Neutral Citation Number: [2024] EWHC 3154 (Comm)

Case No: CL-2017-000323

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 06/12/2024

**Before** :

**THE HONOURABLE MR JUSTICE HENSHAW**

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**Between:**

**IN THE MATTER OF GERALD MARTIN SMITH**

**Defendant**

**AND**

**IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE SERIOUS FRAUD OFFICE FOR THE COMMITTAL OF GERALD MARTIN SMITH TO PRISON FOR CONTEMPT OF COURT**

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**Kennedy Talbot KC and Gary Pons** (instructed by **Serious Fraud Office**) for the **Applicant**
**Dr Smith appeared in person**

Hearing date: 29 October 2024
circulated to parties: 31 October 2024

# Approved Judgment

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**Mr Justice Henshaw:**



## (A) INTRODUCTION

1. The Serious Fraud Office ("***SFO***") applies to commit the defendant, Dr Smith, to prison for contempt of court. The alleged contempts are:

   i) disobeying a Restraint Order ("***the Restraint Order***") made on 20 May 2005 by Wilkie J under the Criminal Justice Act 1988 ("***CJA 1988***"), as varied by an order made by Andrew Baker J on 20 May 2022 ("***the Variation Order***"), by spending more than the £2000 per month permitted on living expenses on fifteen occasions from June 2022 to December 2023;

   ii) breaching undertakings he gave to the Court, set out in an agreement dated 27 January 2021 ("***the LCL Settlement Deed***"), which compromised the claim brought by the SFO and certain Enforcement Receivers with him, by:

      a) procuring Dr Robert Morris to assign his purported rights in a tenancy in respect of Flat 21 Hamilton House, 81 Southampton Row, London, WC1B 4HA **("*Flat 21*")**;

      b) changing or causing to be changed the front door lock to Flat 21; and

      c) causing Ms Auta Caldado and Ms Gabrielle Beluzzo to occupy Flat 21; and

   iii) breaching the same undertakings by:

      a) failing to give vacant possession of Flats 11 and 12 Hamilton House, 81 Southampton Row, London, WC1B 4HA **("*Flats 11 and 12*")**; and

      b) issuing an application to stay a writ of possession in respect of Flat 11 and 12 without any foundation or proper basis.

2. The application was heard before me on 29 October 2024. At the beginning of the hearing, Dr Smith applied for an adjournment, which I refused for the reasons given in

a short oral ruling (see further §§ 60-61 below). I then heard submissions from counsel for the SFO and from Dr Smith directed at the question of whether Dr Smith had committed the contempts alleged. These submissions occupied most of the court day. I reserved judgment, indicating that I would reach a decision on questions of liability and, in the event that I found any contempt had been committed, would adjourn the hearing to a later date for consideration of sentence.

3. For the reasons set out below, I have reached the conclusion that Dr Smith committed each of the contempts alleged.

## (B) FACTUAL BACKGROUND

4. In March 2003 Orb a.r.l. ("***Orb***"), a private limited company registered in Jersey, entered into an agreement with Atlantic Hotels (UK) Ltd ("***Atlantic Hotels***") a company connected to a businessman named Mr Andrew Ruhan. In simple terms, the agreement provided for the transfer to Atlantic Hotels of Orb's shares in Izodia Plc, a portfolio of 37 hotels, and a portfolio of development, commercial and warehouse businesses. Dr Smith was the chief executive officer of Orb.

5. On 29 March 2004, a discretionary trust was established in the Isle of Man on the instructions of Mr Andrew Ruhan ("***the Arena Settlement***"). Mr Simon Cooper and Mr Simon McNally were closely connected with the Arena Settlement: Mr Cooper was named as the Settlor, and they both were initially named as members of the class of beneficiaries. The assets settled into the Arena Settlement included the hotel portfolio and the portfolio of businesses.

6. On 18 February 2005, the SFO charged Dr Smith with offences of conspiracy to defraud and theft in connection with payments that he had procured from Izodia Plc between August and November 2002.

7. On 20 May 2005, the High Court (Administrative Court) made a Restraint Order in respect of Dr Smith's realisable property, on the SFO's application, under section 77 of the CJA 1988 in connection with the theft from Izodia. The Restraint Order also extended to others who were considered to hold Dr Smith's assets, including his then wife Dr Gail Cochrane.

8. On 24 April 2006, Dr Smith pleaded guilty to ten counts of theft and false accounting contrary to the Theft Act 1968 and was convicted of stealing £35 million from Izodia. On 11 September 2006, he was sentenced to eight years' imprisonment.

9. On 13 November 2007, a confiscation order was made against Dr Smith under the CJA 1998 in the sum of £40,956,911.

10. On 7 April 2008, Mr Finbarr O'Connell and Mr Jeremy Outen of KPMG LLP were appointed, on the SFO's application, to act as receivers pursuant to section 80 of the CJA 1988 to enforce payment of the confiscation order. Later, on 29 May 2013 Mr O'Connell and Mr Outen were replaced by John Milsom and David Standish, also of KPMG LPP (the "***Enforcement Receivers***").

11. In 2012, proceedings were brought by Orb, Mr Nicholas Thomas and Mr Roger Taylor, who are, or at least were, close associates of Dr Smith (Mr Nicholas Thomas having

met the Defendant when they were both in prison in 1990) ***("the Orb Claimants***") against Mr Andrew Ruhan and Messrs Cooper and McNally in relation to the March 2003 agreement that led to the transfer of Orb's assets to Atlantic Hotels ("***the Orb Litigation***"). The Orb Litigation was managed by the Defendant, and was later settled by an agreement between the parties, referred to as the "***Isle of Man Settlement***", in late 2013 and early 2014. As part of the settlement, Messrs Cooper and McNally transferred assets including (i) the shares in 18 British Virgin Islands and Isle of Man companies ("***the Arena Companies***") into the ownership of a Marshall Islands company, incorporated at the Defendant's instigation, named SMA Investment Holdings Ltd ("***SMA***"), and (ii) £10m, which was sent to an account held in Dr Gail Cochrane's name.

12. By early 2016 a number of different parties had claimed interests in Dr Smith's assets. In order to case manage these together with the CJA proceedings, on 13 January 2017 Popplewell J transferred the CJA proceedings (and hence the restraint and receivership proceedings) from the Administrative Court to this Court.

13. A number of variations were made to the Restraint Order by the High Court between 23 May 2016 and 25 May 2017, leading to a Conformed Restraint Order made by Popplewell J on 25 May 2017. The Restraint Order contains the standard penal notice warning Dr Smith (and others) of the consequences of breach of the Restraint Order. §§2 and 3 of the Restraint Order under the heading "*Disposal of or dealing with assets*" provide:

> "Dr Smith must not until further order of the Court:
>
> (1) remove from England and Wales any of his assets up to the value of £67,190,681.11 which are in England and Wales; or
>
> (2) in any way dispose of, deal with or diminish the value of any of his assets any of his assets up to the value of £67,190,681.11 whether they are in or outside England and Wales.
>
> 3. Paragraph 2 applies to all Dr Smith's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order Dr Smith's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. Dr Smith is to be regarded as having such power if a third party holds or controls the asset in accordance with her direct or indirect instructions."

14. §12 of the Restraint Order provided the following exception to the prohibition contained in §2:

> "(1) This order does not prohibit Dr Smith from spending up to £250 a week towards his ordinary living expenses if he is not in prison and up to £1000.00 on legal advice and representation in connection with this order. But before spending any money Dr Smith must tell the Prosecutor where the money is to come from.

> This shall remain until such time as the confiscation order is made."
>
> …….
>
> (4) Dr Smith may agree with the Prosecutor that the above spending limits are varied or that this Order be varied in any other respect in relation to them, but any such agreement must be in writing."

15. On 26 June 2017, the SFO and the Enforcement Receivers applied for a determination that the shares of 27 Marshall Islands, Manx, Canadian, Dutch, Jersey and English companies created by entities associated with the Defendant ("***the Non-Arena Companies***") were the realisable property of Dr Smith (and so could be applied by the Enforcement Receivers towards the Confiscation Order). A number of parties joined this claim to assert a proprietary interest in various classes of property which had been included in the claim. The application largely concerned the ownership of assets which had been transferred as a result of the Isle of Man Settlement. The parties included:

    i) Dr Smith;

    ii) Dr Gail Cochrane;

    iii) Anthony Smith, Dr Smith's brother;

    iv) Dr Robert Morris;

    v) Litigation Capital Limited ("***LCL***"), a company ostensibly wholly owned by Anthony Smith, which asserted that it was the sole shareholder of the Non-Arena Companies;

    vi) Messrs Thomas and Taylor;

    vii) Harbour Fund II LP ("***Harbour***"), a litigation funder who had provided finding to the claimants in the Orb Litigation. The terms upon which Harbour provided the funding were set out in an investment agreement, which included a provision by which the Orb Claimants would hold any proceeds of the Orb Litigation on bare trust for Harbour and themselves ("***the Harbour Trust***");

    viii) The Viscount of the Royal Court of Jersey in her capacity as the administrator of the en desastre (bankruptcy) estates of Dr Gail Cochrane and Orb;

    ix) Stewarts Law LLP, who acted for the Orb Claimants in the 2012 proceedings; and

    x) the Joint Liquidators of a number of the Arena Companies ("the Joint Liquidators").

16. The proceedings were case managed by Foxton J. On 20 May 2020 Foxton J made an order identifying the assets which were to be the subject of the trial of the action, and a 'guillotine' provision requiring all claims to any of the relevant assets to be made by a specified date. The assets listed in the order, at Schedule 2, included Flats 11, 12 and

21 of a residential block in London, Hamilton House, to which two of the contempt allegations currently made relate.

17. In due course, claims were put forward, including a claim by Dr Morris claiming to be a tenant of Flat 21, and a claim by LCL to have a proprietary interest in the Identified Underlying Assets.

18. The SFO and the Enforcement Receivers' application was partly resolved by two settlement agreements.

19. First, a Settlement Agreement was made on 5 September 2019 between the SFO, Harbour, Stewarts Law LLP, the Joint Liquidators, a number of companies listed in Appendix 5, the Viscount of Jersey and the Enforcement Receivers (together "***the Settlement Parties***"), in respect of their claimed proprietary interests in the assets to which the application related. The companies listed in Appendix 5, and defined as the "***Arena Companies***", included Bridge Properties (Arena Central) Limited ("***BPAC***"), a BVI company, and Specialty Finance Limited, an Isle of Man company.

20. Secondly, the LCL Settlement Deed was entered into on 27 January 2021 between the Settlement Parties and Dr Smith, Anthony Smith, LCL, Dr Morris (an old friend of Dr Smith's) and others connected to Dr Smith ("***the LCL Parties***"). The Deed released the LCL Parties' claim to any proprietary or other interest in assets which was the subject of the SFO and the Enforcement Receivers' application, the assets being identified in § 3 of the Deed. Those assets were defined as "*the Paragraph 3 Property*", and included the "*Identified Underlying Assets*", in turn defined as the assets set out in Schedule 2 to Foxton J's order of 20 May 2020, and hence including Flats 11, 12 and 21, Hamilton House. The release in § 3 extended to:

> "… all and any actions, claims, rights, demands and set-offs, whether capable of being litigated or enforced in this jurisdiction or any other, whether presently known or unknown to the Parties or to the law, and whether arising in law or equity, under statute or otherwise, that they have, had, may have or hereafter can or shall or may subsequently acquire, against the Settlement Parties or any other person, where such action, claim, right, demand or set-off etc relates to or arises out of or in connection with"

the assets listed. Further, § 5 provided that:

> "The LCL Parties do not and will not challenge (or cause, procure, facilitate or assist any other person to challenge) the Settlement Parties' cases at the Directed Trial, or in any further, consequential or related proceedings which seek to vindicate the Settlement Parties' rights to the Paragraph 3 Property or establish the quantum of the Settlement Parties' entitlements in relation thereto. For the avoidance of doubt, this clause does not prevent and is not intended to prevent any of the LCL Parties from giving evidence in the SFO Proceedings if required by the Court to do so."

21. Clause 9 of the Deed provided:

> "The LCL Parties and each of them undertake to the Settlement Parties and will undertake to the Court (in an order bearing a penal notice):
>
> 9.1. To use their reasonable endeavours to assist the Settlement Parties and each of them to realise the Paragraph 3 Property for the benefit of whichever person is ultimately found by the Court, or is agreed to be, entitled to the Paragraph 3 Property.
>
> 9.2 Not to impede, obstruct or hinder in any way, whether directly or indirectly or by way of assistance rendered to any third party, any attempts made by the Settlement Parties or any of them to safeguard and/or realise the Paragraph 3 Property.
>
> 9.3 To comply, as soon as reasonably practicable, with reasonable requests made of them by the ERs, JLs and/or Viscount (including, for the avoidance of doubt, by meeting with the ERs, JLs and/or Viscount, providing them with information or documentation, and executing such documents as they may require) in connection with safeguarding and/or realising the Paragraph 3 Property.
>
> 9.4. To take the specific steps or refrain from taking the specific steps (as the case may be) as set out in Schedule 3, save that a reference to one or more of the LCL Parties individually in relation to a specific obligation contained therein shall not be considered to be an obligation owed by the remaining LCL Parties."

22. Clause 10 of the LCL Settlement Deed provided that the undertakings would be recorded on the face of the court order discontinuing the LCL Parties' claims as set out in Schedule 2 to the Deed. Schedule 2 contained a draft of an order containing a penal notice and containing undertakings by Dr Smith and the other LCL Parties in the same terms as set out in clause 9 of the Deed. Schedule 3 set out various undertakings, including:

> "2. The LCL Parties undertake not to take any steps to undermine, prejudice or interfere with the obligations contained in the LCL Settlement Deed"

23. Clause 12 of the LCL Settlement Deed provided that that the LCL Parties and each of them *"shall give or procure vacant possession (including the termination of any tenancies and removal of any third party occupants)"* of the properties set out in Schedule 4 *"on the timescales set out therein and in favour of the parties specified therein"*. Schedule 4 included Flats 11, 12 and 21, Hamilton House, and required vacant possession of them to be given to the Enforcement Receivers by the date 12 months from the date set out in § 15. That date (referred to as "*the trigger condition*") was the date of *"judgment in favour of one or more of the Settlement Parties in relation to the property in question at the end of the Directed Trial, regardless of any appeals or outstanding issues which might allow a subsequent party to assert priority"*.

The Directed Trial was defined to mean the trial of the SFO/Enforcement Receivers' application, being heard by Foxton J. The Settlement Parties were defined as the parties to the Settlement Agreement dated 5 September 2019 (and hence included BPAC).

24. Schedule 7 to the LCL Settlement Deed set out a form of letter to be written by LCL Parties (other than LCL) requesting permission to discontinue their claims. A number of signed letters were annexed. These included a letter from Dr Morris dated 27 January 2021 stating:

> "Dear Judge,
>
> I, Robert Morris, write as a party to claim no. CL-2017-000323.
>
> I wish to inform the Court that settlement negotiations between myself, the Settlement Parties and a series of other parties known as the LCL Parties have reached a successful conclusion and resulted in an agreement between the parties (the "LCL Settlement Deed"). I understand that a copy of the LCL Settlement Deed will be provided for the Court's consideration.
>
> I have read and understood the LCL Settlement Deed and in particular the undertakings contained in the draft order at Schedule 2 of the LCL Settlement Deed. I appreciate that as an unrepresented litigant the Court may wish to hear from me and I am willing to attend Court for this purpose.
>
> I am aware that I am able to take independent legal advice about the settlement agreement but not done so.
>
> Yours sincerely"

Dr Morris was the occupant of Flat 21, Hamilton House.

25. At a hearing on 2 February 2021 the LCL Settlement Deed with the undertakings was placed before Foxton J. Dr Smith was not present but was represented by counsel. Foxton J expressed some concern about the absence of Dr Smith because these were undertakings that were being given to the Court. He said that the LCL Parties (hence including Dr Smith) *"…all need to understand that the effect of giving an undertaking to the court is the equivalent of the court making an order that they do the thing they have undertaken to do and, if there were non-compliance with that undertaking, then the law of contempt of court is potentially engaged, as it would be for breach of an order".* Foxton J ordered that further letters be provided by the LCL Parties setting out that they understood the consequences of failing to comply with the undertakings they were giving, and he stated that the order he proposed to make would not take effect for 14 days which allowed time for these letters to be provided.

26. Also on 2 February 2021, Foxton J approved a Consent Certificate of Inadequacy under section 83 of the CJA 1988, which conferred on the High Court a power to certify, with reasons, that the realisable property of a defendant to a confiscation order was inadequate for the payment of any amount remaining to be recovered under the order. (Such a certificate then entitled the defendant to apply to the Crown Court for the

amount recoverable under the order to be reduced.) In Dr Smith's case, the certificate stated, upon Dr Smith having given various undertakings, that the value of his realisable property was inadequate to pay the amount of the confiscation order, which together with accrued interest stood at £72,928, 795 as at 14 January 2021. The certificate stated that Dr Smith had no realisable property other than the assets set out in § 1 of the certificate. These included (i) the maximum recovery by the SFO and the Enforcement Receivers from what was held to be Dr Smith's realisable property in the Directed Trial (and any other trial in these proceedings) and was payable towards the confiscation order under the 2019 Settlement Agreement, and (ii) *"[t]he value of [Dr Smith's] realisable property comprised in any other proceeds of the Isle of Man Settlement … that fall outside the scope of [these proceedings] and is payable towards the Confiscation Order under the 2019 Settlement Agreement. The said proceeds that might amount to [Dr Smith's] realisable property are confined to the identified assets and those traceable to the Schedule of Assets and Payments appended to this Order (to the extent that they fall outside the scope of any determinations in [these proceedings]".*

27. On 3 February 2021, Dr Smith provided a letter of the kind Foxton J had required, which stated:

> "Dear Judge,
>
> I, Dr Gerald M Smith, write as a party to claim no. CL-2017-000323 and further to my previous letter to Court concerning the settlement deed to which I (among others) am a party (the "Settlement Deed").
>
> I have read the undertakings I propose to make to the Court and which are set out: (i) in the recitals to the draft Order at Schedule 2 to the Settlement Deed; and (ii) in Schedule 3 to the Settlement Deed.
>
> I have also read the penal notice at the beginning of the draft Order at Schedule 2 to the Settlement Deed.
>
> I can confirm to the Court that I am aware of the following matters:
>
> 1. The giving of an undertaking to the Court is equivalent to the Court having made an order against me in those terms.
>
> 2. That if it is found that I have breached any of those undertakings, a committal application may be made against me alleging that I have committed a contempt of Court.
>
> 3. That if it is found that I am in contempt of Court as a result of any breach of my undertakings, I may be imprisoned, fined or have my assets seized.
>
> I also confirm that I am content to discontinue the claims that I had previously made in relation to the Identified Underlying Assets.

> I am aware that I am able to take independent legal advice in relation to the proposed order and undertakings and have done so.
>
> Yours sincerely,"

28. Dr Morris provided a similar letter on the same date.

29. On 4 February 2021, Foxton J made an order to give effect to the LCL Settlement Deed ("***the LCL Order***"). The Order including the following recital:

> "AND UPON the LCL Parties (and each of them) UNDERTAKING to the Settlement Parties and to the Court:
>
> (a) To use their reasonable endeavours to assist the Settlement Parties and each of them to realise the Paragraph 3 Property for the benefit of whichever person is ultimately found by the Court, or is agreed to be, entitled to the Paragraph 3 Property.
>
> (b) Not to impede, obstruct or hinder in any way, whether directly or indirectly or by way of assistance rendered to any third party, any attempts made by the Settlement Parties or any of them to safeguard and/or realise the Paragraph 3 Property.
>
> (c) To comply, as soon as reasonably practicable, with reasonable requests made of them by the ERs, JLs and/or Viscount (including, for the avoidance of doubt, by meeting with the ERs, JLs and/or Viscount, providing them with information or documentation, and executing such documents as they may require) in connection with safeguarding and/or realising the Paragraph 3 Property.
>
> (d) To take the specific steps or refrain from taking the specific steps (as the case may be) as set out in the Appendix to this Order (save that a reference to one or more of the LCL Parties individually in relation to a specific obligation contained therein shall not be considered to be an obligation owed by the remaining LCL Parties)"

The Appendix to the order included the following undertaking:

> "2. The LCL Parties undertake not to take any steps to undermine, prejudice or interfere with the obligations contained in the LCL Settlement Deed."

I refer collectively to these various undertakings given by, among others, Dr Smith as the "*Undertakings*".

30. The LCL Order used the same expression, "*the Paragraph 3 Pr*operty", as the LCL Settlement Deed itself, and contained a definition of that expression which included *"the Identified Underlying Assets".* The order did not itself define the latter term, but clearly must be read in the context of the LCL Settlement Deed itself, to which the order

cross-referred and gave effect. Dr Smith made no suggestion before me that he ever had any doubt that Flats 11, 12 and 21 were covered by the terms of the Undertakings; and in my view the Undertakings clearly and unequivocally did cover them.

31. The LCL Order was served in accordance with §10 of the Order, which dispensed with personal service and ordered service by email to the email addresses specified in Schedules 3A and 3B of the Order of Foxton J dated 20 May 2020.

32. Throughout this process Dr Smith was represented by solicitors and counsel.

33. The remaining issues were determined by a seven-week trial before Foxton J, who handed down judgment on 18 May 2021. The outcome of the trial was reflected in an order of Foxton J dated 11 June 2021 ("the Consequentials Order") which included these provisions:

> "Harbour
>
> 4. The interests in the following assets are held by their legal owners on the terms of the Harbour Trust and are to be applied and apportioned between the beneficiaries, namely Harbour, Orb arl, and Messrs Thomas and Taylor, in accordance with those terms (save as set out below):
>
> …
>
> c. The traceable proceeds of the IOM Settlement Cash, but in particular:
>
> …
>
> vi. An equitable interest of 16.62% in Flats 11, 21 and 23 Hamilton House;
>
> …
>
> d. The traceable proceeds of the £23,921,641.59 paid to Candey LLP which derived from the $43.5m Qatar Settlement Payment, but in particular:
>
> i. An equitable interest of 90% in Flat 12 Hamilton House (reflecting the balance of the purchase price)
>
> …"
>
> "The SFO
>
> 16. With the exception of the shares in Bodega, Dr Gerald Martin Smith holds 100% of the equitable interest in the shares of each of the Non Arena Companies (as set out in Schedule 2 to this order)."
>
> "The Joint Liquidators

> 20. The companies under the Joint Liquidators' control have equitable interests in the IUAs set out in Schedule 4 to this order in the proportions set out therein, subject to such claims as remain available to HPII following the findings in the Trial Judgment and the Strike Out Judgment."
>
> "Other Findings
>
> 25. Save insofar as set out above or below, the claims pursued by the parties at the Directed Trial are dismissed and none of the said parties hold any equitable or proprietary interests in any of the Relevant Property or the IUAs.
>
> 26. Except insofar as referred to in this order, no other person, whether a party to this claim or otherwise, is entitled to any proprietary interest or interest under the 1988 Act in the Relevant Property or the IUAs. In addition to the interests recognised above in this order, the following bona fide interests remain unaffected by this paragraph:
>
> a. Assured shorthold tenancies in favour of the occupants of Flats 2, 3, 10, 14, 17, 18, 22, 23 and 24 Hamilton House;
>
> b. The life interest in Antoinette Gardens;
>
> c. 50% of 32 Moor Lane owned by Mrs Catherine Irving;
>
> d. The mortgage of Montagu Square in favour of Santander UK Plc in the sum of £330,000."

34. Schedule 4 to the Consequential Order was headed "Equitable Interests in the IUAs". It recorded *inter alia* that:

    i) the legal owner of Flat 11 Hamilton House was Future Investments Limited, and the equitable interests were held as to 16.62% by Harbour and 83.28% by BPAC;

    ii) the legal owner of Flat 12 Hamilton House was Blackwood Investments Limited, and the equitable interests were held as to 90% by Harbour, 4.19% by BPAC and 5.81% by Specialty Finance Limited; and

    iii) the legal owner of Flat 21 Hamilton House was Sarn Investments Limited, and the equitable interests were held as to 16.62% by Harbour and 83.28% by BPAC.

35. Harbour, BPAC and Specialty Finance Limited were all Settlement Parties. It followed that Foxton J's judgment was a *"judgment in favour of one or more of the Settlement Parties in relation to the property in question at the end of the Directed Trial …"*, as regards Flats 11, 12 and 21 Hamilton House, for the purpose of clause 12 of and Schedule 4 to the LCL Settlement Deed.

36. On 20 May 2022, Andrew Baker J made the Variation Order upon the application of Dr Smith. It varied the exception contained in §12 of the Restraint Order to permit Dr Smith to spend up to £2,000 per month towards his ordinary living expenses (instead of £250 per week). Furthermore at §3 it permitted him to open a single bank account in his name but required that he notified the SFO of the details of the account. It also required him to provide the SFO with copies of his account statements for this "*Nominated Account*" on a monthly basis.

37. At the same hearing on 20 May 2022, Dr Smith admitted two contempts of court by operating two bank accounts in breach of the Restraint Order and later, on 29 July 2022, a third breach by operating a third account in breach of the order.. He had withdrawn or transferred a total of £57,410 from the accounts over a 15-month period. In due course, on an application by the SFO, Dr Smith was committed for contempt and the court imposed a sentence of 8 months' custody suspended for 18 months. All of the actions alleged to amount to contempts in the present application occurred during the operational period of that suspended sentence, apart from the first instance (in June 2022) of exceeding the monthly spending limit.

38. The period of 12 months from the Directed Trial judgment, referred to in Schedule 4 to the LCL Settlement Deed, expired on 18 May 2022. The Enforcement Receivers on various occasions between May 2021 and March 2022 wrote to occupants at Hamilton House, including Dr Smith and Dr Morris, notifying of them of their obligations to provide vacant possession by 18 May 2022 of (relevantly) Flats, 11, 12 and 21.

39. On 16 May 2022, Dr Morris sent a response asserting that he had been advised that, under the Directed Trial judgment, *"the claims of the Orb Claimants outranked all other claims to the Property. I am advised that as such, the Settlement Parties (the SPs) did not succeed, and therefore clause 15 of the [LCL Settlement Deed] was not triggered."*

40. On 19 May 2022, Dr Smith sent a response making the same assertion, that *"the so-called Settlement Parties (the SP's) did not succeed, and therefore clause 15 of the [LCL Settlement Deed] was not triggered"*. In an evidently coordinated effort, Dr Smith's daughter Ms Iona Smith (occupant of Flats 19-20) and his daughter Dr Imogen Smith (occupant of Flat 1), sent materially identical responses on 16 and 17 May 2022 respectively.

41. On 31 May 2022, Dr Smith's then solicitors, Berkeley Square Solicitors, sent a letter indicating that they were instructed and seeking leading counsel's advice on the matter. However, on 10 June 2022 Berkeley Square Solicitors wrote again, proposing agreement by consent that Dr Smith would give vacant possession of Flats 11 and 12 by a date 14 days after judgment was handed down in a Part 8 claim that had been issued by the joint trustees of the Harbour Trust.

42. After further correspondence, a consent order was signed by or on behalf of Dr Smith on 6 December 2022 and approved by Cockerill J on 18 December 2022. The order recited:

> "UPON the settlement deed dated 27 January 2022 among the Second Applicants and other Settlement Parties (as defined therein) on the one hand and the 20th Respondent (Gerald Martin

Smith) and other LCL Parties (as defined therein) on the other (the "LCL Deed") in which the 20th Respondent and other LCL Parties agreed "to give or procure vacant possession (including the termination of any tenancies and removal of third party occupants)" of certain UK properties in favour of the Second Applicants within 12 months of "judgment in favour of one or more of the Settlement Parties in relation to the property in question at the end of the Directed Trial"

AND UPON the order dated 4 February 2021 in which the 20th Respondent (and other LCL Parties) gave certain undertakings to the Court and the Settlement Parties including (without limitation) (a) to assist the Settlement Parties to realise the relevant property for the benefit of whichever person is ultimately found by the Court, or is agreed to be, entitled to that property, (b) not to impede attempts to safeguard or realise the relevant property and (c) to comply with reasonable requests made of them by the Second Applicants (the "Undertakings")

AND UPON judgment from the Directed Trial being handed down by Mr Justice Foxton on 18 May 2021 and an order consequential on judgment being made by Mr Justice Foxton on 11 June 2021 (the "Judgment")

AND UPON the Second Applicants requesting, by reference to the LCL Deed, the Undertakings and the Judgment, that the 20th Respondent give vacant possession of Flat 11 Hamilton House, … and Flat 12 Hamilton House, … (the "Properties") in favour of the 2nd Applicants [viz the Enforcement Receivers] and/or the 34th and 35th Respondents [viz Future Investments Limited and Blackwood Investments Limited] (being the legal owners of the Properties over whose shares the 2nd Applicants are appointed receivers by an order made on 7 December 2017 (the "2017 RO"))

AND UPON a hearing being listed for 14-15 November 2022 (the "November Hearing") in respect of the following applications: (1) an application dated 9 July 2021 by the 16th and 17th Respondents for the appointment of receivers (the "T&T Receivership Application"); (2) a part 8 claim issued by Mr Rupert Ticehurst, the 16th and 17th Respondents on 8 June 2022 to determine their role and powers as (purported) trustees of the Harbour Trust (the "Part 8 Claim"); and (3) an application dated 24 June 2022 by the 7th, 10th, 21st, 22nd, 24th and 25th Respondents for the appointment of Messrs David Standish and David Pike of Interpath Advisory as receivers (the "2022 Receivership Application") (together the "Applications")

AND UPON the 20th Respondent [viz. Dr Smith] asserting that the LCL Deed is of no force or effect and that his obligation to give vacant possession has not been triggered, but offering to

give vacant possession of the Properties to the appropriate party 14 days following hand-down of judgment determining the Applications

AND UPON the judgment of Foxton J handed down on 30 November 2022 dismissing the T&T Receivership Application, declaring that Mr Ticehurst was not appointed as a trustee and removing the 16th and 17th Respondents as trustees of the Harbour Trust, and granting the 2022 Receivership Application

AND UPON an order made by Foxton J on 14 December 2022 appointing Messrs Standish and Pike as receivers of the Properties"

43. The operative provisions of the consent order were:

"BY CONSENT IT IS ORDERED:

1 This order is made:

1.1 without prejudice to any obligation in the LCL Deed, or any dispute as to the LCL Deed's validity, enforceability or effect between any of the parties to the LCL Deed (in respect of which all rights are reserved and no admissions are made);

1.2 without prejudice to any alleged breach of the Undertakings (in respect of which all rights are reserved and no admissions are made); and

1.3 notwithstanding any terms of any (purported) tenancy, licence or agreement (whether express or implied) under which the 20th Respondent occupies (or purports to occupy) the Properties.

2 By 2pm on 13 January 2023, the 20th Respondent shall give vacant possession (or procure vacant possession including the termination of any tenancies and removal of third party occupants) of the Properties to Messrs Standish and Pike or such other person(s) as they may direct.

3 If the 20th Respondent does not deliver up vacant possession in accordance with paragraph 2 of this Consent Order, then Messrs Standish and Pike shall have permission to issue a Writ of Possession in the High Court for the giving of vacant possession of the Properties to Messrs Standish and Pike or such other person(s) as they may direct.

4 In this Consent Order, giving vacant possession of the Properties shall include, without limitation:

4.1 the hand delivery to Messrs Standish and Pike (or their agents) of all keys or other means of obtaining access

> (including any copies) to the Properties, the building and premises at Hamilton House, 81 Southampton Row in the possession or control of the 20th Respondent;
>
> 4.2 the removal of all possessions, belongings or chattels located in the Properties; and
>
> 4.3 the removal of all possessions, belongings or chattels of the 20th Respondent located in the building or premises at Hamilton House, 81 Southampton Row (including in any car parking spaces).
>
> 5 No order as to costs."

44. Similarly, on or about 14 December 2022 Dr Morris signed a consent order, which was approved by Foxton J on 19 December 2022. It was in similar form to the consent order to which Dr Smith agreed, but the recital regarding the outcome of the Directed Trial read:

> "AND UPON the 45th Respondent confirming that he would comply with any order of the Court regarding the Property, but that he had been advised that: (a) the Judgment determined that Isle of Man Settlement assets are the property of the Orb Claimants which they hold jointly as trustees of the Harbour Trust; (b) the claims of the Orb Claimants outranked all other claims; and (c) as such the Settlement Parties did not succeed and his obligation to give vacant possession in the LCL Deed had not been triggered, and the 45th Respondent indicating that he would await further directions from the Court following the hearing of the Applications "

45. The operative provisions of the consent order included the following:

> "2 By 2pm on 13 January 2023, the 45th Respondent shall give vacant possession (or procure vacant possession including the termination of any tenancies and removal of third party occupants) of the Property to Messrs Standish and Pike or such other person(s) as they may direct.
>
> 3 If the 45th Respondent does not give vacant possession in accordance with paragraph 2 of this Consent Order, then Messrs Standish and Pike shall have permission to issue a Writ of Possession in the High Court for the giving of vacant possession of the Property to Messrs Standish and Pike or such other person(s) as they may direct."

## (C) PROCEDURAL BACKGROUND

46. CPR 81.4(2)(c) requires that any contempt application contains a statement confirming that any order was personally served and when it was served, unless the court or the parties dispensed with personal service.

47. The Variation Order (see § 36 above) was made pursuant to an application by Dr Smith, following correspondence sent by his then solicitors, Berkeley Square Solicitors, on 17 November 2021. In the correspondence he sought to vary the restraint order to permit him to open a bank account out of which he would spend £2400 per month; the amount of £2400 was opposed by the SFO, but a reduced amount of £2000 was agreed. Accordingly, the Variation Order was made by consent at a hearing on 20 May 2022, which occurred in the presence of Dr Smith, who was represented by solicitors and counsel.

48. Once the Variation Order had been made it was emailed to Berkeley Square Solicitors by the Court**.** The Variation Order at §3 permitted Dr Smith to open a single bank account in his own name but required him within 72 hours of opening the account to provide to the SFO the details of that bank account. On 23 May 2022, Berkeley Square Solicitors wrote to the SFO providing the details of the pre-paid Pockit account as the nominated account. Their letter specifically referred to the Variation Order.

49. The SFO, by way of an application notice dated 6 March 2024, applied for the requirement to serve the Variation Order personally to be dispensed with. That application was adjourned by Robin Knowles J, to be dealt with at the present hearing.

50. The existence of a power retrospectively to dispense with service of the underlying order, even after a contempt application has been made, was confirmed by the Court of Appeal in *Business Mortgage Finance 4 Plc v Hussain* [2022] EWCA Civ 1264, [2023] 1 W.L.R. 396 at §§78–82. The court said at §79:

> "…..the requirement for personal service was never an absolute one if it could be shown that the respondent had actual knowledge of the terms of the order: see for example at para 74 where Nicklin J refers to such cases as *Hearn v Tennant* (1807) 14 Ves 136 where Lord Eldon LC held that it was sufficient if the respondent was present when the order was made, and *Ex p Langley* (1879) 13 Ch D 110 where this court accepted that a telegram might in a suitable case be sufficient notice of an injunction to sustain proceedings for contempt".

51. In MBR Acres Ltd v Maher [2022] 3 WLR 999, Nicklin J said an order can be made dispensing with personal service if it is shown that the respondent knows of the specific terms of the order, for example by being present when it is made. . In the first instance decision in *Business Mortgage Finance 4 Plc v Hussain* [2022] EWHC 449 (Ch), [2022] 4 All E.R. 170 at §57, Miles J stated that the test for dispensing with personal service of an injunctive order was whether there was any injustice to the defendant.

52. I accept the SFO's submission that in the present case there is good reason to dispense with the requirement for the Variation Order to be personally served because:

    i) Dr Smith was aware of the underlying Restraint Order and the consequences of breaching it, because he had already admitted contempts that arose out of his breach of it. He admitted them on 20 May 2022 at the same hearing at which the Variation Order was made.

ii) The Variation Order was made pursuant to Dr Smith's own application.

iii) Dr Smith consented to the terms of the Variation Order.

iv) The Variation Order was made at a hearing at which Dr Smith attended in person and was represented by solicitors and leading counsel.

v) The Variation Order was served by the Court on Dr Smith's solicitors at the time, and their response in their letter dated 23 May 2022 they made it clear that Dr Smith was aware of the terms of the Variation order.

vi) Dr Smith continued to comply with the requirement in the Variation Order at §3B to provide copies of his bank statement on a monthly basis.

53. In these circumstances, it is clear that Dr Smith had notice of the Variation Order and its terms, and there is no injustice in dispensing with personal service of it. Dr Smith did not attempt to persuade me otherwise at the hearing. I shall so order.

54. Turning to the present contempt application, the notice of application to commit for contempt was hand delivered to Berkeley Square Solicitors on 20 March 2024. They were at that time on the record as acting for Dr Smith. On 25 March 2024 Berkeley Square Solicitors objected to service in this manner, insisting that Dr Smith should be served personally. As a consequence, the issue of service was referred to the Court pursuant to CPR 81.5(2)(c), and the SFO provided a note for the assistance of the court dated 27 March 2024. Berkeley Square Solicitors provided a letter dated 2 April 2024. No suggestion was made to the effect that Dr Smith was unaware of the application.

55. On 19 April 2024 Cockerill J made an order on the papers that service on Berkeley Square Solicitors was good and proper service of the contempt application on Dr Smith. Males LJ on 16 October 2024 dismissed Dr Smith's application for permission to appeal from that order.

56. On 9 May 2024, Dr Smith filed a Notice or Change of Legal Representatives in Form N434, indicating that he would be representing himself. However, he declined to attend the listing appointment for the contempt application on the ground that he was, at that stage, seeking to appeal from Cockerill J's order.

57. On 14 June 2024 Mr Justice Robin Knowles directed that if Dr Smith chose to rely on written evidence in answer to the contempt application, he must serve it by 4pm on 2 August 2024. Dr Smith did not serve any evidence, and that remained the position by the time of the hearing before me.

58. On 15 July 2024, for the avoidance of doubt, the SFO personally served the contempt application and the application to dispense with personal service of the Variation Order on Dr Smith. Service was effected at Southwark Crown Court, where Dr Smith was attending a preliminary hearing in the case I mention below.

59. On 20 September 2024 Dr Smith was sentenced to 18 months' imprisonment by HHJ Cole sitting at Southwark Crown Court, having been convicted after a trial for the fraudulent procurement of a £50,000 Covid 'Bounce Back' loan in the name of Arcana

Ltd. The monies had been used to settle a costs order made in the SFO and Enforcement Receivers' application by Foxton J on 29 July 2020.

60. At the start of the hearing before me, Dr Smith applied for an adjournment so that he could obtain legal representation. Dr Smith outlined the complexity of the background to the matter, in which he had had legal representation much of the time. He said he could not currently afford representation, but sought a 6 to 8 week adjournment to arrange funding, possibly from family and friends. Dr Smith said he had canvassed this proposal with the SFO about 3 weeks ago but they were not willing to agree to an adjournment. Dr Smith said he had no documents, and no idea of the law of contempt, and that his files were currently subject to a solicitors' lien. Dr Smith said he had made the application only on the morning of the hearing because he had not known what position the SFO was going to take. In response to the point that legal aid would have been available for the contempt application, Dr Smith said it was challenging to arrange this and to find representation while in custody, as he currently is.

61. I declined to adjourn the hearing, giving my reasons in a short oral ruling. I concluded that Dr Smith had had ample time to prepare for the hearing and, if he so chose, to arrange representation. The contempt application had been sent to his then solicitors in March 2024, and it is highly probable that Dr Smith was made aware of it and provided with a copy. (As Males LJ subsequent noted in the context of the application for permission to appeal from Cockerill J's order, Dr Smith's solicitors did not at any time say that they had not made Dr Smith aware of the application, and nor did Dr Smith suggest this in his evidence on that application.) The full application bundle had been given to Dr Smith on 15 July 2024 when he was served personally. Throughout this period, Dr Smith was on bail rather than in custody: he was imprisoned only on 20 September 2024 when he was sentenced at Southwark Crown Court. The committal application and correspondence from the SFO (on 17 June, 15 July, 2 October and 24 October 2024) reminded Dr Smith of the availability of legal aid. Documentation relating to the history of the matter would be of limited relevance, given that the contempt application relates to relatively discrete more recent events. Dr Smith knew that the SFO had declined to agree to an adjournment and had no reason to expect one would be agreed. Dr Smith was produced from prison for the hearing by an order of Foxton J dated 1 October 2024. The SFO's skeleton argument for the present hearing, dated 13 October 2024, was personally served on Dr Smith.

62. The hearing then proceeded, with counsel for the SFO making submissions to which Dr Smith responded. The SFO relied on an affidavit dated 22 February 2024 from Mr Paul William Crome of the SFO and an affidavit dated 21 February 2024 from Mr David John Standish of Interpath, one of the two enforcement receivers. Dr Smith, who is clearly articulate and intelligent, had not filed evidence (and did not call oral evidence) but made submissions for well over an hour. I draw no adverse inference from Dr Smith having not called evidence. Following brief reply submissions from counsel for the SFO, I reserved judgment indicating that I would deal first with questions of liability. Those questions are the subject of this judgment.

## (D) APPLICABLE PRINCIPLES

63. The law of contempt is broadly based upon the principle that the courts cannot and will not permit interference with the due administration of justice.

64. An undertaking which has been given to the Court is the equivalent to an injunction and may be enforced by an order of committal: *Bishlawi v Minrealm Ltd* [2007] EWHC 2204 (Ch)

65. In *Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc* [2009] EWHC 1445 (QB) (at §§14-16), the court stated that in order to prove that there has been a breach of a court order, it must be demonstrated that:

    i) the act was deliberately done by the defendant. It is not necessary, however, for the claimant to prove that the defendant intended to breach, or knew that he was breaching, the court order: *Varma v Atkinson* [2020] EWCA Civ 1602;

    ii) the act was in breach of the terms of the order; and

    iii) the individual committing the act had notice of the order and its terms.

66. These matters must be proven to the criminal standard, i.e. (in modern parlance) so that the court is sure of them (see, e.g., *In re A (A Child) (Removal from Jurisdiction: Contempt of Court)* [2008] EWCA Civ 1138; [2009] 1 W.L.R. 1482, CA). That is the standard I have applied throughout my consideration of this matter.

67. 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 purposively: *Pan Petroleum AJEC Limited v Yinka Folawiyo Petroleum Limited* [2017] EWCA Civ 1525 per Flaux LJ. Whilst the general principles of contractual construction apply to the construction of undertakings, any ambiguity should be resolved in favour of the person giving the undertaking: *Jobserve v Skillsite* [2004] EWHC 661 (Ch) Lewison J at §§ 12-14. No order or undertaking will be enforced by committal unless its terms are clear, certain, and unambiguous.

68. The court may draw inferences from primary facts which it finds established by evidence. A court may not, however, infer the existence of some fact that constitutes an essential element of the case unless the inference is compelling, such that no reasonable man would fail to draw it: *Kwan Ping Bong v R* [1979] AC 609.

69. A defendant cannot be compelled to give evidence orally or in writing (CPR 81.7(3)), but he is entitled to give oral evidence and, with the leave of the court, call witnesses to give oral evidence, should he choose to.

## (E) THE ALLEGED CONTEMPTS OF COURT

### (1) Alleged contempt 1: breach of maximum spending limit

70. Dr Smith's nominated account under the Restraint Order is a pre-paid Pockit card account, requiring funds to be credited before Dr Smith is able to spend using this account.

71. The account statements for the account indicate that Dr Smith exceeded the monthly limit of £2,000 for a total of fifteen separate months. The first overspend was of £66.18 in June 2022. There were then overspends every month from August 2022 to December 2023 inclusive, apart from September 2022, March 2023 and September 2023. The

largest excesses were of £4,071.63 7 in November 2023 and £2,649.77 in December 2023.

72. When applying to increase the monthly limit, Dr Smith had relied upon expenditure on electricity bills, council tax bills and water bills. However, as detailed in the affidavit of Mr Crome of the SFO, the spending from the nominated account does not include any such items or other regular living expenses, apart from spending at supermarkets averaging £114 a month. Further, enquiries reveals that Dr Smith did not make any payments in respect of electricity bills from May 2022 onwards, on Council tax bills from May 2022 onwards or on water bills. Most of the expenditure has in fact been on high-end restaurants and hotels. At the same time, Dr Smith has also been able to use money from a Pockit account held by a Mr Bryce to pay for his flights to Mallorca and his expenditure there.

73. The SFO invites the inference that Dr Smith has access to other funds to meet his living expenses, and has exceeded the monthly allowance for his Pockit account by spending on luxury items.

74. Dr Smith in his submissions made two main points.

75. First, that the money he was spending came from his brother. Technically, he said, that might mean that he was not spending money subject to the Restraint Order at all. He suggested, in that regard, that the Pockit account was not a bank account and he might not be regarded as owning money put into the account by his brother. In any event, if by receiving and spending his brother's money via the Pockit account meant he was in breach of the Restraint Order, he had not realised that. If he was in contempt of court, he unreservedly apologised.

76. Secondly, Dr Smith explained (and this was not disputed) that he had regularly sent the SFO statements of account relating to the Pockit account, as well as quarterly statements of where the money came from, and they had at no stage objected to the expenditure. He added that the only significant overspend had been on a Christmas present.

77. As to the first of those points, the Restraint Order applies to:

> "all the Defendant's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Defendant's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions" (§3)

78. Whether or not the Pockit account in Dr Smith's name is a bank account, the pre-paid funds contained in it are and were assets which Dr Smith had the power, directly or indirectly, to dispose of or deal with as if it were his own. The Restraint Order therefore applied to the funds in the Pockit account, regardless of their source, subject to the monthly spending exception set out in the Restraint Order.

79. As to the second point, Dr Smiht did not suggest, and it could not realistically be suggested, that the SFO's lack of response resulted in a variation of the order. This point goes, in my view, to mitigation and will be relevant when considering sanctions.

80. I am sure that Dr Smith deliberately exceeded the monthly spending limit, thereby breaching the Restraint Order, while having full knowledge of its terms (which, as noted earlier, were relaxed on his own application by increasing the spending limit). Each of the overspends was a contempt of court.

**(2) Alleged contempt 2: Flat 21 Hamilton House**

81. Following the Directed Trial, Foxton J concluded that the equitable interests in Flat 21 were held on the terms of the Harbour Trust and by companies under the control of the Joint Liquidators.

82. As noted earlier, Dr Morris, who was occupying Flat 21, after correspondence with the Enforcement Receivers agreed in a consent order to give vacant possession of Flat 21 by 13 January 2023. Shortly before signing the consent order, Dr Morris sent an email to Dr Smith on 13 December 2022 timed at 21:13, explaining that he was providing an undertaking to the Court to comply with the order that required him to give vacant possession.

83. On 12 January 2023, Dr Morris handed to the Enforcement Receivers one key and one fob for Flat 21, as subsequently confirmed in the email sent by Edward Bittante of Interpath. The email observed that a spare key was left in the flat's post box by the movers and would be collected in due course.

84. On the same day, however, Dr Morris signed a deed of assignment by which, for the consideration of the payment of £1, he assigned to Minardi Investments Ltd ("***Minardi***") his purported rights, title and interest (legal, equitable, or otherwise) in a tenancy said to have been granted to him in respect of Flat 21.

85. The SFO submits that Minardi was at that time being used by Dr Smith as a nominee vehicle, to assert ownership of the assets that were the subject of the Proceedings, referring to the following matters:

    i) Minardi was also used in an attempt to attempt to relitigate issues which had been resolved either in the Directed Trial or by the LCL Settlement Deed: Minardi asserted an interest in the assets held as a nominee by SMA Investment Holdings Ltd by way of letters to the Enforcement Receivers and the Joint Liquidators. These letters were sent by Minardi using a ProtonMail email address, which echoed the type of email address typically used by Dr Smith. This led Foxton J to conclude in another judgment that Dr Smith was closely involved in the formulating of Minardi's claims ([2023] EWHC 428 (Comm) § 12).

    ii) The letters sent by Minardi were redolent of Dr Smith's style of letter, including the font used, the lay-out of the letters, the language used and the misspellings.

    iii) Other correspondence sent by Minardi was authored by Dr Smith. Email correspondence from Minardi, on two occasions, was sent to the directors of

> Minardi, Mr Almond and Mr Bryce (the same Mr Bryce whose Pockit account was used by Dr Smith) in circumstances which strongly suggested that they were not the authors.

86. However, there is more direct evidence of Dr Smith's involvement. Dr Smith emailed Dr Morris on 12 January at 15:03, having previously asked Dr Morris to call him, saying:

> "Rob
>
> Somewhat surprisingly I see you have moved out without any warning.
>
> As you have made that decision can you kindly assign all your rights to Minardi please. I attach an assignment deed.
>
> This will help me with the battles for control of this asset, and of course the delivery of your funds. Please sign, Gloria or anyone can witness. Then send to, minardiadmin@pm.me,
>
> It would help if you could do this sooner rather than later.
>
> Also please call. Thanks
>
> G"

87. Dr Morris set out the circumstances behind his signing of the deed of assignment in a witness statement dated 10 April 2023. At §8 he said that he had not taken sufficient time to fully consider the deed and that he had foolishly relied upon Dr Smith's advice to him that he needed to sign the document and that by doing so he would be out of the litigation.

88. On 13 January 2023, at 07:18 Dr Smith sent a message to Dr Morris asking "*Where have you put the beds and sofa?*", from which I agree with the SFO that it is to be inferred that Dr Smith had recently been inside Flat 21.

89. On 23 January 2023 an agent instructed by the Enforcement Receivers discovered that the locks to the front door had been changed, which prevented the Enforcement Receivers from accessing the premises. I infer that Dr Smith brought that about given that:

    i) it was Dr Smith who had requested that Dr Morris sign the deed of assignment, expressly stating that it would advance his interest for this to happen;

    ii) Dr Smith had access to Flat 21 and appeared to have entered it on or shortly before 13 January 2023;

    iii) Dr Smith was at the time residing in Flat 11 and 12 and will have known when Flat 21 was unoccupied; and

iv) Minardi wrote letters dated 23 and 27 January 2023, stating that they had taken and intended to retain possession of the flat, attaching copies of the purported deed of assignment.

90. Accordingly, the Enforcement Receivers had to make an application for a writ of possession in relation of Flat 21 on 3 May 2023, supported by a witness statement from David Standish, which was granted on 5 May 2023. By this time, Minardi were in liquidation. The liquidators upon being served with the application for possession notified the Enforcement Receivers on 17 May 2023 that they did not object to the application. Despite that, on 26 May 2023 an email, purporting to come from Minardi but not its liquidators, was sent to the Enforcement Receivers complaining about the notice of eviction.

91. When the High Court Enforcement Officers went to Flat 21 to execute the writ of possession, there were two females in occupation, subsequently identified as Ms Auta Calado and Ms Gabrielle Beluzzo. One of the females contacted Dr Smith, who she described as her landlord, by phone and passed the phone to the High Court Enforcement Officer. Dr Smith said that there had been a hearing on 26 May 2023, the outcome of which he did not know, and he asked to delay the eviction. The other female stated that she paid rent to her landlord Minardi. Both women subsequently asserted in correspondence that in fact they were not paying any rent. They collected the last of their possessions from the flat on 10 June 2023.

92. Dr Smith in his submissions did not seek to challenge any of the matters set out in §§ 82-91 above. Nor did he suggest (i) that he did not deliberately try to prevent the handing over of Flat 21 with vacant possession, (ii) that he was not thereby in breach of the Undertakings or (iii) that he did not know the terms of the Undertakings and what they meant.

93. After describing at some length the history of the matter from his point of view, Dr Smith made a number of points, which can be summarised as follows:

i) The LCL Settlement Deed should be regarded as ineffective for lack of consideration. The consideration to be provided under it by the Settlement Parties was title to a group of assets worth £4-5 million. However, following the Directed Trial judgment, the Settlement Parties could not give good title to those assets, because the Orb Claimants had prevailed in the litigation, subject only to the effect of the Harbour Trust.

ii) By reason of the Supreme Court's decision in *Paccar v Road Haulage Association* [2023] UKSC 28, the agreement under which Harbour funded the Directed Trial proceedings was an unlawful damages-based agreement. As a result, elements of the outcome of the trial cannot stand. Specifically, if the Harbour Trust were unlawful, then all assets recovered under the Directed Trial judgment would belong to the Orb Claimants.

iii) Mr Thomas, Mr Taylor and Dr Cochrane (who had been made bankrupt because she had guaranteed the Harbour funding) had issued applications alleging that the Harbour Trust was invalid. Those proceedings would result in a declaration in the next six to eight months.

iv) The above points were relevant to the contempt allegations in relation to the Flats because they explained why Dr Smith believed he was entitled to take the position he did.

v) In relation to Flat 21, Dr Smith was trying to protect the interests of Dr Morris, who had invested something of the order of £800,000 into the litigation against the Ruhan interests. Dr Morris and his mother had been very generous during the litigation. Later on, after a divorce, Dr Morris needed somewhere to live. Flats 11, 12 and 21 had been bought from Dr Smith's brother in 2013 with cash recovered as part of the Isle of Man settlement. The brother had allowed Dr Smith to use Flat 11 as his home when he came out of prison. Later, Dr Smith wished to allow Dr Morris to live in Flat 21 until Dr Morris recovered his investment in the litigation.

vi) There was no continuing contempt and no harm had been done. Dr Smith doubted that the Flats would be sold before the Harbour issue was determined.

94. In my view none of those points is capable of being an answer to the contempt allegations in relation to the Flats. The LCL Settlement Deed was contractually effective as a deed regardless of consideration. Foxton J's order following the Directed Trial declared the beneficial interests in relation to the Flats, and that judgment currently stands, regardless of any arguments that might in due course be made about (a) the effectiveness of the LCL Settlement Deed or (b) the validity of the Harbour Trust. Moreover, Flats 11 and 21, in particular, were declared to be 83% beneficially owned by BPAC (and hence under the control of the Joint Liquidators): a finding that does not depend on the validity of the Harbour Trust.

95. In any event, aside from all of the foregoing points, the terms of the Undertakings were clear and unequivocal. Each of Dr Smith's actions in (a) procuring that Dr Morris purported to assign rights to Flat 21 to Minardi, (b) arranging for the locks to be changed and (c) arranging for Ms Calado and Ms Beluzzo to go into occupation of the flat:-

i) was a failure and/or refusal to use his reasonable endeavours to assist the Settlement Parties and each of them to realise the flat for the benefit of whichever person is ultimately found by the Court to be entitled to it;

ii) (on any view) impeded, obstructed and hindered attempts made by the Settlement Parties or any of them to safeguard and/or realise the flat; and

iii) was a step taken to undermine, prejudice or interfere with the obligations contained in the LCL Settlement Deed.

I have said *"(on any view)"* in relation to (ii) above because, even if there were any room for argument about who the court had found to be entitled to the Flats or about the scope of Dr Smith's obligations in the LCL Settlement Deed (and in my view there is not), there could be no possible doubt that Dr Smith clearly and unequivocally undertook not to impede, obstruct or hinder attempts by the Settlement Parties (or any of them) to safeguard and/or realise the Flats. The Settlement Parties were seeking vacant possession of the Flats in order to safeguard and/or realise them, and that was obvious to all concerned including Dr Smith.

96. I am sure that each of those steps was a breach of the Undertakings, and that Dr Smith took each of them deliberately and while knowing the terms of the Undertakings. It follows that Dr Smith is guilty of contempt of court in relation to Flat 21. I am also sure that Dr Smith in fact knew that he was thereby in breach of the Undertakings.

97. I also do not accept Dr Smith's suggestion that the contempt caused no harm. Mr Standish explains in his affidavit that the delay in obtaining possession meant that the flat remained occupied with no rent being paid. It was eventually let, in October 2013, for £2,900 a month, with the tenant paying service charge and reserve fund payments. The delay from 13 January 2023 to 27 May 2023, when possession was obtained, amounted to 134 days, which approximates to £12,775 of lost potential rental. In addition, money had to be spent on service charge, reserve fund payments and the Annual Tax on Enveloped Dwellings (ATED) charge. Together with the lost rental, these totalled approximately £18,325. On top of that, professional fees were incurred of £105,424 in steps, before and after 13 January 2023, related to the obtaining of possession of the flat. Dr Morris agreed to pay, and did pay, £36,000 towards the expenses incurred. Net of that figure, Mr Standish estimates the total cost to the receivership arising from Dr Smith's efforts to avoid vacant possession of Flat 21 being given to be £87,749.

**(3) Alleged contempt 3: Flats 11 and 12 Hamilton House**

98. Dr Smith was in actual and physical occupation of Flats 11 and 12. Like Flat 21, they comprised part of the "*Paragraph 3 Property*" to which the Undertakings applied. As set out earlier, Dr Smith also agreed to the December 2022 consent order requiring him to give vacant possession of Flats 11 and 12 to the Enforcement Receivers by 2pm on 13 January 2023.

99. Dr Smith did not give vacant possession to the Enforcement Receivers by that date. Instead, he asserted by way of a letter dated 12 January 2023 that he had proprietary rights in respect of both Flat 11 and 12, namely tenancies which he asserted gave him the right of occupation until he no longer required it. That was inconsistent with his agreement to the consent order and also with the outcome of the Directed Trial, which had determined the rights to Flats 11 and 12 and declared that no other interests existed. Dr Smith had compromised any rights he might have had by agreeing to the terms of the LCL Settlement Deed.

100. As a result, the Enforcement Receivers found it necessary to issue a writ of possession, which was done on 20 March 2023. Notices of eviction were delivered on 23 March 2023 setting out that the execution of the writ would take place on 11 April 2023.

101. However, there was a further delay because on 4 April 2023, Dr Smith issued an application to stay the execution of the writ of possession. He argued, in summary, that:

i) there had been no consideration of whether it was appropriate to make a possession order;

ii) his tenancy was protected by virtue of §12 of the Management Receivership Order, which prevented steps being taken to obtain vacant possession of inter alia Flat 11 and 12;

iii) his tenancy was part of the consideration he received in return for the assistance he provided the Orb Claimants in their claim against Andrew Ruhan; and

iv) his decision to consent to delivering up vacant possession was based upon a mistaken belief that the Enforcement Receivers were entitled to vacant possession pursuant to the LCL Settlement Deed.

102. Butcher J, by a judgment dated 26 May 2023, found there to be no merit in any of those contentions. In outline, Butcher J held that:

i) the Consequentials Order did not recognise any leasehold interest in Flats 11 and 12;

ii) the court had made a 'guillotine' order on 20 May 2020, as part of the case management of the SFO and Enforcement Receivers' application, to ensure that all concerned, both parties and non-parties, came forward to assert any proprietary claims in relation to Flats 11 and 12 or otherwise be debarred;

iii) the LCL Settlement Deed discontinued all claims which Dr Smith had previously made in respect of inter alia Flats 11 and 12; and

iv) Dr Smith was bound by the court's previous orders and precluded from raising claims to the contrary.

103. I agree with the SFO that Dr Smith's application was wholly without merit and was a clear attempt to resile from the position he had agreed by the LCL Settlement Deed and the consent order approved by Cockerill J on 18 December 2022. It was a deliberate act designed to maintain his occupation of Flat 11 and 12 on a basis that he could had advanced at trial but had agreed to discontinue. It was designed to frustrate the efforts of the Enforcement Receivers to realise Flat 11 and 12.

104. Dr Smith finally left Flats 11 and 12 on 10 June 2023, aside from miscellaneous possessions which had to be removed.

105. I have already summarised in §§ 93-94 above the submissions which Dr Smith put forward in relation to the Flats and my reasons for rejecting them or their relevance to the present application.

106. In my view, each of Dr Smith's actions in (a) refusing to give vacant possession of Flats 11 and 12 by 2pm on 13 January 2023, and (b) making and pursuing a wholly unmeritorious application to stay his eviction from Flat 11 and 12 based on grounds that he had previously compromised:-

i) was a failure and/or refusal to use his reasonable endeavours to assist the Settlement Parties and each of them to realise the flats for the benefit of whichever person is ultimately found by the court to be entitled to it;

ii) (on any view) impeded, obstructed and hindered attempts made by the Settlement Parties or any of them to safeguard and/or realise the flats; and

iii) was a step taken to undermine, prejudice or interfere with the obligations contained in the LCL Settlement Deed.

107. I am sure that each of those steps was a breach of the Undertakings, and that Dr Smith took each of them deliberately and while knowing the terms of the Undertakings. It follows that Dr Smith is guilty of contempt of court in relation to Flats 11 and 12. I am also sure that Dr Smith in fact knew that he was thereby in breach of the Undertakings.

108. I also do not accept Dr Smith's suggestion that the contempt caused no harm. Mr Standish explains in his affidavit the losses which arose, for similar reasons as those in respect of Flat 21. He estimates the total losses arising in relation to Flats 11 and 12 to be approximately £181,701.

## (F) CONCLUSIONS

109. For the reasons set out above, I conclude that Dr Smith is guilty of the contempts of court alleged in the application. I shall hear submissions about, and any further evidence relevant to, the question of what (if any) sanction(s) should be imposed.