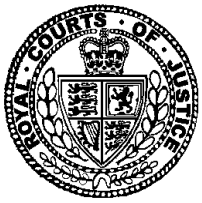

Neutral Citation Number: [2020] EWHC 2667 (QB)

Case No: QB-2018-003978

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 September 2020

Before:

MR JUSTICE CHOUDHURY

Between

THE QUEEN

on the application of

(1) GML INTERNATIONAL LTD
(2) STEFAN PAUL PINTER
(3) TRIDENT FIDUCIARIES (I.O.M.) LTD **Claimants**
(as trustees of the Berry Revocable Trust)
- and -

JONATHAN HENRY MARTYN HARFIELD

Defendant

- -

MR Y. BHEEROO (instructed by **Keystone Law**) for the Claimants.
THE DEFENDANT was not present and was not represented.

Hearing date: 15 September 2020

- -

JUDGMENT

MR JUSTICE CHOUDHURY:

Introduction

1. This is the claimants' application to commit the defendant to prison, or alternatively for such other sanction to be imposed by the court as the court sees fit, for failing to comply with the terms of a freezing injunction made by HHJ Simpkiss, sitting as a Judge of the High Court, on 23 July 2020. I shall refer to that as "the freezing order".

2. The allegations made against the defendant are set out in the grounds of committal. These are that:

> 1. He contumaciously and / or deliberately breached paragraph 7(1) of the freezing order by failing to inform the claimants' solicitors by 4.30 pm on 24 July 2020, alternatively by 27 July 2020, of all of his assets as defined, "Held worldwide exceeding £1,000 in value".
>
> 2. He contumaciously and / or deliberately breached paragraph 8 of the freezing order by failing to swear and serve on the claimants' solicitors by 31 July 2020 an affidavit disclosing all of his assets as defined, "Held worldwide exceeding £1,000 in value".

Should the Court proceed in the Defendant's absence?

3. The defendant is not in attendance today and nor is he represented. By a letter dated 9 September 2020, the defendant's solicitors, McDermott Will & Emery ("MWE"), wrote to the claimants' solicitors, Keystone Law, confirming that neither they nor counsel had instructions to appear at the hearing of the committal application. It does appear, however, that MWE remain on the record for the defendant, and there has been no formal notification otherwise. It is to be noted also that MWE acted for the defendant at the trial of the main action in February this year, at the application for the freezing order before HHJ Simpkiss, and that they continue to act for him in ongoing insolvency proceedings. It would appear therefore that the lack of instructions from the defendant to MWE is confined to this committal hearing alone.

4. The question which arises is whether the hearing should proceed in the defendant's absence or whether it should be adjourned to some later date so that the defendant can be present to answer the charges of contempt against him.

5. I indicated in the course of the application this morning that I would proceed in the defendant's absence. My reasons for doing so are as follows:

6. Mr Bheeroo, who appears for the claimants, as he did at trial and on the application for the freezing order, reminds me that the usual approach, where the court is satisfied that the defendant has been properly served and has decided intentionally to absent himself, is to

proceed with the hearing, and that is the case even where the hearing deals with committal. I was referred to the judgment of Cockerill J in *ICBC Standard Bank Plc v Erdenet Mining Corp LLC (EMC)* [2017] EWHC 3135 (QB), which sets out at [55] of the judgment a checklist of principles established by Cobb J in the case of *Sanchez v Oboz* [2015] EWHC 235 (Fam) to be applied when the court is considering whether to proceed in the absence of a respondent. These principles, and my observations in relation to each, are as follows:

7. "(i) Whether the respondents have been served with the relevant documents, including notice of this hearing": Here, there can be no doubt that the defendant has been served with the relevant documents and notice of the hearing. The claimants were permitted by the order of Murray J dated 26 August 2020 to serve the documents by email to a specified email address known to belong to the defendant. MWE were also served with the relevant documents, and are aware of the hearing, as confirmed in their letter dated 9 September 2020. MWE further confirm in that letter that the documents are to be served on the defendant directly at the email address which is known to the claimants. It is also suggested that the documents could be sent to MWE if that is convenient, the implication being that not only was MWE still in touch with the defendant but also that it could receive documents on the defendant's behalf.

8. "(ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing": The defendant was served with the relevant documents on 26 August 2020. That was almost three weeks ago. I consider that to be ample notice for the defendant to prepare his response to the application. That would be ample even in a relatively complex application. As it is, the allegations of breach of the freezing order in this case are relatively simple, the issue being one of failure to provide any of the information ordered, or to provide a supporting affidavit.

9. "(iii) Whether any reason has been advanced for their non-appearance": I am told, and the correspondence or the absence of it bears this out, that the claimants know of no good reason for the claimant failing to appear. Whilst the available information suggests that the defendant is residing abroad, there is no suggestion that the defendant wishes to put in any evidence, or apologise to the court for non-attendance. Indeed, the specific act of effectively dis-instructing his representatives for this hearing suggests that the non-attendance is calculated.

10. "(iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present; (i.e. is it reasonable to conclude that the respondents knew of or were indifferent to the consequences of the case proceeding in their absence?)": Whilst MWE have stated that they are without instructions to appear at the hearing of the committal application, they remain on the record, and continue to act for the defendant in other proceedings. Mr Bheeroo submits that in these circumstances it can be reasonably inferred that the defendant knows and has been advised of the consequences of the case proceeding in his absence. I agree. The defendant clearly continues to receive detailed advice in relation to the ongoing bankruptcy proceedings, as is clear from the correspondence received by the claimants from MWE as recently as 4 September 2020. It seems highly unlikely that a defendant who is in receipt of such advice is not aware of or has not been advised as to the consequences of failing to comply with the freezing order. The reasonable inference to be drawn is that the defendant is aware, and has chosen nevertheless not to attend or be represented. He has, by implication therefore, waived his right to be present.

11. "(v) Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation": There is nothing here to suggest that an adjournment would secure attendance, or would facilitate the defendant's representation. It can, for reasons already discussed above, reasonably be inferred that the defendant has chosen not to attend. An adjournment is unlikely to alter that decision.

12. "(vi) The extent of the disadvantage to the respondents in not being able to present their account of events": It is inevitable that there is some disadvantage to the defendant in not being able to present his account of events. However, the defendant has, as I have said, had ample opportunity to present his account. He could have done so in writing, or through his solicitors, should he have so wished. Instead, despite repeated prompting, the defendant has remained entirely silent as to the reasons for his apparent failure to comply with the freezing order. The nature of the allegations of contempt brought against the defendant are such that it is difficult to see what account of events the defendant could advance in his defence. As such, I consider the extent of disadvantage to the defendant in the circumstances of this case to be minimal, and such disadvantage that does exist is entirely of the defendant's own making.

13. "(vii) Whether undue prejudice would be caused to the applicant by any delay": The claimants fear that the delay leading up to the hearing, and the defendant's conduct so far, may have already allowed him to take steps to dissipate his assets, and frustrate the claimants' enforcement efforts. Mr Bheeroo submits that any further delay would cause undue prejudice to the claimants. Asset disclosure is a critical element in securing enforcement of the judgment of Mr Richard Hermer QC, sitting as a Deputy Judge of the High Court. That judgment, which I shall refer to as "the Hermer judgment", was issued on 17 April 2020. Since then, there has been no attempt, or no apparent attempt, to comply with any of the terms of the order made following upon the Hermer judgment. I agree with Mr Bheeroo that any delay in considering the application for committal of the defendant for contempt would risk undermining the seriousness of the alleged breaches of the freezing order, and may well cause considerable prejudice to the claimants in their attempts to enforce the Hermer judgment generally.

14. "(viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents": This is not a case where there has been partial compliance, with the issue being whether there has nevertheless been substantial compliance. An examination of the extent to which there has been compliance may involve questions of fact and degree, and an interpretation of events or documents. The nature of the alleged breaches here is not such that the absence of the defendant would prejudice the forensic process. The claimants say that there has been no attempt at compliance at all. It will be a relatively straightforward matter for the court to determine whether that allegation has been made out to the requisite standard.

15. "(ix) The terms of the 'overriding objective' including the obligation on the court to deal with the case justly, including doing so expeditiously and fairly and taking any step or making any order for the purposes of furthering the overriding objective": For the reasons set out above under other factors, I consider that the overriding objective points plainly towards proceeding in the absence of the defendant. I recognise that it is an exceptional course to take to proceed in the absence of a defendant, particularly in proceedings potentially affecting the liberty of

the subject. However, in cases where the defendant's conduct indicates a deliberate decision not to attend or be represented, as is the case here, the court can proceed if the factors I have just considered militate in favour of doing so. Not to take that course would undermine the authority of the court, and the importance of attending court in order to explain non-compliance with its orders.

16. In coming to this decision to proceed in the defendant's absence, I have had regard to his Article 6 rights to a fair hearing. However, the safeguards considered above, including as to proper notice of the hearing, and the provision of a fair opportunity to prepare, adequately address those rights.

17. Having decided to proceed, I turn to the substance of the application.

Background

18. The first claimant, GML, is a UK financial services company. The second claimant, Mr Pinter, is a director and the sole underlying beneficial owner of GML. The third claimant, Trident, is the trustee of the Berry Revocable Trust, a family trust set up by Mr Pinter in the Isle of Man, and of which Mr Pinter is also a trustee. The defendant is a chartered accountant, and is employed as a director and deputy general manager of a UK company, E-Pay International Limited, which provides payment services under the brand name Monneo. He also appears to hold senior executive positions in two different companies registered in the Czech Republic: Pay Gate s.r.o. and Finnotiv.

The underlying dispute:

19. The full details of the underlying dispute between the parties are set out in considerable detail in the Hermer judgment, and are not repeated here. Suffice it to say that the claimants' claim against the defendant concerned the repayment of sums of money paid by the claimants to the defendant, or for his benefit, between December 2008 and April 2014. The claimants' case was that these payments were by way of loans to the defendant, and which the claimants expected would be repaid. The defendant's case was that the payments were made in part-performance of an alleged compensation agreement, which he said he had agreed with the second claimant as far back as May 2006. The purpose of that compensation agreement, according to the defendant, was to indemnify him against any loss he might suffer as a result of staying on as a chief executive director during a difficult period at First Investment Bank in Bulgaria. This is dealt with in more detail in the Hermer judgment at [17] to [20].

20. Following a breakdown in the relationship between Mr Pinter and the defendant in May 2014, the parties ceased to communicate for a period of time until 10 July 2017, when the defendant, through his then solicitors, Pinsent Masons, sent a letter before action to the second claimant claiming he was entitled to a sum of just under £12 million for alleged breach of contract and fraudulent misrepresentation. That claim was not, in the event, pursued by the defendant. The claimants subsequently filed their claim against the defendant on 30 April 2018. The defendant did not advance any counterclaim relating to the sum of £12 million or otherwise.

21. Following a five-day trial between 17 and 21 February 2020, the judge found in favour of the claimants. The judge's conclusions on the core dispute commence at [70] of the Hermer judgment. The judge concluded "unhesitatingly" that there was no agreement to compensate the defendant, whether agreed in May 2006 or at all. The documentation adduced at trial was found to be "obviously consistent with the second claimant's written and oral evidence", and the defendant's attempt to adduce evidence to contradict the documents was found to be an "untruthful means of trying to explain away the obvious meaning of the documents": See [65] to [68] of the Hermer judgment.

22. The judge proceeded to summarise his conclusion on the central issue as follows at [99]:

> "I find that there were a series of loans made by the claimants, and that there was never an agreement to compensate as alleged by the defendant. It is not strictly necessary to address why it is on the basis of my findings the defendant has advanced a case that is in so many respects untrue. There are cases in which parties can provide honest but deeply mistaken recollections about events that occurred long ago. The teaching of *Gestmin* is that this may reflect the frailty of human memory. Here the defendant's life undoubtedly spiralled downwards after his departure from FIB, both in terms of finances and health, and thus his memory over time may have been mediated by his sense of injustice that others made so much money out of events that caused him only misery. It may be that over the many years of hardship these circumstances have worked to convince the defendant not just of a moral case but to reconstruct a legal case in his own mind, albeit one that never actually existed. I make no findings in that respect, but I do conclude that the defendant's evidence in all key respects was entirely unreliable, and that rather than repay the kindness shown to him, he instead (through both his intimated claim and the defence in this case) elected to seek to avoid his debts, and subject the second claimant to deeply hostile and expensive litigation, not least exposing him to over a day of expert cross-examination in which his character was repeatedly sought to be impugned, and unfounded allegations of the utmost seriousness repeatedly put to him in open court." [Emphasis added].

23. Of the thirty-five payments made by the claimants to the defendant, or paid for his benefit, the court found that the claimants were entitled to recover thirty-three of those payments. The defendant was ordered to pay £871,235.67, including interest. The judge stated in respect of the two payments that were found to be irrecoverable that, "This is not because I accept the relevant parts of the evidence of the defendant, but rather because the contemporaneous documentation does not make out that a formal agreement for repayment on demand existed in respect of those specific payments": See Hermer judgment at [107].

24. The judge further ordered that the claimants were to recover their costs of the proceedings on the indemnity basis, and ordered an interim payment on account in the sum of £250,000. When considering whether or not to award costs against the defendant on the indemnity basis, the judge found as follows, at [120] of the Hermer judgment:

> "I conclude that it is appropriate to award indemnity costs. I have set out in detail in the body of this judgment repeated findings about not simply the unsatisfactory nature of the defendant's evidence but also the manner in which he conducted this litigation. As I have found, he was a wholly unsatisfactory witness, in very large measure untruthful and mendacious." [Emphasis added].

25. These are strong criticisms of the defendant's veracity made by the trial judge, who had the benefit of seeing and hearing the evidence given by the defendant and Mr Pinter, and of considering that evidence in light of the contemporaneous documentation.

26. The final order following the Hermer judgment, which I shall refer to as "the Hermer order", provided for payment of all sums due by 1 May 2020. I am told that to date the defendant has failed to comply with any aspect of the Hermer order.

27. The post-judgment dealings between the parties are set out in the first affidavit of Kelly John Tinkler sworn in support of the application for the freezing order. It is apparent that the defendant and his legal representatives have made little or no effort to engage with and respond to the various items of correspondence sent by Keystone Law regarding the defendant's non-compliance with the Hermer order. The defendant has not even acknowledged that he is in breach of the Hermer order.

28. Following the defendant's breach of the Hermer order, the claimants applied for and obtained an interim third party debt order against Barclays Bank, which was the only bank at which the defendant is believed to hold an account within this jurisdiction. On 29 June 2020, the claimants received notice that the defendant's account with Barclays was overdrawn, and had a negative balance of just under £8,000.

29. Given the defendant's overall conduct up to that point, his unwillingness to cooperate, and the history of evading his debt obligations to the claimants, the claimants, with considerable justification, feared that the defendant was taking steps to frustrate the claimants' ability to enforce the judgment debt, and that there was a real risk he was dissipating his assets, so as to put them beyond the reach of the claimants.

30. Accordingly, on 15 July 2020 the claimants made an on-notice application for a post-judgment worldwide freezing order against the defendant, to facilitate, and in execution of, the Hermer order. Mr Andrew Savage of MWE and the defendant filed witness statements opposing the application for the freezing order. Counsel was also instructed, and did appear at the hearing on 23 July 2020 to oppose the application.

31. The application for the freezing order was considered by HHJ Simpkiss, who found that there was overwhelming evidence of a risk of dissipation of assets by the defendant. HHJ Simpkiss made the following findings, amongst others:

> 1. That in the absence of any attempt by the defendant to demonstrate his inability to pay the judgment debt, it was necessary to look at the factual background, which was that he knew that he owed money to the claimants, that he had concocted a defence to the claim, that he had put forward his case aggressively, and that he had instructed expensive legal representation without explaining how he was paying for it.
>
> 2. The findings of dishonesty in the Hermer judgment showed a wilful attempt by the defendant not to honour the judgment debt.
>
> 3. There were serious questions as to where the defendant held his assets.

32. HHJ Simpkiss proceeded to make the freezing order. In keeping with the standard requirements for such orders, it is prefaced by a penal notice, which is in the following terms:

> "Penal notice: If you, Jonathan Henry Martyn Harfield, disobey this order, you may be held to be in contempt of court, and may be imprisoned, fined, or have your assets seized."

The risk of imprisonment for breach could not have been made more clear.

33. The mandatory terms of the freezing order relevant for present purposes are at paragraphs 7 and 8 of that order. They provide:

> "7(1) Unless paragraph (2) applies, the respondent must by 4.30 pm on the day after service of this order, and to the best of his ability, inform the applicants' solicitors of all his assets worldwide exceeding £1,000 in value, whether in his own name or not, and whether solely or jointly owned, giving the value, location and details of all such assets."
>
> …
>
> "(8) Within five working days after being served with this order, the respondent must swear and serve on the applicants' solicitors an affidavit setting out the above information."

34. The defendant was also ordered to pay the claimants' costs of the application pursuant to paragraph 10 of the freezing order, by 7 August 2020. The defendant is also in breach of that

provision of the freezing order, as he is in respect of other provisions, although those breaches do not form part of the grounds of committal.

35. I am told that all attempts by Keystone Law to elicit a response from the defendant as to whether he will purge his contempt have gone unanswered.

36. I was referred to two items of correspondence in particular. These identify that the defendant is clearly in breach of the order, and invite the defendant to set out the steps taken by way of purging that contempt. As I have said, those communications have gone unanswered.

Legal Framework

37. That is the factual background to this application. I turn now to consider the legal framework. The general principle for a contempt application for non-compliance with a court order is set out in CPR 81.4, which provides:

> "(1) If a person –
>
> (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
>
> (b) disobeys a judgment or order not to do an act,
>
> then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal."

38. CPR r.81.5 provides that:

> "(1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question … "

39. CPR r.81.9 provides that:

> "(1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets."

40. Contempt is a quasi-criminal jurisdiction, enforced through the civil courts, with the burden of proof falling on the claimants. The standard of proof is that of the higher criminal standard, which is beyond a reasonable doubt or, to use the more modern terminology, "so

that the court is sure", as opposed to the civil standard of on the balance or probabilities: See *Baho v Meerza* [2014] EWCA Civ 669 at [15].

41. The leading statement of the legal principles for finding a defendant to be in contempt arising from the disobedience of a court order is set out in the judgment of Christopher Clarke J, as he then was, in *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) at [150]:

> "In order to establish that someone is in contempt it is necessary to show (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: *Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors* [2009] EWHC 1445 (QB) … "

42. As to the third point, this is not concerned with whether the defendant knew that his conduct was a breach of the order; the intention is directed towards the act or omission, not its legal effect. As such, the intention of the defendant that is required to be proved is an intention to do the act or omit to do the act which is said to constitute a breach of the order. It is not necessary to establish that the defendant intended to breach the order. Contempt of court is regarded in general as a strict liability offence. It is therefore no answer to say that there was no direct intention to disobey the order. Issues of motive or intent behind the actions of the defendant breaching the terms of the injunction are not relevant to this question of whether the defendant is in contempt: *Masri* at [155]:

> "I regard myself as similarly bound. I do so with less reluctance than Jacob J. In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order – particularly when a belief that it was not a breach may have rested on the slenderest of foundations or on convenient advice which was plainly wrong."

See also *Palmer v Tsai* [2017] EWHC 1860 (Ch) at [12].

Is the Defendant in contempt?

43. I turn now to consider whether the defendant is in contempt of court. As set out earlier, there are several procedural requirements which must be complied with before an order for committal may be made. Pursuant to CPR r.81.5, the order must be served on the defendant. In this case, the freezing order was served on the defendant on the same day that it was sealed by the court, that is to say, on 24 July 2020. The freezing order was also served by email on the defendant with the permission of the court.

44. As provided for in paragraph 19 of the order, the further requirement under CPR r.81.9 as to the incorporation of a penal notice has been complied with. The penal notice was in the form set out above.

45. The procedural requirements having been complied with, I turn now to consider whether there has been a breach of the substantive parts of the order. I am satisfied so that I am sure that the defendant is in contempt of court for breaching paragraphs 7 and 8 of the freezing order. I say that for the following reasons, taking account of the three questions to be considered, as identified in *Masri*:

46. Was the defendant aware of the terms of the freezing order? In my judgment, he was aware. The defendant was certainly aware of the application for the freezing order, and actively participated in the process by filing evidence to oppose the application and by instructing MWE and counsel to attend the hearing on his behalf. The defendant was also provided with a draft of the freezing order prior to the 23 July 2020 hearing, and his counsel and instructing solicitors were involved in drawing up the final order once HHJ Simpkiss granted the claimants' application. The notion that the defendant's legal representatives would not have made him aware of the terms of the freezing order or of the consequences of non-compliance following the hearing on 23 July 2020 is, in my judgment, fanciful in the extreme.

47. The defendant continues to be advised by MWE in respect of separate insolvency proceedings where the defendant is applying to set aside a statutory demand served on him by the claimants. MWE expressly referred to the freezing order in their letter dated 4 September 2020, when refusing to provide voluntary disclosure of documents in the insolvency proceedings. A copy of the sealed freezing order was emailed to the defendant on 24 July 2020, and sent to MWE on the same day. Although the defendant has not acknowledged receipt of the email, the claimants did use the same email address that the defendant was using to communicate with the second claimant in April 2020. MWE have implicitly confirmed this email address as being correct in a letter dated 9 September 2020, where they stated, "You have his email address". Moreover, I am told that Keystone Law received no bounce-back or error message to suggest that the email sent had not been received.

48. In any event, the fact that the documents were served on MWE, which was, and continues to be, on the record for the defendant, suffices to establish knowledge on the part of the defendant. Even in its most recent letter to Keystone Law, MWE were content for documents relating to the committal application to be sent to them "if convenient". One can presume that a reputable firm such as MWE would only make such an offer to receive documents on behalf of their clients on instruction.

49. Did the defendant act or fail to act in a manner involving a breach of the freezing order? I am told that the defendant has failed to comply with paragraphs 7(1) and 8 of the freezing order in that no such information or affidavit as required has been provided. There is no reason not to accept the claimants' contention that there has been no compliance. The correspondence demonstrates the history of non-engagement since the Hermer order was made. There has been no correspondence from the defendant or his representatives to explain non-compliance with the freezing order or the Hermer order. Most recently, the defendant has specifically withdrawn instructions from his representatives for this hearing, thereby suggesting that there is nothing that he wishes to say to the court by way of explanation or apology.

50. Paragraphs 7(1) and 8 of the freezing order are clear and unambiguous in their terms, and mirror the standard wording provided for in the template freezing order annexed to PD 25A. They impose on the defendant the simple requirement to provide evidence of his assets above the threshold value of £1,000, and to confirm the position by affidavit. There has not even been an attempt to provide this information or any such affidavit, nor has there been any request for additional time to comply or any suggestion that there was any impediment to the defendant doing so.

51. In summary, the defendant has provided no evidence whatsoever as to why he has been wholly unable to comply with paragraphs 7(1) and 8 of the freezing order.

52. I conclude that the defendant knew that his failure to provide the information requested would be a material breach of the freezing order. This is not a case where disclosure has been partial or merely arguably incomplete. There has been no disclosure of assets at all. Instead, the defendant's conduct is indicative of a deliberate choice having been made not to comply with paragraphs 7(1) and 8 of the freezing order. I am satisfied so that I am sure that the defendant would be fully aware that he is in breach of the freezing order, and that he is not labouring under any misapprehension otherwise.

53. The defendant would also have been well aware of the importance of the disclosure element of the freezing order. It was made clear to the defendant in the course of the hearing before HHJ Simpkiss that the disclosure provisions were necessary because the defendant had failed to pay the judgment debt under the Hermer order, and his general evasive conduct was considered to be designed to frustrate the claimants' enforcement efforts. HHJ Simpkiss expressly found that there were serious questions as to where the defendant held his assets, and this formed part of the judge's reasoning for making the freezing order. As stated by Flaux J, as he then was in *Navig8 Chemicals Pools Incorporated v Nu Tek (HK) PVT Limited* [2016] EWHC 1790 (Comm):

> "The disclosure of assets by the respondent in such a case is a critical element in ensuring the efficacy of the court's order."

54. The defendant, who has been advised throughout, could not have been in any doubt as to the importance of disclosure in this case. It is worth noting that the trial judge's observation was that the defendant is an educated and sophisticated person, with considerable experience at a relatively high level in international finance: See Hermer judgment [62]. As Mr Bheeroo submits, it would be unimaginable that a defendant such as that would not be aware of the seriousness of flouting court orders, and the risk that he would be liable to be found in contempt of court if he did.

55. The third requirement in *Masri*, namely that the defendant knew of the facts which made his conduct a breach, is evident from the above. In my judgment, therefore, all three questions are answered to the criminal standard of proof, and point towards the contempt being established.

What sanction should the Court impose?

56. I turn then to consider sanction for the contempt which I have found. Given the defendant's absence, the question once again arises whether the court should proceed in his absence to sentence immediately or should adjourn to give the defendant an opportunity to address the court on sentence and mitigation before sentence is imposed. The latter course would generally be considered the fairer one, particularly where the deprivation of liberty is a possibility. In some cases an adjournment may be considered necessary to see how matters develop following findings of contempt, including whether the defendant takes steps to rectify the consequences of the breach so that the court can impose an appropriate sentence: Such an adjournment was considered in *JSC BTA Bank v Solodchenko* [2010] EWHC 2404 (Comm) at [36] - [37], where it was stated:

> "[36] Mr Smith says I should not adjourn the sentencing aspects of this present application. The time has come, he says, for the dual objects of punishment and coercion to be employed as Mr Kythreotis' admissions do not detract from the evidence that there has been contumacious flouting of the July order. A further period of grace would not be fair to the bank, for which huge amounts of money are at stake and time is of the essence. Moreover, once the court has found that there has been an intentional disregard of its orders, the court ought to consider the proper punishment as a matter of urgency."

> "[37] I do not agree. It is impossible to determine what length of sentence is appropriate or, if there is satisfactory compliance with the July order, if a custodial sentence is appropriate at all without seeing what happens. I considered the authorities on suspension of custodial sentences in general terms overnight for the purpose of understanding the jurisdiction I am asked to exercise. It was obvious from those authorities that the court had to determine whether a custodial sentence is necessary, then, if so, to decide on the appropriate length of term and, only then, to decide whether to suspend and, if so, on what conditions or for what period. Suspension is primarily aimed at ensuring compliance; in a case like this, primarily compliance with the existing orders for disclosure. I only had to consider the application of the decided authorities to the existing facts to realise that it would in my judgment be wrong to try and pass sentence without knowing whether Mr Kythreotis is sincere in his assurance that he wishes now to provide the information ordered in the July order. A short adjournment would put the court in a better and, most importantly, fairer position to determine how to deal with the admitted contempt."

57. That said, it is nonetheless open to the court to proceed to sanction should it make findings of contempt against the defendant, particularly one who intentionally absents himself from the hearing: see, for example, *Russian Commercial Bank (Cyprus) Limited v Fedor Khoroshilov* [2013] EWHC 4433 (Comm). Mr Bheeroo submits that this is an appropriate case in which to proceed to sentence in the defendant's absence. He points to the deliberate failure to attend; the dis-instruction of legal representatives solely for these proceedings whilst retaining their services in other proceedings; and the history of non-engagement and non-compliance. He submits that an adjournment would serve no real purpose as the court would be in the same position at any adjourned hearing as it is now.

58. I accept those submissions. I consider that this is an appropriate case in which to proceed to sentence immediately. Whilst some contemnors when faced with the reality of a finding of contempt may have cause to reflect on their conduct and adopt a more cooperative stance, both with regard to compliance and to dealings with the court, there is little here that would instil any confidence that the defendant would take such a course. Unlike the *Solodchenko* case, where sentencing was adjourned in light of an indication from the respondent that he desired to comply with the terms of the order, the defendant here has given no indication at all that he wishes to apologise for or attempt to purge his contempt. The reality therefore is that an adjournment is unlikely to serve any real purpose.

59. The defendant is not unduly prejudiced by this approach of proceeding to sentence. He has, as we know, access to expert representation, but has chosen not to avail himself of it in these proceedings. Had he wished the court to take account of anything he might wish to say in his defence or by way of mitigation, he has had ample opportunity to do so.

60. I turn then to the penalty itself. The most serious penalty for contempt is committal to prison. Under section 14(1) of the Contempt of Court Act 1981:

> "(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

61. An order for committal may serve two distinct purposes: (i) punishment for past contempt; and (ii) securing compliance.

62. Whilst not mandatory, the court's sentence may include elements of both, to make clear what period of committal is regarded as appropriate for punishment alone, i.e. what period would be regarded as just if the contemnor were promptly to comply with the order in question: *JSC BTA Bank v Solodchenko & Others (No 2)* [2011] EWCA Civ 1241; [2012] 1 WLR 350 at [56]:

> "In the case of continuing breach, out of fairness to the contemnor, the court may see fit to indicate (a) what portion of

> the sentence should be served in any event as punishment for past breaches and (b) what portion of the sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive, but not binding upon a future court."

63. Pursuant to CPR r.81.29:

> "(1) The court making the committal order may also order that its execution will be suspended for such period or on such terms or conditions as it may specify."

64. Whilst suspension is a matter of discretion it may be considered appropriate: (i) as a first step, with a view to securing compliance with the breached court order; and (ii) in view of compelling and cogent personal mitigation.

65. The Court may, as an alternative, impose a fine as punishment. There is no statutory limit to the amount of a fine, as per section 14(2) of the Contempt of Court Act 1981. If a fine is an appropriate punishment, it is wrong to impose a custodial sentence because the contemnor could not pay the fine: See *Re M (Contact Order)* [2005] EWCA Civ 615; [2005] 2 FLR 1006.

66. A deliberate breach of a freezing injunction or of a disclosure order is a serious matter, and will normally result in an immediate sentence of imprisonment. That was made clear by Rix LJ in *Templeton Insurance Limited v Thomas* [2013] EWCA Civ 35 at [42] where he stated as follows:

> "In my judgment, whereas it will always remain appropriate to consider in individual cases whether committal is necessary, and what is the shortest time necessary for such imprisonment, and whether a sentence of imprisonment can be suspended, or dispensed with altogether: nevertheless, it must now be accepted that the attack on the administration of justice which is made when a freezing order is breached usually merits an immediate sentence of imprisonment of some not insubstantial amount. Of course, courts will bear in mind that the maximum sentence which can be handed down on any one occasion is two years; and will make due allowance for the encouragement of, or rewarding of, better thoughts and the purging of contempt, and for the credit due in the ordinary way for an admission of responsibility and remorse. Nevertheless, it must be borne in mind that breaches of freezing orders, unlike many other contempts, are nearly always spawned in darkness, and therefore

> will be hard, and sometimes impossible, to detect, until it is too late." [Emphasis added].

67. The authorities in relation to sentencing for contempt were reviewed by Popplewell J, as he then was, in *Asia Islamic Trade Finance Fund Limited v Drum Risk Management Limited* [2015] EWHC 3748 (Comm) at [7]:

> "I was referred to a number of relevant authorities, including *Crystal Mews Limited v Metterick & Others* [2006] EWHC 3087 (Ch) at paras.8 and 13, *Trafigura Pte Ltd v Emirates General Petroleum Corporation* [2010] EWHC 3007 (Comm), *JSC BTA Bank v Solodchenko* [2011] EWHC 2908 (Ch), *JSC BTA Bank v Solodchenko (No 2)* [2012] 1 WLR 350 at paras.52 to 57 and 66 to 67, *Templeton Insurance Limited v Thomas & Panesar* [2013] EWCA (Civ) 35 at para.42, *JSC VTB Bank v Skurikhin* [2014] EWHC 4613 (Comm) and *ADM Rice Inc v Corporacion Comercializadora de Granos Basicos SA* [2015] EWHC 2448 (QB). From those authorities I derive the following principles which are applicable to the present case:
>
> (1) In contempt cases the object of the penalty is to punish conduct in defiance of the court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to achieve.
>
> (2) In all cases it is necessary to consider (a) whether committal to prison is necessary; (b) what is the shortest time necessary for such imprisonment; (c) whether a sentence of imprisonment can be suspended; and (d) that the maximum sentence which can be imposed on any one occasion is two years.
>
> (3) A breach of a freezing order, and of the disclosure provisions which attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount.
>
> (4) Where there is a continuing breach the court should consider imposing a long sentence, possibly even a maximum of two years, in order to encourage future cooperation by the contemnors.
>
> (5) In the case of a continuing breach, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches; and (b) what portion of a

> sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive but not binding upon a future court. If it does so, the court will keep in mind that the shorter the punitive element of the sentence, the greater the incentive for the contemnor to comply by disclosing the information required. On the other hand, there is also a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element of the sentence both punishes the contemnors and deters others from disregarding court orders.
>
> (6) The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as he then was, at para.13 of the *Crystal Mews* case, namely:
>
> > (a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;
> >
> > (
> >
> > b) the extent to which the contemnor has acted under pressure;
> >
> > (c) whether the breach of the order was deliberate or unintentional;
> >
> > (d) the degree of culpability;
> >
> > (e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;
> >
> > (f) whether the contemnor appreciates the seriousness of the deliberate breach;
> >
> > (g) whether the contemnor has co-operated; to which I would add:
> >
> > (h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

68. Taking these factors into account, my conclusions are as follows: The contempt in this case is so serious that nothing less than a custodial sentence will do. As has been stated in several of

the authorities mentioned above, a breach of a freezing order, and of the disclosure provisions which attach to a freezing order, is an attack on the administration of justice, and usually merits an immediate sentence of imprisonment of a not insubstantial amount, perhaps not less than a year.

69. The shortest period which is commensurate with the seriousness of the breach in this case, in my judgment, is nine months. I note here the fact that the breaches form part of a pattern of ongoing breaches since the Hermer judgment and the Hermer order. There has not been compliance or even purported compliance with any part of the freezing order, including those parts relating to costs and to informing the claimants before any expenditure for daily living expenses is undertaken. Such blatant disregard of the court's orders cannot and will not be tolerated. I have no doubt, as I have said above, that the defendant is aware of the seriousness of this breach, but has chosen to take that course nevertheless.

70. I do not propose to give an indication of what element of the sentence of nine months' imprisonment should be served in any event by way of punishment for past offences, should there be any belated attempt to comply. There is a real concern in this case that the delays so far, and failure to comply, may mean that the purpose for which the order was made in the first place can now no longer be achieved. However, it will of course be open to the defendant to apply to the court for some part of his sentence to be remitted in the event that there is attempted compliance. It will be for the court on that occasion to determine whether such compliance, if there is any, merits any remission.

71. I have considered whether that term of imprisonment should be suspended, but I see no reason in this case for taking that course. As I have mentioned, this is not a case where there has been purported or partial compliance. There has been no compliance at all with any part of the freezing order or the Hermer order that preceded it. The factors that might have led the court to consider suspending the sentence are simply not present here. Although there is no indication of any past offending or criminal conduct, the defendant has established himself over recent months as a serial defier of court orders. The defendant has also not availed himself of the opportunity, which is clearly open to him, to put forward any mitigation or explanation for his contempt.

72. In reaching this decision as to the sentence, I have borne in mind that the maximum sentence for contempt is two years. The Practice Direction, Committal for Contempt [2015] 1 WLR 2195, imposes specific requirements regarding judgments in committal cases. In paragraphs 13 to 15 it sets out those requirements. These are that:

> "13. (1) In all cases, irrespective of whether the court has conducted the hearing in public or in private, and the court finds that a person has committed a contempt of court, the court shall at the conclusion of that hearing sit in public and state:
>
> (i) the name of that person;
>
> (ii) in general terms the nature of the contempt of court in respect of which the committal order, which for this

> purpose includes a suspended committal order, is being made;
>
> (iii) the punishment being imposed; and
>
> (iv) provide the details required by (i) to (iii) to the national media, via the CopyDirect service, and to the Judicial Office, at judicialwebupdates@judiciary.gsi.gov.uk, for publication on the website of the Judiciary of England and Wales.
>
> (2) There are no exceptions to these requirements. There are never any circumstances in which any one may be committed to custody or made subject to a suspended committal order without these matters being stated by the court sitting in public."

> "14. In addition to the requirements at paragraph 13, the court shall, in respect of all committal decisions, also either produce a written judgment setting out its reasons or ensure that any oral judgment is transcribed, such transcription to be ordered the same day as the judgment is given and prepared on an expedited basis. It shall do so irrespective of its practice prior to this Practice Direction coming into force and irrespective of whether or not anyone has requested this."

> "15. Copies of the written judgment or transcript of judgment shall then be provided to the parties and the national media via the CopyDirect service. Copies shall also be supplied to BAILII and to the Judicial Office at judicialwebupdates@judiciary.gsi.gov.uk for publication on their websites as soon as reasonably practicable."

73. Pursuant to the requirements of the Practice Direction just set out, this is an order for committal made in respect of the defendant, Jonathan Henry Martyn Harfield. The contempt comprises blatant failures to comply with orders made by the court. The punishment for the contempt is a term of imprisonment of nine months. I shall issue a warrant for committal accordingly.