as has been widely publicised in the international press, Mr Deripaska was made the subject of sanctions by the United States authorities. Those sanctions have had a significant and direct impact on Mr Deripaska's assets, and it appears that Mr Deripaska is now taking steps to liquidate certain of his most significant assets in the short-term. Further, the claimants are concerned that the wider effect of the sanctions is to encourage Mr Deripaska to repatriate his assets to Russia, where for the reasons set out below, I believe he retains substantial influence and/or otherwise take unjustifiable steps to restructure his assets in a way which will make it more difficult for third parties to enforce against them.'

11. In the light of this concern, the claimants requested that, in determining the value of Mr Deripaska's assets for the purpose of the freezing order, 'no account should be taken of any such assets based in Russia'. This provision was included in the order made by Mr Justice Robin Knowles on 11th May 2018 at a hearing which was effectively without notice.

12. Thereafter BCLP obtained a licence under the US sanctions legislation permitting them to act for Mr Deripaska. In a letter dated 23rd May 2018 they offered certain undertakings in return for discharge of the freezing order in what was described as 'a pragmatic attempt to avoid further disruption and prejudice', doing so on the basis that the order had been obtained wrongfully, without proper disclosure of material information and without proper grounds for such an order. BCLP suggested that the effect of Mr Deripaska's offer was that he would have made arrangements for assets with a value of well in excess of £125 million, of which he was the ultimate beneficial owner, to be made available in London to be held as security for the award. The letter concluded by saying that if the terms proposed were not acceptable, Mr Deripaska

reserved the right to make an immediate application to the court to set aside the freezing order. An application was duly issued.

13. The claimants' initial reaction was to reject this offer on the basis that it provided insufficient assurance that the award would be paid. Some further correspondence followed in which, among other things, the claimants expressed concern that security should be provided which did not depend on future enforcement action in Russia. By the time that the freezing order came back before the court on the return date, 19th June 2018, no agreement had been reached. At that hearing, however, Mr Justice Robin Knowles made clear that if the parties could not reach agreement, he would determine whether the freezing order should be continued or discharged. After a short adjournment, the parties did reach agreement, the result of which was that the undertakings which are at the heart of this appeal were given.

The undertakings

14. Three undertakings were given, by B-Finance (acting by its director Mr Anton Vishnevskiy), by Mr Deripaska, and by Reynolds Porter Chamberlain ('RPC') who were by then Mr Deripaska's solicitors (acting by their then senior partner). The undertakings must be read together as a package.

The B-Finance Undertaking

15. The B-Finance undertaking dated 28th June 2018, was as follows:

> '… 2) I am the sole Director of B-Finance Limited, a company organised and existing under the laws of the British Virgin Islands ... (the "Company"). The ultimate beneficial owner of the Company is Mr Deripaska.
>
> 3) I confirm and warrant that: (i) the Company is the legal owner of over 245,000,000 unencumbered shares in EN+ Group Plc (a company incorporated under the laws of Jersey) ("EN+"). Of these 45,500,000 are held in certificated form (the "**Shares**"); and (ii) the Company does not have any current or contingent liabilities which could result in a claim being made against the Shares. The total value of the Shares using the share price as at close on 19 June 2018 was £186,730,506.16. In reality, that value is likely to be considerably more.
>
> 4) I consider it to be in the best interests of the Company to enter into the below undertakings and I confirm and warrant that I have authority to give the undertakings contained in this letter and to bind the Company in so doing. …
>
> 5) I further hereby undertake to the court in connection with the above proceedings, in my capacity as Director and on behalf of the Company, as follows:
>
> (a) The Company will arrange for original share certificates in respect of the Shares ("**the Share Certificates**") to be

deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London.

(b) The Company will not dispose of the Shares or otherwise deal with them pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim Nos CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018-000121 between the Claimants on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "**Arbitration Claims**"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and the fulfilment of any obligation imposed on Mr Deripaska and/or Filatona by the Court or such written agreement, following which all undertakings contained in this letter shall immediately lapse.

(c) I and the Company will irrevocably instruct RPC to (i) hold the Share Certificates and not to deal with or dispose of or otherwise deal with the Shares in any way pending the final outcome of the Arbitration Claims, or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and (ii) provide an undertaking to the High Court of England & Wales to that effect.

(d) In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Arbitration Claims in favour of the Claimants, and in the event Mr Deripaska fails within 42 days to comply with any obligations to make payment required under the terms of any such Order or agreement or by the terms of any Share Purchase Agreement or Order as may be ordered or agreed, the Company will take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance (following which all undertakings contained in this letter shall immediately lapse). In this event, the Company will make such irrevocable instructions as are necessary such that the said sale proceeds shall be received into RPC's bank account and paid by RPC directly to the Claimants or as otherwise ordered or agreed so as to satisfy any liabilities of Mr Deripaska and/ or Filatona Trading Limited under a final judgment.

(e) The Company has not incurred and will not incur any liability that would have the effect of preventing, impeding or obstructing the fulfilment of the undertaking at sub-paragraph (d) above.

> 6) This letter shall be governed in all respects by English law and the courts of England shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter. For the avoidance of doubt, the Company and I hereby irrevocably submit to the English Court in relation to all matters arising out of the undertakings set out above. Furthermore, the Company and I will accept service of any documents which relate to these undertakings at the address set out in paragraph (2), above. …'

16. Mr Deripaska's undertaking, also dated 28th June 2018, was in the following terms:

> '… 2) I write further to: (i) the letter of today's date from Mr Anton Vishnevskiy, the director of B-Finance Limited and the undertakings to the court set out in that letter (the "B-Finance Letter"). For ease of reference I attach that letter herewith.
>
> 3) I confirm and warrant that, as stated in the B-Finance Letter, 1 am the ultimate beneficial owner of B-Finance Limited ("B-Finance"). I understand that both Mr Vishnevskiy and B-Finance's holding company, Fidelitas International Investments Corp ("Fidelitas"), are satisfied that it is in the best interests of B-Finance to give the undertakings. …
>
> 4) Once the undertakings have been provided by Mr Vishnevskiy on behalf of B-Finance, 1 understand that Fidelitas is unable to take any step to frustrate compliance with, and/or enforcement of, the undertakings. Nevertheless, and for the avoidance of doubt, I hereby further undertake to the court in connection with the above proceedings, as follows:
>
> a) I shall not take any step or procure the taking of any steps, whether directly or indirectly, in my capacity as ultimate beneficial owner or in any other capacity, which has the effect of preventing, impeding or obstructing the fulfilment of the undertakings set out in the B-Finance Letter as they may fall due for performance.
>
> b) I shall take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcement.
>
> c) I undertake to repeat these undertakings in an affidavit if so required.
>
> 5) I have had explained to me by my English lawyers the terms of the undertakings which I have given to the Court (set out above) and the consequences of breaching them. I understand that if those undertakings are breached I (and/or B-Finance) may be held to be in contempt of court and that I (and/or B-Finance

> and/or its directors as the case may be) may be imprisoned, fined or have my/their/its assets seized.
>
> 6) This letter (and all matters arising out of it) shall be governed in all respects by English law and the courts of England and Wales shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter. …'

17. Finally, the RPC undertaking, dated 29th June 2018, was as follows:

> '… I write further to the letter of today's date from Mr Anton Vishnevskiy, the director of B-Finance Limited ("the Company") and the undertakings to the court set out in that letter. For ease of reference I attach that letter herewith.
>
> I confirm that original share certificates ("**the Share Certificates**") in respect of 45,500,000 shares ("**the Shares**") in EN+ Group Plc (a company incorporated under the laws of Jersey) have been deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London.
>
> I hereby undertake to the court in connection with the above proceedings and pursuant to irrevocable instructions I have received from the Company (which owns the Share Certificates and the Shares) that RPC will hold the Share Certificates and not dispose of or otherwise deal with the Shares in any way pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim No.s CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018- 000121 between Navigator Equities Limited and Vladimir Chernukhin on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Proceedings"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and Navigator Equities Limited and Vladimir Chernukhin (on the other). In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Proceedings in favour of the Claimants or any such settlement, and in the event Mr Deripaska fails within 42 days to make any payment required under such judgment or settlement, I hereby undertake that pursuant to irrevocable instructions I have received from the Company RPC will take appropriate steps to facilitate the sale of such number of the Shares as are required to satisfy any Order of the Court as regards a judgment debt or other order to complete the purchase of Navigator's shares in Navia Holdings Ltd on terms that the proceeds of such sale are paid to this firm and further undertake to remit such proceeds as required by the Court or agreement between the parties up to the amount ordered by the Court or agreed. This letter shall be governed in all respects by English law and the courts of England and shall have exclusive

> jurisdiction to settle any disputes that may arise out of or in connection with this letter....'

EN+'s change of domicile

18. I have already referred to the dramatic impact of the sanctions imposed on EN+ which Clifford Chance had described in the application for a freezing order. Indeed, the judge found that there was a real concern, shared by a number of governments of states where Rusal carried on business, that the sanctions imposed on EN+ posed a threat to its continued existence, so that unless those sanctions were lifted there was a real risk that EN+ would either become insolvent or would be nationalised by the Russian government.

19. The chairman of EN+ in 2018 was Lord Barker, a British peer. With others, he developed what became known as the 'Barker Plan', designed to persuade the US authorities to revoke the sanctions imposed on EN+. It depended on persuading the US authorities that Mr Deripaska had been removed from control of the company. The plan involved the reduction of Mr Deripaska's indirect shareholding in EN+ to about 45%, the reduction of his voting rights to about 35% of EN+'s issued share capital, and the reconstitution of the company's board so that a majority of directors were independent of Mr Deripaska. A critical element of the plan was a debt for equity swap whereby a Russian bank, VTB Bank, took ownership of shares in EN+ previously pledged to it by Mr Deripaska or his companies as security for debt. However, VTB was only prepared to agree to this if the domicile of EN+ was changed from Jersey to a Russian special administrative region. EN+'s change of domicile was, therefore, essential if the Barker Plan was to succeed.

20. The change of domicile was possible as a result of some changes to Russian company law which took effect from 3rd August 2018. From that date, a new statute, 'The Federal Law on International Companies No 290-FZ', enabled a foreign corporation to change its domicile from the country of its incorporation to one of two special administrative regions within the Russian Federation, where it could benefit from various advantages including fiscal advantages not available elsewhere in Russia. The statute allows a foreign corporation to constitute itself as either an 'International Limited Liability Company' or an 'International Joint Stock Company', without the need to dissolve itself and transfer its assets to a newly formed entity, by voting in accordance with its constitution to change its governing law to Russian law. The company would then be registered in the special administrative region and, from the date of registration, would be governed by the legislation of the Russian Federation.

21. Jersey law, codified in the Companies (Jersey) Law 1991 as amended, enables Jersey registered companies to take advantage of provisions such as those contained in the Russian statute, provided that various conditions are satisfied. These include that the proposal to change domicile by the company concerned is approved by a special resolution of the company (i.e. a majority of two thirds voting in favour) and that the change of domicile (described in the legislation as the 'continuance') is approved by the Jersey Financial Services Commission ('the Commission'). Thus Article 127U of the Jersey legislation provides that, if the requirements of the legislation are satisfied, 'the Commission may grant the application …', with a right of appeal to the court if the Commission refuses to do so 'on the ground that the decision of the Commission was

unreasonable having regard to all the circumstances of the case'. Article 127V provides that:

> 'When a company is, in accordance with the terms of authorization of the Commission under Article 127U, continued as a body corporate under the laws of the other jurisdiction to which the authorization relates—
>
> (a) it thereupon ceases to be a company incorporated under this Law; and
>
> (b) the registrar shall on that date record that by virtue of paragraph (a) of this Article, it has ceased to be so incorporated.'

22. The Barker Plan, including that EN+ was considering relocating its domicile to Russia, was well publicised from an early stage. The EN+ board's approval of the plan in principle was reported by Tass and Reuters in August 2018. The formal steps to achieve the change of domicile (or continuance) were carried out as follows.

23. On 1st November 2018, EN+'s board approved a proposal that it seek to re-domicile in the Russian Federation. The decision was announced in a press release and was reported in the Wall Street Journal.

24. On 20th December 2018, at a general meeting of the shareholders of EN+, the shareholders passed special resolutions approving the continuance of the company as an International Joint Stock Company in Russia, in accordance with the Russian legislation. Again, there was a public announcement of the result of the vote.

25. It is this vote which gives rise to the claimants' application to commit Mr Deripaska for contempt of court. At the time B-Finance held over 53% of EN+'s share capital and could therefore have blocked the passing of the special resolutions by voting against them. It did not do so, but on the contrary voted in favour. There is a dispute between the parties as to whether B-Finance voted in this way on the specific instructions of Mr Deripaska or whether it voted in accordance with general guidance provided by him at an earlier stage to do what was necessary to give effect to the Barker Plan. The judge did not find it necessary to resolve that dispute, saying that because, as Mr Deripaska knew, those in control of B-Finance would have complied with whatever instructions he gave, it did not matter whether Mr Deripaska instructed B-Finance to vote in favour or merely failed to qualify earlier guidance by directing it not to do so.

26. On 24th December 2018, EN+ applied to the Commission for its consent to the continuance of the company as a body corporate governed by the laws of Russia. Notice of the application was published in the Jersey Gazette. This was followed by a meeting of the new board of the company, now with a majority of independent directors, which approved the Barker Plan, including the continuance, as being in the best interests of the company.

27. It is not entirely clear when the Commission gave its approval to the application. The evidence served on behalf of Mr Deripaska suggests that approval was given on 16th May 2019, but we were also shown a letter from the Commission dated 21st August

2019 expressing a provisional view that the application should not be approved because of litigation in Jersey related to the parties' dispute. However, the precise date does not matter. More important are the facts that, as the Commission pointed out in its letter, 'Article 127U(1) … provides [the Commission] with a discretion as to whether or not to grant a continuance application even if the statutory criteria have otherwise been satisfied', and that at some point approval was given.

28. On 20th May 2019 EN+ applied to be registered in one of the special administrative regions in Russia. The process of changing domicile was completed by 22nd August 2019, on which date the Commission in Jersey, having been notified that EN+'s registration in Russia had been completed, issued a certificate of continuance. It appears to have done so despite the provisional view to the contrary expressed in its letter of the previous day.

Correspondence about the change of domicile

29. As I have explained, EN+'s change of domicile was carried out in public view, with press reports and announcements to the market issued at every stage. It is therefore surprising, at least at first sight, that nothing was said by Mr Deripaska or his lawyers to the claimants about this process. Indeed, the relocation appears to have been already in contemplation as early as June 2018 when the undertakings with which this appeal is concerned were given to the court, but nothing was said on that occasion to draw attention to the proposal that EN+ would shortly cease to be a Jersey registered company or to the fact that the shares whose certificates were to be held by RPC would in future be held electronically in dematerialised form. Mr Deripaska has since apologised for the failure to draw these matters to the court's attention.

30. Equally surprising is the fact that nothing was said by the claimants about the change of domicile during this whole process, even though they now contend that it constitutes a serious contempt for which Mr Deripaska should be committed to prison. Mr Chernukhin did not give evidence, so it is impossible to say precisely what he knew at the time, but he certainly read some of the press reports referring to the proposed change of domicile and it is a reasonable inference that he was aware of the publicly available information about it. In those circumstances it seems that it did not occur to him that the change of domicile constituted a contempt of court or, if it did, that he made a deliberate choice to say nothing about it at the time.

31. In the event the first mention of the change of domicile as between the parties came on 29th May 2019, after EN+ had made its application for registration in Russia, but before that registration had been completed. On that date RPC advised Clifford Chance that OFAC had lifted the sanctions previously imposed on EN+ and that the company was in the process of being registered in Russia as a Russian legal entity. The RPC letter continued:

> '... 7. We are instructed that:
>
> (a) once the continuance of EN+ takes place, its shares will be held in dematerialised form i.e. share certificates will not be issued to shareholders;

> (b) the existing shares and share certificates in respect of Jersey-domiciled EN+ will be automatically cancelled (including the share certificates held by RPC pursuant to the undertakings previously given by Mr Deripaska, B-Finance and Rupert Boswell of RPC in respect of the 45.5 million certificated shares in EN+ owned by B-Finance (the **Undertakings**);
>
> (c) all shareholders in Jersey-domiciled EN+ will at the point the Continuance is completed, automatically be granted new shares in Russia-domiciled EN+ on a one-to-one basis; and
>
> (d) EN+'s listed Global Depositary Receipts will continue to be traded on the London Stock Exchange as before (as well as the Moscow Stock Exchange).
>
> 8. The current Undertakings refer to certificated shares in EN+ and are based upon the Jersey share certificates in EN+ being held by RPC. In light of the Continuance of EN+, the undertakings will, with the permission of the court, need to be withdrawn. ...'

32. After asserting that there was no need for alternative security to be provided in place of the undertakings, RPC concluded by inviting the claimants to consent to their withdrawal.

33. The claimants did not consent to an order to that effect. Instead, after further correspondence, on 26th June 2019 they issued an application for (among other things) an order for a payment into court to replace the undertakings. On 28th June 2019 Mr Deripaska issued an application to be released from his undertaking. That application was supported by a witness statement by Mr Andrew McGregor of RPC who repeated what had been said about the effect of the continuance in RPC's letter dated 29th May 2019 set out at [29] above:

> '52. I am instructed that:
>
> 52.1 all shareholders in Jersey-domiciled En+ will automatically be granted new shares in Russia-domiciled En+ on a one-to-one basis;
>
> 52.2 the new (Russian) En+ shares will be held in dematerialised form, i.e. share certificates will not be issued to shareholders;
>
> 52.3 the existing shares and share certificates in respect of Jersey-domiciled En+ will, upon completion of the Continuance, automatically be cancelled (including the share certificates in respect of the Undertakings Shares held by RPC pursuant to the Undertakings; and

> 52.4 En+'s listed Global Depository Receipts (**GDRs**) will continue to be traded on the London Stock Exchange (**LSE**) as well as the Moscow Stock Exchange (**MOEX**). …'

34. On 3rd July 2019 the applications came before Mr Justice Teare, who ordered Mr Deripaska to pay some £90.5 million into court by no later than 31st July 2019 (*Filatona Trading Ltd v Navigator Equities Ltd* [2019] EWHC 1846 (Comm)).

35. After further applications and hearings which it is unnecessary to recount, on 30th September 2019 Mr Deripaska procured payment to the claimants of some US $106.3 million in full satisfaction of the sums due under the awards, together with interest and costs. The judge found, to the criminal standard of proof, that this payment was only made as a result of the hearing before Mr Justice Teare on 3rd July 2019.

The application to commit for contempt of court

36. It was not until 14th November 2019, some 45 days after the claimants had been paid in full by Mr Deripaska, and therefore after the undertakings had ceased to apply, that the claimants issued their application to commit Mr Deripaska for contempt. It is necessary to quote extensively from their application notice. After setting out the background and reciting the terms of the undertakings, the claimants continued (quotations in italics in the original):

> '**Ground of Contempt**
>
> 22. By reason of the matters set out above, Mr Deripaska has breached the undertakings and is in contempt of Court as follows:
>
> a. At a meeting of EN+ shareholders held on 20 December 2018 Mr Deripaska, being the ultimate beneficial owner of B-Finance, procured and/or permitted B-Finance to vote in favour of a special resolution to approve the Continuance.
>
> b. Mr Deripaska procured B-Finance to vote in favour of the special resolution in circumstances where the affirmative vote of B-Finance was determinative of whether the Continuance would take place.
>
> c. The effect of the Continuance was:
>
> i. That the shares in EN+ secured pursuant to the Undertakings (and defined therein as "the Shares"), would be "*automatically cancelled*" and all prior shareholders in EN+ granted new shares (on a one-to-one basis) in a new Russian-domiciled company.
>
> ii. That the share certificate in respect of the Shares "*including the shares certificates held by RPC pursuant to [the Undertakings]*" would be "*automatically cancelled*" to be replaced with shares in the new

Russian-domiciled company to be in dematerialised form.

d. By procuring and/or permitting the affirmative vote of B-Finance at the shareholders meeting on 20 December 2018, Mr Deripaska thus breached the Deripaska Undertakings in that he thereby:

Breach 1

i. Took a step which had the effect of "*preventing, impeding or obstructing the fulfilment of*" the undertaking given by B-Finance to "*not dispose of the Shares or otherwise deal with them*" pending the final outcome of the Arbitration Act Proceedings. The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) amounted to a dealing and/or disposal of the shares within the meaning of the prohibition in the undertaking.

Breach 2

ii. Took a step which had the effect of "*preventing, impeding or obstructing the fulfilment of*" the undertaking given by B-Finance that, after final judgment in the Arbitration Act Proceedings and in the event of non-payment of the judgment sum by Mr Deripaska, it would "*take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance*". The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) meant that the Shares referred to in the undertaking would no longer be available for sale and/or would not be capable of realising any value capable of meeting the outstanding balance of any judgment sum.

Breach 3

iii. Failed to "*take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcement*" by failing to procure B-Finance to vote against the proposal to move the domicile of EN+ to Russia at the

> shareholders meeting on 20 December 2018. The cancellation of the shares caused by B-Finance's affirmative vote (as procured and/or permitted by Mr Deripaska) meant that the Shares referred to in the undertaking would no longer remain available for direct enforcement.
>
> 22A. Each of the above breaches was committed deliberately by Mr Deripaska (i.e. knowing that they were in breach of the Deripaska Undertakings). In circumstances where Mr Deripaska was directly involved in providing the Deripaska Undertakings and he understood their significance in the context of his beneficial shareholding in EN+, it is to be inferred that Mr Deripaska was cognisant of the terms of the Deripaska Undertakings whilst the proposed redomiciliation was in progress up to and including the date on which the shareholders' vote took place (20 December 2018) and that he knew that his permitting and/or procurement of the vote in favour of the proposed redomiciliation by B-Finance would have breached the Deripaska Undertakings. Moreover, at all material times Mr Deripaska had available to him specialist lawyers in Russia, England and Jersey to advise him in relation to the Deripaska Undertakings insofar as he was in any doubt as to their meaning and effect and/or as to the whether procuring and/or permitting a vote in favour of the redomiciliation of EN+ would constitute a breach of them.'

37. The application to commit was supported by the eighth affidavit of Ms Berard of Clifford Chance.

The abuse of process application

38. On 18th February 2020 Mr Deripaska issued an application to strike out the contempt application as an abuse of process on the ground that it was maliciously motivated. Both applications, that is to say the committal application and the application to strike out, came before Mr Justice Andrew Baker, who decided that the committal application should be struck out as an abuse (*Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm)) on the ground that the claimants' subjective motive in bringing the application was a desire for revenge and personal animosity towards Mr Deripaska, and that the claimants and their lawyers had failed to comply with what the judge described as their 'quasi-prosecutorial' duties.

39. One of the points canvassed by Mr Justice Andrew Baker was whether the effect of the change of domicile was that the shares in EN+ had ceased to exist. As to this, he said that although Mr Deripaska's initial position, set out in RPC's letter of 29th May 2019 and Mr McGregor's second witness statement, had been that the existing shares were automatically cancelled, that was no longer his position and, in fact, it was common

ground 'that the [Jersey shares] were not extinguished, rather they were continued from Jersey to the Russian SAR':

> '39. … before me it was common ground, that after the Redomiciliation completed, "the Shares" (as defined) would still exist, and have still existed, being then the relevant block of 45,500,000 shares in En+ as incorporated in the Russian SAR.'

40. The claimants appealed against the striking out of the committal application. Giving the judgment of this court with which Lady Justice Asplin and Lord Justice Snowden agreed (*Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656), Lady Justice Carr recorded the claimants' position on this question as follows:

> '68. The overarching submission for the Appellants is that the Judge's conclusions were premised on a "fundamental misunderstanding" of the consequences of Mr Deripaska's actions. The conduct of which the Appellants complained was that Mr Deripaska either assisted in procuring, or at the very least failed to prevent, the dissolution of EN+ Jersey, and the incorporation of EN+ Russia. As a result, Mr Deripaska's shares in EN+ Jersey were cancelled; and the protection which the Deripaska Undertakings had been intended to provide was rendered worthless. The error said to have been made by the Judge was (i) to disregard the dissolution of EN+ Jersey and treat the shares in EN+ Russia as the same shares which formed the subject matter of the Undertakings, and (ii) in the process to ignore the very obvious and significant difference between the Appellants' ability (on the one hand) to enforce the Award against shares in a Jersey-registered company whose share certificates were held by way of security in England by English solicitors, and (on the other hand) their ability to enforce the Award against "dematerialized" shares in a Russian-registered company which were beneficially owned by a man "widely recognised as being extremely close to the Russian government and highly influential in his home country". The Judge incorrectly recorded that it was common ground that the Jersey shares would still exist after the domiciliation.'

41. She recorded Mr Deripaska's position as follows:

> '76. … i) The Positive Undertaking: there is no sustainable basis on which to contend that the Judge was incorrect in his conclusion as to the legal effect of redomiciliation. The Jersey shares were not cancelled and remained available for direct enforcement (according to the relevant provisions of the Companies (Jersey) Law 1991 and the Russian Federal Law on International Companies, which establish that a company continues uninterrupted in its corporate existence following a redomiciliation). This is said to have been unchallenged below, and consistent with evidence submitted by the Appellants and oral submissions on their behalves. Further, the Judge was

> correct to conclude that the subject-matter of the undertakings was not cancelled following the redomiciliation (since the Jersey shares continued after the redomiciliation as a matter of Jersey and Russian law and were treated as having been Russian shares since the date of incorporation). Further, the Judge was correct to record that this was common ground. Equally, the Jersey shares remained available for direct enforcement within the meaning of the Positive Undertaking, properly construed. …'

42. Thus issue was clearly joined on two questions. The first was whether the effect of the change of domicile was that the shares in EN+ were automatically cancelled and replaced by new shares in a different company. As to this, the claimants contended that this was the effect, while Mr Deripaska contended that the shares continued in being as a matter of Jersey and Russian law and were treated as having been Russian shares in the existing company since the date of its incorporation. The second question was whether it had been common ground before Mr Justice Andrew Baker, as he had understood, that the position was as contended by Mr Deripaska.

43. This court did not decide the first issue, but only that the claimants' position was arguable. As to the second question, it held that Mr Justice Andrew Baker had misunderstood the claimants' position in saying that there was common ground:

> '90. For the reasons explored in more detail below, I have reached the conclusion that the Judge erred in the following central respects:
>
> i) He reached his conclusions on the basis of two fundamental misapprehensions:
>
> a) First, that it was common ground before him (and indeed by the time of the hearing before Teare J on 3 July 2019) that the Jersey shares (i.e. "the Shares" (as defined in the B-Finance Undertakings)) would still exist upon and following the redomiciliation. This was not common ground at all, and Mr Pillow fairly did not suggest otherwise in his oral submissions on appeal. There were in fact cogent reasons for concluding that the Jersey shares were "cancelled" and ceased to exist upon and following the redomiciliation; …'

44. Developing this point further, Lady Justice Carr pointed out at [95(iii)] that, among other things, the contempt application notice itself stated that the effect of the change of domicile was that:

> '…the shares in EN+ secured pursuant to the Undertakings (and defined therein as "the Shares") would be automatically cancelled and all prior shareholders in EN+ granted new shares (on a one-to-one basis) in a new Russian-domiciled company…'

45. The appeal from Mr Justice Andrew Baker was allowed. The main reason for this conclusion was that the claimants' subjective motivation for bringing the contempt

application was irrelevant, but this court also concluded that the merits of the application had a part to play because (at [102]) 'an assessment of whether or not the Contempt Application was properly arguable was required'. As to this, Lady Justice Carr concluded as follows:

> '104. The following analysis on the law and facts was (at least) properly arguable:
>
> i) That, in breach of the Positive Undertaking, Mr Deripaska failed to take all steps necessary to ensure that the "underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc)" remained available for direct enforcement:
>
> a) The "underlying assets" the subject of the Positive Undertaking were the Jersey shares, being the 45,500,000 certificated shares owned by B-Finance in EN+ Jersey in respect of which the certificates were held by RPC in London;
>
> b) Those Jersey shares did not remain available for direct enforcement upon completion of the redomiciliation, since they then ceased to exist. The replacement shares in EN+ Russia were not the same shares;
>
> c) Mr Deripaska could have caused B-Finance to vote against the redomiciliation, in which case the redomiciliation could not have proceeded. Such a step may have been unwelcome or commercially disadvantageous, but it was not impossible;
>
> d) The vote permitted by Mr Deripaska was causative of the redomiciliation;
>
> ii) That, in breach of the Negative Undertaking, Mr Deripaska procured the taking of a step which had the effect of impeding or obstructing the fulfilment of the B-Finance Undertakings, in particular B-Finance's undertaking that it would not "dispose of the Shares or otherwise deal with them pending the final outcome of proceedings". Given Mr Deripaska's control over B-Finance (including the procuring of the B-Finance Undertakings), interest as ultimate beneficial owner of the Jersey shares, and the acknowledgment of Mr McGregor (in McGregor 2) that Mr Deripaska "did, via B-Finance, vote in favour of" the redomiciliation, Mr Deripaska (must have) procured B-Finance's vote in favour of the redomiciliation. This facilitated the cancellation of the Jersey shares which in turn amounted to a disposal of or dealing with the Jersey shares;

> iii) The Undertakings were sufficiently clear and unambiguous in any event and/or when read in their proper context;
>
> iv) The Contempt Application was not disproportionate to what would be a serious contempt, if made out, irrespective of the fact that Mr Deripaska had satisfied the Award.
>
> 105. The Judge ought therefore to have acknowledged (and factored into his reasoning) the arguable merits as set out above, including that it was properly arguable (to the criminal standard of proof) that Mr Deripaska had committed a serious (as opposed to merely technical) contempt of court, as alleged in the Contempt Application.'

46. It is apparent from this summary, and in any event was explicit at [102], that this court did not attempt to determine whether this analysis should succeed. It went no further than holding that it was properly arguable. Whether the case should succeed was for Judge Pelling to decide when the committal application finally came before him in March 2023.

The law

47. Judge Pelling directed himself as to the law in these terms, which were not disputed before him and which I would endorse:

> '31. Although the principles that apply to a trial of this sort are well known, it is nevertheless desirable that I set them out at least in summary to the extent necessary to explain the conclusions I reach later in this judgment. In summary:
>
> i) Given the potential consequences of a finding of contempt, a heightened standard of procedural fairness has to be maintained throughout - see *Navigator Equities Limited and another v. Deripaska* [2021] EWCA Civ 1799 per Carr LJ at [79];
>
> ii) The applicant must prove to the criminal standard of proof, that is beyond reasonable doubt or so that the judge is sure, that the defendant:
>
> a) knew of the terms of the undertaking breached;
>
> b) acted in breach of, or failed to act in compliance with, the undertaking concerned; and
>
> c) knew of the facts that made his conduct a breach.
>
> See *Kea Investments Limited v. Watson* [2020] EWHC 2599 per Nugee LJ at [19] and *Re L (A Child)* [2016] EWCA Civ 173 per Vos LJ as he then was at [75(v)] and Theis J at [78(8)];

iii) It is not necessary for the applicant to prove that the defendant knew or believed that what he did was a breach of his undertaking (although that will be relevant to sanction and is an issue that I have been asked to determine in the event that it is necessary to do so) - see *Kea Investments Limited v. Watson* (ibid.) per Nugee LJ at [26];

iv) In reaching a conclusion on the issues that must be proved to the criminal standard, it is open to a court to draw inferences from primary facts which have been proved. However, a court may not infer the existence of an essential element, unless the inference is one that no reasonable person would fail to draw - see *Masri v. Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) per Christopher Clarke J as he then was at [145];

v) If it is to be enforced by contempt proceedings, an injunction or undertaking must be expressed in terms that are sufficiently clear and certain to make plain what is permitted and what is prohibited - see *AG v. Punch Limited* [2002] UKHL 50; [2003] 1 AC 46 at [35] and *Navigator Equities Limited and another v. Deripaska* (ibid.) per Carr LJ at [82(ix)];

vi) Lack of clarity may arise where (i) the language used may have more than one meaning or (ii) in a borderline case where it is inherently uncertain whether the term applies at all or (iii) the language is so technical or opaque as not to be readily understandable by the person to whom the injunction is addressed or by whom the undertaking is given - see *Cuadrilla Bowland Limited v. Persons unknown* [2020] EWCA Civ 29 per Leggatt LJ as he then was at [58];

vii) However, whether a term of an order or undertaking is unclear in any of these ways, is dependent on context and in any event the alleged lack of clarity is irrelevant if it is immaterial to whether the breach alleged has occurred, because there would have been a breach whichever possible construction applied - see *Cuadrilla Bowland Limited v. Persons unknown* (ibid.) per Leggatt LJ at [60];

viii) In relation to context, the words of an undertaking are to be given their natural and ordinary meaning and are to be construed in their context, including historical context and with regard to the object of the order – see *Pan Petroleum AJE Limited v. Yinka Folawiyo Petroleum Limited* [2017] EWCA Civ 1525 per Flaux LJ at [41(3)] and *Navigator Equities Limited and another v. Deripaska* (ibid.) per Carr LJ at [82(vi)];

> ix) A contempt application must comply strictly with the formal requirements imposed by CPR rule 81.4(2); and
>
> x) The applicant is confined strictly and solely to attempting to prove the contempt allegations set out in the application notice and the court is confined to considering only those allegations – see *Re L (A Child)* (ibid.) per Vos LJ at [75(iii)] and Theis J at [78(2)] and *Kea Investments Limited v. Watson* (ibid.) at [220], where Nugee LJ held that:
>
> > " … the Court must confine itself to the terms of the count as specified in the Particulars of Contempt, and that if it is sought to go outside them, it is necessary formally to apply to amend them (which has not been suggested in respect of this count). I also agree that since it is a requirement of CPR r 81.10(3)(b) that the application notice must be supported by an affidavit setting out all the evidence on which the applicant relies, a respondent to a committal application who wishes to know in precisely what way he is said to have been in breach of the order is entitled to look not only at the terms of the Particulars of Contempt scheduled to the application notice, but at the supporting affidavit to discover what the applicant relies on".'

48. The last of these principles is of particular importance in the present case. This principle should not be thought of pejoratively as a 'pleading point'. Rather, it is a necessary aspect of the 'heightened standard of procedural fairness' which has to be maintained when a defendant is facing committal to prison.[1] Accordingly, the issue on a committal application is not whether the defendant is guilty of contempt, but whether it is proved to the criminal standard that the defendant is guilty of contempt in the respects set out in the application notice. To the extent that Mr Jonathan Crow CVO, KC for the claimants submitted that it was sufficient for the claimants to prove that B-Finance had disposed of or dealt with the shares represented by the certificates held by RPC, and that Mr Deripaska was thereby in breach of his undertaking, even if the claimants had not proved what was alleged in their application notice, I would reject that submission.

The judgment

49. The judge noted that it was a common theme of each of the breaches alleged in the application notice that the change of domicile of EN+ from Jersey to a special administrative region in Russia resulted in the 45.5 million certificated shares that B-Finance had undertaken not to dispose of or otherwise deal with being 'automatically cancelled' and replaced with 'new shares … in a new Russian-domiciled company'. Accordingly, applying the last of the principles which he had set out, if that was not the

[1] In practice it is unlikely that Mr Deripaska would ever be imprisoned here. He is not present in the jurisdiction and is prevented by sanctions from coming here. But this cannot affect the principles to be applied and in any event the possibility that circumstances may change cannot be ruled out.

effect of the change of domicile, the application to commit must necessarily fail as no other basis on which it might succeed had been identified in the application notice.

50. The judge noted also that the question whether the shares in a Jersey company which changes its domicile to Russian law pursuant to Articles 127Q to 127V of the Companies (Jersey) Law and the Russian Federal Law on International Companies are automatically cancelled and replaced with new shares in a new company involves questions of Jersey and Russian law. However, the claimants had chosen not to adduce any expert evidence from a lawyer qualified to express an opinion as to Jersey or Russian law, and these provisions of Jersey and Russian law had no equivalent in English company law. Instead, they had relied on what had been said by Lady Justice Carr in the abuse of process appeal and on what had been said in RPC's letter of 29th May 2019 (see at [31] above) and Mr McGregor's witness statement (see at [33] above).

51. The judge concluded, however, that it was for the claimants to prove their case to the criminal standard; that the matters relied on by the claimants were insufficient to discharge this burden; that this was not a case where foreign law issues could be resolved without expert assistance by a judge simply looking at the foreign statute concerned (cf. *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 at [148]); and that without evidence of foreign law as to the effect of the change of domicile, the application to commit must fail.

52. In case he was wrong about this, the judge went on to consider such evidence as there was concerning the effect on the shares of the change of domicile from Jersey to Russia. So far as Jersey law was concerned, he regarded the purpose of the legislation as being to enable the company to continue (hence 'continuance') as a going concern without ceasing to exist. If the company did cease to exist and its shares were automatically cancelled, that would defeat the purpose of the legislation. Although Article 127V referred to the company ceasing 'to be a company incorporated under this law', that was to be interpreted as meaning that the company ceased to be a Jersey company but did not cease to exist. As to Russian law, without expert evidence as to the effect of the Russian legislation, any conclusions had to be heavily qualified. It appeared, however, that the language of the legislation was consistent only with the continued existence of the entity concerned, including the continued existence of the shares in the company, rather than the creation of a new company and the automatic cancellation of its existing shares. For these reasons, the claimants had failed to prove, and in any event had not proved to the criminal standard, that the effect of the change of domicile was that the shares in EN+ were automatically cancelled as alleged in the application notice.

53. The judge observed that this analysis was consistent with the formal information provided to shareholders prior to the meeting on 20th December 2018 at which the change of domicile was approved, which stated:

> 'The continuance regime [in Russia] came into force on 3 August 2018, allowing foreign corporate entities which meet the relevant criteria to migrate to Russia without having to incorporate a new entity and with the benefit of preserving their corporate identity … . The company meets these criteria.'

Submissions on appeal

54. For the claimants Mr Crow did not dispute the judge's analysis of the effect of the change of domicile as a matter of Jersey and Russian law. He contended, however, that the issue was not whether the shares ceased to exist, as he put it, 'as an abstract point of company law'. Rather, the subject matter of the undertakings, read together, was the existence of 45,500,000 certificated shares in a Jersey company. He emphasised the definition of the 'Shares' in the B-Finance undertaking ('45,500,000 are held in certificated form (the "**Shares**"') and submitted that the whole point of the undertakings was to ensure that these shares were available as assets outside Russia against which the claimants could enforce the arbitration award in the event that Mr Deripaska's challenges failed. The effect of the change of domicile was that the 'Shares' as defined had ceased to exist because, once it had been completed, EN+ was no longer a Jersey company and its shares were no longer certificated. This should be understood as the sense in which the application notice referred to the shares having been 'automatically cancelled'.

55. Mr Thomas Grant KC on behalf of Mr Deripaska supported the judge's reasoning and submitted also, by way of respondent's notice, that the claimants had also failed to prove that the vote on 20th December 2019 was 'determinative' of whether the change of domicile would take place, as alleged in the application notice.

56. Mr Grant also made a number of wide-ranging further submissions. These included that the context for the undertakings was that it was known that the value of shares in EN+ had already deteriorated sharply as a result of the imposition of sanctions; that this context included a real risk that, without what became known as the Barker Plan, the shares (including those whose certificates were to be held by RPC) would become worthless; that the undertakings conferred no security interest in the shares whose certificates were to be held by RPC; that there was no agreement or understanding between the parties recognising any difficulty of enforcing the award in Russia or acknowledging the claimants' concerns in that regard; that the steps taken to change EN+'s domicile, which was a necessary part of the Barker Plan, were taken publicly and must have been known to the claimants, who never made any objection; that the purpose of the undertakings was spent once Mr Deripaska had paid the award; that it was not open to the claimants to contend that any breach of Mr Deripaska's undertaking was contumelious because his evidence that it had not crossed his mind that the change of domicile was contrary to his undertaking had never been challenged in cross examination (cf. *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 at [70]); and that in the light of that failure any breach was technical at worst, so that the attempt to commit Mr Deripaska to prison was oppressive and an abuse of process (cf. *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch) at [44] to [47]). In the event it is unnecessary to say anything further about these submissions.

Decision

57. The judge was undoubtedly right to say that it was a common theme of the application notice that the 45,500,000 shares whose certificates were to be held by RPC would be 'automatically cancelled' and replaced with 'new shares … in a new Russian-domiciled company' as a result of the change of domicile. That is said to be 'the effect of the Continuance' in paragraph 22(c) of the application notice, while each of the allegations of breach set out in paragraph 22(d) is premised upon the cancellation of the shares (see the terms of the application notice set out at [36] above). It is 'the cancellation of the shares' which is alleged to amount to 'a dealing and/or disposal of the shares within the

meaning of the prohibition in the undertaking' (Breach 1), which 'meant that the Shares referred to in the undertaking would no longer be available for sale and/or would not be capable of realising any value capable of meeting the outstanding balance of any judgment sum' (Breach 2), and which 'meant that the Shares referred to in the undertaking would no longer remain available for direct enforcement' (Breach 3). Thus, if the shares were not cancelled, or more accurately if the claimants have failed to prove to the criminal standard that they were cancelled, the whole basis of the application notice falls away.

58. Accordingly a critical issue is whether the terms 'automatically cancelled' and 'the cancellation of the shares' in the application notice are used, as the judge understood, in what Mr Crow somewhat dismissively described as the 'abstract point of company law' sense or in the wider sense for which he contended that, as a result of the change of domicile, there would no longer be any certificated shares in a Jersey company whose certificates were held by RPC. If the terms were used in the former sense, there is now no challenge to the judge's conclusion that the claimants have failed to prove to the criminal standard that the shares were automatically cancelled. I would add that the judge's conclusion appears to me to be correct as the effect of the change of domicile must depend on Jersey and Russian law, as to which no evidence was adduced, an omission noted by this court on the abuse appeal (see *Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656 at [86]). As the judge said, there is no equivalent of the relevant provisions in English law and caution would be needed in applying English law concepts to the language of the foreign legislation.

59. I have no doubt that these terms were used in the application notice in the former sense, as understood by the judge. First, that is the natural meaning of the terms, cancellation of shares in the company being a concept that is used in company law, which is the relevant context for understanding the effect of EN+'s change of domicile pursuant to legislative provisions of the law of Jersey and the Russian Federation. In contrast, it is not a natural use of language to say that shares have been cancelled merely because a company has changed its domicile or its shares have ceased to be certificated.

60. Second, by placing the words '*automatically cancelled*' in inverted commas in paragraph 22(c), the application notice makes clear that this is a quotation. It is a quotation, as the reader would understand, from RPC's letter of 29th May 2019 and Mr McGregor's witness statement dated 28th June 2019, both of which are referred to and quoted from in previous paragraphs of the application notice. It is therefore relevant to see the sense in which these words were used by RPC and Mr McGregor. There is no doubt that they were used in accordance with what I have described as their natural meaning.

61. Third, the application to commit was supported by the eighth affidavit of Ms Berard of Clifford Chance, which undoubtedly also referred to cancellation in this sense. For example, it stated that:

> '4. … In flagrant breach of those undertakings, Mr Deripaska in December 2018 destroyed that security by causing the shares to be cancelled, thereby erasing their existence and their value.'

62. The affidavit quoted also from RPC's letter of 29th May 2019, and from the judgment of Mr Justice Teare dated 3rd July 2019 (see *Filatona Trading Ltd v Navigator Equities Ltd* [2019] EWHC 1846 (Comm), referred to at [34] above), which had stated that:

> '28. In circumstances where the shares in the Jersey company are to be extinguished, it is difficult to understand how there could not have been a breach of the undertakings.'

63. It referred to 'the new Russian EN+ entity' being incorporated on 9th July 2019 and to 'the Jersey EN+ entity' being dissolved.

64. There is, therefore, no room for doubt that the case which the claimants were making in the application notice was that the shares in EN+ were indeed cancelled so that they ceased to exist, and that new shares in a new company thereafter came into existence.

65. This understanding is confirmed by the course of proceedings before Mr Justice Andrew Baker and the Court of Appeal on the issue of abuse of process. As I have explained (see at [40] to [43] above), one of the questions there discussed, both in the Commercial Court and in this court, was whether it was common ground (as contended by Mr Deripaska) that the shares in EN+ were *not* automatically cancelled as a result of the change of domicile because they continued in being as a matter of Jersey and Russian law and were treated as having been Russian shares since the date of incorporation. That question only made sense if 'cancellation' was being used in accordance with the natural meaning of the term. There was never any doubt that, after the change of domicile had been completed, there were no longer any certificated shares in a Jersey company. So if the term 'cancellation' had been used in the sense for which Mr Crow contends, it would have been obvious and beyond dispute that the shares had been 'cancelled' and to suggest otherwise would not have made sense.

66. The claimants' skeleton argument for the hearing before Judge Pelling confirms that the case then being made was that the shares in EN+ were indeed cancelled. It describes this as having initially been common ground, referring to RPC's letter of 29th May 2019 and Mr McGregor's witness statement dated 28th June 2019, and refers to the fact that Mr Deripaska's case had since reversed, so that he now contended 'that, notwithstanding the Redom, (i) EN+ continued to exist; (ii) the shareholders (including B-Finance) continued to hold shares in EN+; and (iii) B-Finance continued to be bound by its Undertaking not to dispose of or deal with those shares in EN+ Russia'.

67. From this review of the procedural history, I conclude that the case made in the application notice and supporting affidavit, and which was then pursued before Judge Pelling, was indeed that the shares in EN+ had ceased to exist as a result of the change of domicile and not merely that they had assumed different characteristics (i.e. because they were no longer shares in a Jersey company and because they were no longer certificated and were now governed by Russian law). The judge was entitled to conclude that this case had not been proved to the criminal standard and accordingly to dismiss the application. It is not open to the claimants on appeal to advance an alternative case which is materially different from what is alleged in the application notice.

68. This conclusion is sufficient for the committal appeal to be dismissed. It is unnecessary, and would not be appropriate, to consider whether there are other ways in which the

claimants might have put their case. That would potentially require further findings of fact, including on the matters raised by Mr Grant which I have summarised at [56] above. I should, however, mention one further point arising out of the application notice, raised by way of respondent's notice, which also provides a short answer to the committal appeal.

'Determinative'

69. The allegation in paragraph 22(b) of the application notice is that 'the affirmative vote of B-Finance was determinative of whether the Continuance would take place'. It is true that the shareholding of B-Finance was such that it would have been able to ensure the defeat of the special resolution to approve the continuance by voting against it. However, even when the resolution was passed, there were a number of further steps outside the control of Mr Deripaska or B-Finance which had to be completed in order for the continuance to take place. These included, for example, obtaining the approval of the Jersey Financial Services Commission. Article 127U of the Companies (Jersey) Law 1991 confers a discretion on the Commission whether or not to approve a continuance application even if the statutory criteria have otherwise been satisfied, as the Commission pointed out in its letter of 21st August 2019 (see at [27] above) and that letter shows that approval was by no means a foregone conclusion in the circumstances of the present case. There was, moreover, no expert evidence of Jersey law as to the criteria which the Commission would apply, the practice which it adopted in deciding whether to grant such applications, or the approach which the Jersey court would take on appeal in deciding whether a refusal to approve was unreasonable.

70. In these circumstances the claimants failed to prove to the criminal standard the allegation contained in their application notice that the vote of B-Finance in favour of the special resolution was determinative of whether the continuance would take place. For that reason also the committal appeal must be dismissed.

The costs appeal

71. There is, not surprisingly, no challenge to the judge's decision that the claimants should pay Mr Deripaska's costs of the committal application. However, the claimants do challenge his order that Mr Deripaska's costs of and occasioned in responding to the eighth affidavit of Ms Berard should be assessed on the indemnity basis.

The judgment

72. The judge was faced with an application by Mr Deripaska that the entirety of his costs of the committal application should be assessed on the indemnity basis. He rejected that application, applying the test in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm)* [2002] EWCA Civ 879 at [32] that 'before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.' He held that the application was not outside the norm. It had been held by this court on the abuse appeal to be an arguable application and the fact that it had failed did not justify an order for costs on the indemnity basis.

73. However, the judge made the order for some of Mr Deripaska's costs to be assessed on the indemnity basis because he was critical of some of the language used in Ms Berard's

affidavit in support of the application. He described this as 'in some respects highly inappropriate' and as having 'the effect of generating heat rather than light'. He instanced the use of the words 'flagrant' and 'egregious' to describe alleged breaches of the undertaking, when it would have been sufficient to describe them as breaches or as intentional breaches, and observed that:

> 'Courts time and time again have attempted to indicate to parties that evidence in support of any application, and particularly contempt applications [should be] objectively and succinctly not flamboyantly expressed and should be confined to what is strictly relevant to the application concerned.'

74. In fairness to Ms Berard it should be acknowledged that, although she must take responsibility for the content of her affidavit, in a case such as this it is likely that the affidavit was at least approved by other members of the legal team, including counsel, who may well have contributed to its drafting.

75. The judge was also critical of some of the language used in the claimants' skeleton argument for the hearing before Mr Justice Andrew Baker, but regarded that as less significant because it was a submission rather than evidence.

Submissions

76. Mr Crow submitted that the effect of the judge's order was uncertain and that the order was plainly wrong. It was uncertain because it was not clear what were the costs of and occasioned in responding to Ms Berard's affidavit which, on one view, might include the entirety of the costs of the application – although that was plainly not the judge's intention as he said in terms that such an order would be disproportionate.

77. Mr Crow submitted that the order was wrong because the extensive findings of dishonesty and dishonourable behaviour made against Mr Deripaska in the course of the arbitration proceedings and previous court proceedings recited in the affidavit were relevant to the issue of Mr Deripaska's credibility and, in the event that he was held to be in breach of his undertaking, to the question of sanction. The findings made against Mr Deripaska had been extremely serious and the statement that he had advanced a 'fundamentally dishonest case' was a fair reflection of the conclusion of Mr Justice Teare in his judgment on the challenges to the award (*Filatona Trading Ltd v Navigator Equities Ltd* [2019] EWHC 173 (Comm)): in that judgment Mr Justice Teare had found that Mr Deripaska had paid a multi-million dollar bribe to induce a witness to put forward what they both knew to be false evidence. As to the use of terms such as 'serious', 'deliberate' and 'flagrant' in describing the alleged breaches of Mr Deripaska's undertaking, this too was relevant to sanction and reflected language repeatedly used by judges when contempt of court has been established – not surprisingly when the law draws a distinction between serious and technical breaches (*Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch)), and when both 'flagrant breach' and 'fundamental dishonesty' are terms of art in some legal contexts. Moreover such language could not conceivably have added to Mr Deripaska's costs of responding to Ms Berard's evidence.

78. The costs appeal was dealt with by Mr Caley Wright for the defendant. As to the meaning of the judge's order, he submitted that the costs to be assessed on the

indemnity basis were limited to those incurred by the claimants in reading and considering Ms Berard's affidavit and in preparing the five affidavits which were produced in response. He emphasised the wide discretion of a trial judge on the question of costs and submitted that the judge was right, or at any rate entitled, to make an order which would discourage the use of unnecessarily tendentious language. It was irrelevant that the use of such language did not increase the costs incurred by Mr Deripaska.

79. Further, Mr Wright submitted that an affidavit should contain evidence and not argument. In this regard Mr Wright cited paragraph 25 of Ms Berard's affidavit, which reads as follows:

> 'It is also the case that Teare J made critical remarks in respect of certain aspects of the Chernukhin Parties' evidence. However, I do not believe that those matters are of any relevance to this committal application. In particular, those criticisms do not detract from or diminish the severity of the findings of systemic dishonesty, intimidation, perjury and witness subornation made against Mr Deripaska. These findings demonstrate, I would suggest, that the breaches of undertaking which are the subject of this Application are all the more egregious because they are part of a ruthless long-term campaign by Mr Deripaska to deprive the Chernukhin Parties of their due entitlements and to evade judgments made in their favour.'

80. Mr Wright drew attention to Practice Direction 57AC, which applies to witness statements for use at trials in the Business and Property Courts signed on or after 6th April 2021. The Practice Direction emphasises that it is not the function of a witness statement to argue the case and provides that, if a party fails to comply with the requirements of the Practice Direction, the court may (among other sanctions) make an adverse costs order against that party. Mr Wright recognised that the Practice Direction was not in force at the date of Ms Berard's witness statement, but submitted that it merely reflects the powers which the court already had.

Decision

81. Undoubtedly the judge had a wide discretion as to costs and was correct to direct himself that an order for indemnity costs could only be made if there was some conduct or some circumstance which took the case out of the norm. Accordingly this court can only interfere if (in short) he made an error of principle, took into account an irrelevant consideration or failed to take into account a relevant consideration.

82. I would accept that it was legitimate for Ms Berard to make clear that the claimants were relying on the many findings made adversely to Mr Deripaska in the course of the arbitration and the previous court proceedings. It is as a matter of fact no exaggeration to say, as Ms Berard did, that these findings reveal a willingness on the part of Mr Deripaska to act in ways that are fundamentally dishonest, including (by the bribing of witnesses) to subvert the integrity of the administration of justice. Those who wish to read the full story can find it in the previous judgments to which I have referred. It seems to me that these matters were highly relevant as being capable of giving rise to an inference that, if Mr Deripaska was found to be in breach of his undertaking (as to

which there was an arguable case even though that case has not succeeded), the breach had been committed knowingly and intentionally, or at least with a reckless disregard for the process of the court.

83. I agree entirely with what is said in Practice Direction 57AC. In particular, there are some parts of Ms Berard's affidavit, including the paragraph quoted above, which are more in the nature of submission than evidence. However, that was not why the judge made his order for indemnity costs. His order was founded upon the 'inappropriate' or 'flamboyant' language used in the affidavit. As to this, I would accept that Ms Berard was somewhat too enthusiastic in her choice of adjectives to characterise Mr Deripaska's conduct, and that some of her language was not appropriate for inclusion in an affidavit. But in my judgment the judge's order was wrong in principle for three reasons, which so far as I can see he did not take into account.

84. First, it was essentially punitive and not compensatory. The fact that the criticisms of the affidavit which the judge found to be valid had no impact on the costs incurred by Mr Deripaska in responding to the affidavit was a material consideration which the judge did not take into account. Its only effect was to punish the claimants for what the judge regarded as the use of inappropriate language.

85. Second, however, although some of the language used by Ms Berard was unnecessary, what she said about Mr Deripaska's conduct was true. He *had* acted in ways which were fundamentally dishonest, which demonstrated contempt for basic standards of truthfulness in the conduct of litigation, and which it was legitimate to draw to the court's attention as being relevant or potentially relevant to the issue of contempt. The judge did not identify anything Ms Berard had said which was wrong. His only point was as to its manner of expression.

86. Third, the effect of the order which the judge made was that Mr Deripaska's costs of responding to Ms Berard's evidence would be assessed without regard to proportionality, and with any doubt as to reasonableness resolved in Mr Deripaska's favour. That is what an order for indemnity costs means (see CPR 44.3). Earlier in his costs judgment, however, when rejecting the application that all of Mr Deripaska's costs should be assessed on the indemnity basis, the judge had said:

> 'Litigation can be -- and in this case has been throughout -- fiercely, indeed occasionally viciously, fought out without constraint or restraint and without regard to cost or the use of resources, whether private or public. That of itself, as it seems to me, points to a need for the court to apply concepts of proportionality when considering all aspects of this claim, including what costs should be recovered in respect of it. The expressed purpose of Mr Grant's application was to disapply the proportionality principle to the costs claimed by his client. That is not an appropriate basis on which to ask the court to proceed.'

87. I respectfully agree. However, the judge appears to have lost sight of this point when making his order for part of Mr Deripaska's costs to be assessed on the indemnity basis. It seems to me that an order which allows a party to recover costs without regard to proportionality, particularly in a case fought in the way which this one has been, is itself a disproportionate response to the criticisms of Ms Berard's affidavit.

88. In these circumstances I consider that it is open to us to set aside the judge's order. In my judgment justice is served in this case by an order for assessment on the standard basis.

Disposal

89. I would dismiss the committal appeal. I would allow the costs appeal and would set aside that part of the judge's order which provides for Mr Deripaska's costs of and occasioned in responding to the eighth affidavit of Ms Berard to be assessed on the indemnity basis.

LORD JUSTICE LEWISON:

90. I agree.

SIR JULIAN FLAUX C:

91. I also agree.