



Neutral Citation Number: [2016] EWHC 2421 (Comm)

Case No: CL-2016-214

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
London, WC2A 2LL

Date: 07/10/2016

Before :

**THE HON. MR JUSTICE POPPLEWELL**

Between :

**THERIUM (UK) HOLDINGS LIMITED**

**Claimant**

- and -

**(1) MR GUY BROOKE**  
**(2) MS EMMY ETTEMA**  
**(3) CABLE PLUS BV**

**Defendants**

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**Charles Dougherty QC & Joseph Sullivan** (instructed by Harcus Sinclair LLP) for the  
**Claimant**

**Simon Williams** (instructed by direct access) for the **First Defendant**

Hearing dates: 2<sup>nd</sup> & 4<sup>th</sup> August 2016  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

**The Hon. Mr Justice Popplewell :**

*Introduction*

1. On 2 and 4 August 2016 I heard an application by the Claimant (“Therium”) to commit the First Defendant, Mr Brooke, to prison for contempt of court. The contempts alleged were disobedience to various orders made by the Court between April and July 2016, and in one respect, assisting and/or causing and/or procuring the Third Defendant (“Cable Plus”) to breach such an order. At the conclusion of the hearing I announced my decision that Therium had established some of the contempts alleged and that I would give my reasons in writing thereafter. I reserved judgment in relation to the remaining contempts. These are my further findings and reasons.
2. Mr Brooke did not attend the hearing. He was represented by counsel, Mr Williams, who was instructed by direct access and had appeared for him at previous hearings. Mr Brooke is aged 78 and has been in poor health. On the eve of the hearing he sent an email stating that he was unable to travel to attend for medical reasons. Mr Williams made an application for an adjournment on his behalf. I concluded that Mr Brooke was unwilling to attend, not unable to do so, and rejected the application for an adjournment for the reasons set out in a judgment I gave on 2 August 2016.
3. I heard evidence from Mr Van den Heuvel, who was qualified and experienced in the law and practice of Curacao. He gave evidence by video link and was cross examined by Mr Williams. I found him to be a straightforward witness whose evidence was cogent and persuasive. Therium also tendered for cross examination Mr Parkes, a solicitor who had had a number of relevant conversations which were the subject matter of affidavit evidence. Mr Williams stated that he did not require Mr Parkes to be called and did not wish to cross examine him. Accordingly I treat his evidence as unchallenged.

*Narrative*

4. Mr Brooke was a shareholder of Cable Plus Limited which was the parent of a Dutch company, Cable Plus (Netherlands) BV (“Cable Plus Netherlands”). Cable Plus Netherlands had brought legal proceedings objecting to the termination of a broadband licence by the Dutch authorities. It was represented by a Dutch law firm, De Brauw Blackstone Westbroek NV (“DBBW”). DBBW withdrew those legal proceedings. Cable Plus Netherlands was at its own request declared bankrupt on 8 January 2002. The bankruptcy trustee representing the company commenced legal proceedings against DBBW and the relevant lawyer at the firm, a Mr Biesheuvel, alleging professional negligence in withdrawing the legal proceedings. On 25 May 2010 the Hague Court of Appeals found that DBBW and Mr Biesheuvel had been professionally negligent and were liable to Cable Plus Netherlands.
5. Because of the parlous financial position of Cable Plus Netherlands, Mr Brooke needed to find litigation funding to pursue the quantum stage of the claim. For those purposes in February 2011 he caused to be incorporated a new company in Curacao, the Third Defendant, Cable Plus. Mr Brooke was the sole shareholder of

Cable Plus, and has at all times remained so. Its sole director has at all material times been one of the largest corporate service providers in Curacao, The United Trust Company NV which acted as director through its managing director, Mr Gregory Elias. Therium has at times referred to this entity as United International Trust and so used the acronym “UIT”, including in its committal application. I shall use the same acronym “UIT” to refer to The United Trust Company NV, for ease of comprehension.

6. In order to pursue the claim, Mr Brooke and Cable Plus entered into a litigation funding agreement with Therium dated 1 April 2011 (“the LFA”). The LFA provided that Therium would provide funding in a total of £1m in two tranches. By Clause 13.2 the proceeds of any recovery against DBBW and Mr Biesheuvel were to be paid to Kemp Little LLP, the English solicitors acting for Cable Plus in relation to the Dutch litigation. The proceeds were to be held in their client account pending an accounting process under which Kemp Little LLP would recover their costs and Therium be paid the sums due to it under the LFA in priority to the distribution of any surplus to Cable Plus.
7. On 24 June 2015 the Dutch court gave final judgment in favour of Cable Plus against DBBW and Mr Biesheuvel in a sum which, once quantified to include interest and costs, amounted to approximately €3.4m.
8. Mr Brooke was disappointed and dissatisfied with this quantification of liability. It was significantly less than he had been hoping for, and, as was made clear to him at the time, would mean that once Therium and Kemp Little had taken what they claimed to be owed under the LFA there would be nothing left for Cable Plus or Mr Brooke. Mr Brooke sought to negotiate a higher figure from DBBW and Mr Biesheuvel using a prospective appeal as a bargaining counter. As a result a settlement agreement was reached in the Dutch litigation under which DBBW and Mr Biesheuvel agreed to pay Cable Plus €400,000 more than had been awarded in the Dutch court judgment. I shall refer to this sum of approximately €3.8m, which is at the heart of the current contempt application, as “the Claim Proceeds”. The written settlement agreement was executed by Cable Plus on 19 November 2015 and, according to Mr Brooke’s affidavit evidence, concluded on that date. It provided for payment of the Claim Proceeds within 10 days of execution into a numbered bank account in the name of UIT at the United International Bank, Curacao.
9. The fact and amount of the settlement was deliberately kept from Therium by Mr Brooke. Therium had at that time been pressing for information as to the outcome of negotiations. On 23 November 2015 Mr Brooke sent an email to Therium stating that “A settlement agreement is being drawn up at the moment. We are hoping for completion over the next couple of weeks.” This was, as Mr Brooke knew, untrue. The settlement agreement was not “being drawn up”; it had been drafted and executed four days earlier. “Completion” of the agreement was not being hoped for over the next couple of weeks; it had already occurred. Mr Williams submitted that “completion” would have been intended to refer to payment under the agreement rather than its execution. This is not the natural reading of the email and was not supported by any evidence from Mr Brooke. Moreover, even if that were the proper construction, the email would have been

seriously misleading: payment was due within the next six days under the terms of the agreement.

10. Therium continued to press for information in November and December 2015 but was met with no substantive response from Mr Brooke. No copy of the agreement was provided to Therium at the time or until disclosure was later ordered by Teare J in April 2016. The Claim Proceeds were not paid into the Kemp Little account as was clearly required under the terms of the LFA.
11. Mr. Brooke has given no satisfactory explanation for this failure. In his first affidavit he says that he had been advised by Kemp Little when entering into the LFA that the likely recovery would be substantially in excess of the amounts he would have to pay to Therium and Kemp Little; and that he was advised and believed that whilst the LFA appeared to provide that Therium was entitled to a £3 million contingency fee in addition to return of the £1 million advanced by way of funding, in fact clause 6.6 of the LFA capped the total liability of Cable Plus and Mr Brooke at £1 million. The LFA contained an arbitration clause providing for disputes to be resolved in accordance with the rules of the London Court of International Arbitration, and Therium has subsequently commenced an LCIA arbitration against Cable Plus seeking recovery of the Claim Proceeds on the basis of a contractual entitlement under the terms of the LFA. It would therefore be inappropriate for me to express a final conclusion as to the construction of the LFA. Nevertheless, the interpretation advanced in Mr Brooke's affidavit is not a natural reading of the language used and would be a surprising construction, because it would mean that Therium had agreed to advance an unsecured interest free loan of £1 million without the prospect of any benefit.
12. In any event, it is clear from the correspondence that, contrary to his assertion in his affidavit, Mr Brooke was not receiving advice from Kemp Little that that was the extent of his or Cable Plus' responsibility. On the contrary, Kemp Little advised on at least two occasions prior to November 2015 that Cable Plus would make no net recovery from any claim proceeds unless and until they reached £4.5 million. Moreover Mr Brooke proffers no real explanation for failing to pay any part of the £1 million which he accepts is due. There was a suggestion, made for the first time in an email of 20 April 2016, that he did not want to pay it to Kemp Little because he was in dispute with them over the advice they gave when entering into the LFA, but he was not prepared to accede to the suggestion on behalf of Therium that it be paid to another firm in escrow or otherwise secured to abide the outcome of any dispute. Mr Brooke has chosen not to come to court to have his conduct explored and his assertions tested by cross examination. In all the circumstances, and in the light of his subsequent behaviour to which I refer below, I have reached the conclusion that in November 2015 Mr Brooke had no intention of paying any of the Claim Proceeds to Therium and was intent on concealing their whereabouts.
13. Therium continued to press for further information about any settlement between January and April 2016, without success. Because Therium was concerned as to the whereabouts of the Claim Proceeds, it commenced these proceedings on 12 April 2016, seeking an order preserving the Claim Proceeds and information in relation to them in support of the LCIA arbitration which was shortly to be commenced.

14. On 15 April 2016 Teare J made an order on Therium's without notice application restraining Mr Brooke and Cable Plus from disposing of, dealing with or diminishing the value of the Claim Proceeds; and ordering each of them within 60 hours of service and to the best of their ability, after making all reasonable enquiries, to provide information as to the amount of the Claim Proceeds with full details of their location, together with the terms of the Settlement Agreement with DBBW and/or Mr Biesheuvel. The order required the information to be verified on affidavit within 4 working days of the service of the order. Paragraphs 6(1), 7 and 8 of the order of Teare J were in the following terms:

*“6. Until after the Return Date or further order of the court the Respondents must not, without the prior consent in writing of the Applicant's solicitors:*

*(1) in any way dispose of deal with or diminish the value of any moneys, or the proceeds of such moneys, that they or any one of them have/has received, or receives in the future, directly or indirectly from De Brauw Blackstone Westbroek N.V. (“DBBW”) and/or Mr Mark Barend Willem Biesheuvel (“Mr Biesheuvel”) in connection with or arising out of Cable Plus BV's claim against DBBW and Mr Biesheuvel in the Netherlands with case number C/10/417537/HA ZA 13-137, including any interest earned or other income or assets received or derived therefrom (the “Claim Proceeds”). The Claim Proceeds include, in particular, any monies up to the value of €3,801,339.15 held in account number 5000596021000978 at the United International Bank N.V. Landhuis Joonchi II, Kaya, Richard J Beaujon z/n, PO Box 152, Willemstad, Curacao*

*7.(1) Unless paragraph (2) applies, each of the Respondents must within 60 hours of service of this order and to the best of their ability after making all reasonable inquiries, provide the Applicant's solicitors with the following information:*

*(a) The amount of the Claim Proceeds.*

*(b) Full details of the location of the Claim Proceeds, including any bank accounts where the Claim Proceeds are held.*

*(c) The terms of any settlement agreement with DBBW and/or Mr Biesheuvel and, if in writing provide a copy.*

*(2) If the provision of any of this information is likely to incriminate the Respondents, they may be entitled to refuse to provide it, but it is recommended that they take legal advice before refusing to provide the information.*

*Wrongful refusal to provide the information is contempt of court and may render the Respondents liable to be imprisoned, fined or have their assets seized.*

*8. Within 4 working days after being served with this order, the First and Second Respondents must each swear, and the Third Respondent cause to be sworn, and serve on the Applicant's solicitors an affidavit setting out the above information."*

15. On 18 April 2016, in purported compliance with the order of Teare J, Mr Brooke sent an e-mail to Therium's solicitors on his own behalf and on behalf of Cable Plus stating that the Claim Proceeds were €3,801,339.15 and that they were currently held in an account at the United International Bank N.V. in Curacao. He gave the bank's address and the relevant account number. The e-mail attached a copy of the 19 November 2015 settlement agreement between Cable Plus and DBBW and Mr Biesheuvel. On 21 April 2016 Mr Brooke served his first affidavit confirming the location of the Claim Proceeds as being in that amount in that bank account in Curacao.
16. At the hearing on the return date, 22 April 2016, Walker J continued the order of Teare J. Paragraph 5(1) of Walker J's order continued the freezing injunction in relation to the Claim Proceeds in the same terms as paragraph 6(1) of Teare J's Order.
17. On 29 April 2016 Phillips J made an order that insofar as the Claim Proceeds were held by Cable Plus or Mr Brooke or on their respective behalves, they should transfer the Claim Proceeds to a Euro account at the Court Funds Office to be held to the order of the court. Phillips J's order went on to provide that insofar as the Claims Proceeds were held by Cable Plus, including in particular the amount which Mr Brooke had identified as being held in the account at the United International Bank in Curacao, Mr Brooke must to the best of his ability cause and/or procure Cable Plus to transfer the Claim Proceeds into Court. Paragraphs 2 defined the Claim Proceeds in the same terms as in Teare J's order. Paragraphs 3 and 4 of the order were in the following terms:

*"3. Each Respondent shall by no later than 4pm on 3<sup>rd</sup> May 2016 transfer such of the Claim Proceeds as are held by such Respondent or on that Respondent's behalf to a Euro account at the Court Funds Office to be held there to the order of the Court.*

*4. Insofar as the Claim Proceeds are held by the Third Respondent, including in particular the sum of €3,801,339.15 held in account number 5000596021000978 at the United International Bank N. V. Landhuis Joonchi II, Kaya, Richard J Beaujon z/n, PO Box 152, Willemstad, Curacao, the First and Second Respondents must to the best of their ability cause and/or procure the Third Respondent to transfer the Claim Proceeds in accordance with paragraph 3 above."*

18. No sum was paid to the Court Funds Office by 3 May 2016, which was the deadline for payment of the Claim Proceeds into court. No part of the Claim Proceeds has ever been paid into court.
19. On 16 May 2016 Therium issued an application for committal of Mr Brooke for contempt for failing to the best of his ability to cause or procure Cable Plus to pay the €3,801,339.15 into court by 3 May 2016 or at all in breach of Phillips J's order. On 10 June 2016 the hearing of the committal application came before Walker J, who adjourned it as a result of Mr Brooke's non attendance on what he claimed were medical grounds.
20. On 1 July 2016 as a result of proceedings against United International Bank in Curacao, Therium received details of the assets held by the bank on behalf of Cable Plus. That information revealed that the account identified by Mr Brooke did not hold €3,801,339.15 or anything like that sum, but merely €147,292.05. The disclosure also identified that a credit card had been issued with a maximum credit limit of US\$28,000 for which purposes there was a blocked deposit account containing US\$28,000.
21. As a result, on 5 July 2016 Therium applied without notice for a worldwide freezing order and asset disclosure order which was granted by HHJ Waksman QC ("the WFO"). It provided for Mr Brooke and Cable Plus to disclose details of all their assets worldwide by 4pm on 8 July 2016, to be verified on affidavit by 4pm on 13 July 2016. It also required provision of bank statements for each bank account held by them and for any credit or debit cards, with a proviso that if the statements could not be disclosed by 4pm on 13 July 2016 Mr Brooke and Cable Plus were to provide Therium's solicitors with a letter of authority entitling Therium to obtain such statements directly from the bank or banks. Paragraphs 6, 10, 11 and 12(1) of the WFO were in the following terms:

*"6. Until the return date or further order of the court, the Respondent must not (save in compliance with the order of Phillips J dated 29 April 2016)-*

*a. remove from England and Wales any of his assets which are in England and Wales up to the value of €3,801,339.15.*

*b. in any way dispose of deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.*

*10.(1) Unless sub-paragraph (4) applies, the Respondent must by 4pm UK time on 8 July 2016 and to the best of his ability inform the Claimant's solicitors of all his assets worldwide as defined in paragraph 7 of this order) including details of any bank accounts, whether or not in credit, giving the value, location and details of all such assets.*

*(2) Unless sub-paragraph (4) applies, the Respondent must, by 4pm UK time on 8 July 2016 and to the best of his ability, and after making all reasonable inquiries, inform the Claimant's solicitors in writing of the location, nature and value of all assets which represent in whole or in part or are derived from the Claim Proceeds.*

*(3) Unless sub-paragraph (4) applies, the Respondent must by 4pm UK time on 13 July 2016 and to the best of his ability provide the Claimant's solicitors with statements for each bank account held by him/it, including for the avoidance of doubt any bank account disclosed pursuant to paragraph 10(1) above, whether in credit or debit, and whether the account is still open or not, as well as any debit or credit card facilities on any account, for the period 1 November 2015 to the date of this order. Insofar as the bank statements cannot be disclosed within the aforesaid period, despite the Respondent acting to the best of his ability, and unless paragraph (4) applies, the Respondent is within 24 hours of the expiry of the said 5 day period to provide the Applicant's solicitors with a letter of authority entitling the Applicant to obtain such statements directly from the relevant bank/s.*

*(4) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.*

*11. By 4pm UK time on 13 July 2016 the Respondent must swear and serve on the Claimant's solicitors an affidavit setting out the above information, save for the information referred to in paragraph 10(3).*

*12(1) This order does not prohibit Guy Brooke from spending £1,000 a week towards his ordinary living expenses and also a reasonable sum on legal advice and representation, save that no sums may be spent using the Claim Proceeds. Before spending any money Guy Brooke must tell the Claimant's legal representatives where the money is to come from."*

22. On 15 July 2016, the return date for the WFO, Males J continued the WFO and gave permission to amend the committal application. The new allegations of breach, together with amendments for which Andrew Baker QC sitting as a Deputy High Court Judge had given permission on 8 July 2016, comprised



allegations that Mr Brooke was in contempt because he had disposed of or dealt with the Claim Proceeds following and in breach of the order of Teare J of 15 April 2016, as continued by the order of Walker J dated 22 April 2016; that he was in contempt because he had knowingly assisted and/or caused or procured Cable Plus to commit the same breaches; and that he was in contempt because he had failed to comply with the disclosure provisions of the orders of Teare J and HHJ Waksman QC.

23. On 15 July 2016 Males J also granted a *Norwich Pharmacal* order against NatWest Bank plc for disclosure of Mr Brooke's bank statements and debit and credit card statements, which were provided by the bank on 20 and 23 July 2016 respectively. They identified that a sum of £14,211.96 had been transferred by Cable Plus to Mr Brooke's personal bank account on 9 December 2015.
24. On 22 July 2016 I gave permission to amend the committal application to allege breaches of the information requirements of the orders of Teare J and HHJ Waksman QC by reference to that payment.

### **The Contempt allegations**

25. Accordingly the allegations of contempt are made in the re-re-amended committal application in the following terms:

*“3. Mr Guy Brooke is in contempt of Court because he has failed to the best of his ability to cause or procure Cable Plus BV to make a payment of €3,801,339.15 or any payment to the Court Funds Office by 3rd May 2016 or at all, in breach of paragraph 4 of the order of Phillips J dated 29<sup>th</sup> April 2016 (‘the Phillips J Order’). In particular:*

*a. [Paragraphs 2, 3 and 4 of the Phillips J Order were set out]*

*b. In an affidavit sworn on 21<sup>st</sup> April 2016, Mr Guy Brooke:*

*i. Swore that the Claim Proceeds comprised €3,801,339.15 and were being held by Cable Plus BV in account number 5000596021000978 at the United International Bank N.V. Landhuis Joonchi II, Kaya, Richard J Beaujon z/n, PO Box 152, Willemstad, Curacao (paragraphs 15 and 16).*

*ii. Swore that he is the sole shareholder in Cable Plus BV and was authorised to swear an affidavit on its behalf (paragraph 1). All three Respondents had been ordered to swear affidavits by paragraph 8 of an order of Teare J dated 15th April 2016.*

*iii. Offered an undertaking on behalf of himself and Cable Plus BV to preserve the Claim Proceeds in the bank account in Curacao.*

- c. *Mr Guy Brooke is, and is on his own case, the controlling mind of Cable Plus BV.*
- d. *Cable Plus BV failed to transfer any funds to the Court Funds Office by 3<sup>rd</sup> May 2016. To the best of Therium's knowledge, as at the date of this application Cable Plus BV has not transferred any funds to the Court Funds Office.*
- e. *Therium's solicitors have corresponded with Mr Guy Brooke and have spoken to him in order to ascertain why no transfer has taken place and to seek detail and evidence as to what steps he has taken to comply with his obligations under the Phillips J Order. He has failed to provide any substantive explanation as to why no transfer has been made and has failed to provide any evidence (beyond assertion) of the steps he has taken.*
- f. *Therium's solicitors offered to consent to a variation of the Phillips J Order to allow for payment to their client account (to be held to the order of the court) instead of payment into Court to assist Mr Guy Brooke if he was facing any practical difficulties in making payment to the Court Funds Account. Mr Guy Brooke failed to respond to this offer.*
- g. *Whilst Mr Guy Brooke claims to have instructed Cable Plus BV's corporate director ('UIT') to make the transfer, in fact he has given it no such instructions.*
- h. *Mr Guy Brooke is clearly able to act on Cable Plus BV's behalf since he purported to offer an undertaking on its behalf, he swore an affidavit on its behalf, he is the sole shareholder, he was described by his own counsel as Cable Plus BV's controlling mind and the chairman of UIT has stated that Mr Brooke has the authority to direct it to make the transfer simply by sending it an e-mail instructing it to do so. Mr Brooke has failed to provide any explanation as to why no transfer has been made despite being reminded of the need to comply with the Phillips J Order on 3<sup>rd</sup> May, 4<sup>th</sup> May, 5<sup>th</sup> May, 6<sup>th</sup> May and 10<sup>th</sup> May and has failed to provide any evidence (beyond assertion) as to what steps he has taken in seeking to comply with the order.*
- i. *Mr Brooke has failed and is continuing to fail to act to the best of his ability to cause or procure the transfer in failing to:*
  - i. *Instruct UIT to make the transfer before 3rd May 2016 or at all.*

- ii. *Ensure that the postal address he provided to the Court Funds Office was an address or mailbox to which he would have ready immediate access on a daily basis until such time as the transfer was made. Instead, he provided the Court Funds Office with the address of the mailbox in Taunton he provided in his affidavit in respect of which he had given instructions that post should must not be signed for. Moreover, and in any event, he left the country and so was not able to access any post sent to that mailbox.*
  - iii. *Obtain details of the Euro account from the Court Funds Office by telephone or e-mail and send those details to UIT.*
  - iv. *Contact UIT regularly (at least on every working day) by telephone and by e-mail to direct that the transfer be made and to ascertain whether the transfer had been made and, if not, why it had not been made and to ascertain what steps were necessary to ensure that the transfer could and would be made. It is clear that he has not done this, since he told Therium's solicitor at the telephone on 5<sup>th</sup> May 2016 that he did not know what was happening and has failed to provide any substantive update whatsoever since 3<sup>rd</sup> May 2016. If he had contacted UIT regularly and had received information that there were practical problems with the payment being made electronically he would have taken steps to resolve those problems or he would have directed that payment must be made by banker's draft. Alternatively he would have responded to and agreed to Therium's offer to vary Phillips J's order by consent to provide for payment to Marcus Sinclair LLP's client account to be held to the order of the court, or would have suggested an alternative variation to the order to resolve any practical difficulties (e.g. payment to another secure bank account in the jurisdiction). Instead, he has simply ignored this offer.*
  - v. *If he was unable to obtain satisfactory responses from UIT, as sole shareholder of Cable Plus BV (on his case) he should have taken steps to procure its removal as a director and appointed himself as director or appointed an alternative director in order to procure the transfer.*
4. *Mr Guy Brooke is in contempt of Court because he has disposed of or dealt with the Claim Proceeds in breach of paragraph 6(1) of the order of Teare J dated 15<sup>th</sup> April 2016 ('the Teare J Order') and/or paragraph 5(1) of the order of Walker J dated 22<sup>nd</sup> April 2016. In particular:*

- a. *[Paragraph 6(1) of the Teare J Order was set out]*
- b. *[Paragraph 5(1) of the Walker J Order was set out]*
- c. *In an affidavit sworn on 21<sup>st</sup> April 2016, Mr Guy Brooke:*
  - i. *Swore in paragraphs 15 and 16 that the Claim Proceeds comprised €3,801,339.15 and were being held by Cable Plus BV in account number 5000596021000978 at the United International Bank N.V. Landhuis Joonchi II, Kaya, Richard J Beaujon z/n, PO Box 152, Willemstad, Curacao ('the Curaçao Account').*
  - ii. *Swore that he is the sole shareholder in Cable Plus BV and was authorised to swear an affidavit on its behalf (paragraph 1). All three Respondents had been ordered to swear affidavits by paragraph 8 of an order of Teare J dated 15<sup>th</sup> April 2016.*
  - iii. *Offered an undertaking on behalf of himself and Cable Plus BV to preserve the Claim Proceeds in the bank account in Curacao.*
- d. *Mr Guy Brooke is the controlling mind of Cable Plus, as his and Cable Plus's own counsel accepted in his skeleton argument for the hearing before Walker J on 22<sup>nd</sup> April 2016 (para 8).*
- e. *As of 1<sup>st</sup> July 2016, the Curacao Account contains only €147,292.05, as stated in information produced by United International Bank N.V. on that date in accordance with an order of the Curaçao Courts.*
- f. *On a date unknown to Therium between 21<sup>st</sup> April 2016 and 1<sup>st</sup> July 2016, €3,654,047.10 of the Claim Proceeds were removed from the Curaçao Account, in breach of paragraph 6(1) of the Teare J Order and/or paragraph 5(1) of the Walker J Order (depending on the date or dates on which the monies were removed).*
- g. *As the sole shareholder and controlling mind of Cable Plus, it is to be inferred that Mr Guy Brooke directly or indirectly instructed or requested that the transfer or transfers set out in paragraph 4(f) above be effected. Accordingly, he knowingly breached paragraph 6(1) of the Teare J Order and/or paragraph 5(1) of the Walker J Order (depending on the date or dates on which the monies were removed) by disposing of or dealing with €3,654,047.10 of the Claim Proceeds.*

5. *Mr Guy Brooke is in contempt of Court because he knowingly assisted and/or caused and/or procured Cable Plus to breach paragraph 6(1) of the Teare J Order and/or paragraph 5(1) of the order of Walker J dated 22<sup>nd</sup> April 2016. In particular:*

*[paragraphs a. to f. were the same as paragraph 4]*

- g. As the sole shareholder and controlling mind of Cable Plus, it is to be inferred that Mr Guy Brooke directly or indirectly instructed or requested that the transfer or transfers set out in paragraph 4(f) above be effected. Accordingly, he assisted Cable Plus to breach paragraph 6(1) of the Teare J Order and/or paragraph 5(1) of the Walker J Order (depending on the date or dates on which the monies were removed) by instructing or requesting it to dispose of or deal with €3,654,047.10 of the Claim Proceeds, without which instruction or request it would not have disposed of or dealt with those monies in breach of the order(s).*

6. *Mr Guy Brooke is in contempt of Court because he failed to comply with paragraphs 6, 10, 11 and 12 of the order of HHJ Waksman QC dated 5<sup>th</sup> July 2016 ('the HHJ Waksman QC Order') or with paragraphs 7(1) and 8 of the Teare J Order. In particular:*

*a. [Paragraphs 6, 10, 11 and 12(1) of the HHJ Waksman QC Order were set out]*

*b. [Paragraphs 7 and 8 of the Teare J Order were set out]*

*c. Mr Guy Brooke breached paragraphs 10(1) and 10(2) of the HHJ Waksman QC Order in that he failed to provide any information whatsoever by 4pm UK time on 8th July 2016.*

*d. Mr Guy Brooke breached paragraphs 10(1) and ii of the HHJ Waksman QC Order by failing to the best of his ability to inform Therium's solicitors of all of his assets worldwide either informally by 4pm on 8th July 2016 or at all or in his affidavit. He failed to provide any details of his assets save for asserting that this only assets were two bank accounts at NatWest (paragraph 5 of his affidavit).*

*This is a breach of paragraphs 10(1) and 11 because:*

- i He failed to give any information as to the contents of those bank accounts.*

- ii. *He failed to disclose his shareholding in Cable Plus, which is plainly an asset within the meaning of paragraph 7 of the order.*
- iii. *It is to be inferred that he has other assets that he has failed to disclose since he has, since the order was made, continued to instruct counsel to act for him in England including to attend a hearing on 15<sup>th</sup> July 2016 and he must have incurred living expenses since the order was made. These payments and expenses have not been made using monies in the NatWest accounts, since on his own evidence Mr Brooke has been unable to draw any funds from those accounts.*
- e. *Mr Guy Brooke breached paragraphs 7(1) and 8 of the Teare J Order by failing, to the best of his ability and after making all reasonable inquiries, to inform Therium's solicitors of full details of the location of the Claim Proceeds, including any bank accounts where the Claim Proceeds were held, within 60 hours of service of that order or in an affidavit within 4 working days of service of the order or at all. In an e-mail dated 18<sup>th</sup> April 2016 Mr Brooke stated that the entirety of the Claim Proceeds were being held by Cable Plus in a specific bank account in Curaçao. He confirmed this information in an affidavit sworn on 21<sup>st</sup> April 2016. In fact, £14,211.96 of the Claim Proceeds were transferred by Cable Plus to Mr Brooke's personal bank account on 9<sup>th</sup> December 2015. Mr Brooke failed, in breach of the Teare J Order, to inform Therium's solicitors of the location of this part of the Claim Proceeds and to swear an affidavit confirming the location of this part of the Claim Proceeds. Further, in breach of the Teare J Order, he stated that the Claim Proceeds of €3,801,339.15 were in the specified bank account in Curaçao when he knew that £14,211.96 of the Claim Proceeds were not in that bank account but had been transferred to him.*
- f. *Mr Guy Brooke breached paragraphs 10(2) and 11 of the HHJ Waksman QC Order by failing, to the best of his ability and after making all reasonable inquiries, to inform Therium's solicitors of the location, nature and value of all assets which represent in whole or in part or are derived from the Claim Proceeds, either in writing by 8th July 2016 or at all or in his affidavit. Mr Brooke stated in his affidavit that he has 'no idea' where the Claim Proceeds are and stated that he has 'tried repeatedly to contact Gregory Elias to ascertain their whereabouts, but without success' (paragraph 7 of*

*his affidavit). This is a breach of paragraphs 10(2) and 11 because:*

- i. It is inconceivable that Mr Brooke does not know (or is unable to find out) the location of the Claim Proceeds. He is the sole shareholder of Cable Plus which was formed solely to run the underlying Dutch litigation, ultimately for his benefit. It is his creature and now exists solely to hold the Claim Proceeds, albeit that it should be holding them on trust for Therium.*
- ii. Mr Brooke has plainly failed to act to the best of his ability and has failed to make all reasonable inquiries to ascertain the location of the Claim Proceeds. He asserts that he has repeatedly tried to contact Mr Elias but gives no details of these attempts and exhibits no correspondence to him. He has previously been able to contact Mr Elias and, indeed, relies on telephone calls and e-mails to Mr Elias in his current evidence submitted in defence of the committal application. It is inconceivable that he had, for over a week, been unable to contact Mr Elias or anyone in Curaçao who might be able to tell him where the Claim Proceeds have been transferred to.*
- g. Mr Brooke stated in his affidavit that, as far as he was aware, the Claim Proceeds had been in the bank account shown in the settlement agreement since December 2015 (paragraph 7). In fact, £14,211.96 of the Claim Proceeds were transferred by Cable Plus to Mr Brooke's personal bank account on 9<sup>th</sup> December 2015. Mr Brooke failed, in breach of the HHJ Waksman QC Order, to inform Therium's solicitors of the location, nature and value of any assets representing in whole or in part this part of the Claim Proceeds and to swear an affidavit confirming the same. Further, in breach of the HHJ Waksman J[sic] Order, he swore that he did not know where any part of the Claim Proceeds were (paragraph 7) when in fact he knew that £14,211.96 of the Claim Proceeds had been transferred to him.*
- h. Mr Guy Brooke breached paragraphs 10(3) and 11 of the HHJ Waksman QC Order by failing to act to the best of his ability to provide Therium with any bank statements or debit or credit card statements by 4pm UK time on 13<sup>th</sup> July 2016 or at all. Having failed to act to the best of his ability to provide those statements, he then also failed to provide Therium by 4pm UK time on 14<sup>th</sup> July 2016 or at all with a letter of authority entitling it to obtain the statements directly from the relevant bank(s),*

again in breach of paragraph 10(3) of the HHJ Waksman QC Order.

- i. *Mr Guy Brooke breached paragraph 6 of the HHJ Waksman QC Order by spending money on living expenses and legal fees without informing Therium's solicitors as required by paragraph 12(1) of the order. It is to be inferred that he breached paragraph 6 because he instructed counsel in England to continue to act for him since the order including to attend a hearing 15<sup>th</sup> July 2016 and he must have incurred living expenses since the order was made.*"

### *Legal principles*

26. Any contempt must be proved to the criminal standard of proof, that is to say that the Court must be satisfied so that it is sure that all the essential ingredients of the contempt have been established. Those ingredients are that:
- (1) the relevant order contained a penal notice and was served on Mr Brooke; this was not in issue;
  - (2) Mr Brooke knew of the terms of the relevant order; this too was not in issue;
  - (3) Mr Brooke acted or failed to act in a manner which involved a breach by him of the relevant order; or, in the case of paragraph 5 of the application notice, that Cable Plus acted or failed to act in a manner which involved a breach by it of the relevant order and Mr Brooke has assisted and/or caused and/or procured such breach by Cable Plus;
  - (4) Mr Brooke knew of the facts which make his conduct a breach (or in the case of paragraph 5 of the application notice, knew of the facts which made Cable Plus' conduct a breach and knew of the facts which rendered his own conduct such as to assist and/or cause and/or procure the breach by Cable Plus).
27. It is not necessary to establish that Mr Brooke deliberately or consciously intended to breach the relevant order made against him: see the authorities reviewed by Christopher Clarke J, as he then was, in *Masri v Consolidated Contractors International Co SAL & others* [2011] EWHC 1024 (Comm) at paragraphs [150]-[155]. In relation to assisting/causing/procuring a breach by Cable Plus, the position may be different; there are conflicting lines of authority: see the discussion in *Arlidge, Eady and Smith on Contempt*, 4<sup>th</sup> edn. at paragraphs 11-25 to 11-35, where the authors conclude that the better view is that there must be an intention to interfere with the administration of justice. The distinction is not of significance on the facts of this case, and I shall assume, without deciding, that for the contempt alleged in paragraph 5 of the application notice it is necessary to establish that Mr Brooke knew and intended that his conduct would assist/cause/procure what he knew and intended would be a breach of the relevant order by Cable Plus.



28. Although the standard of proof is the criminal standard, it is not, however, necessary that the Court should be sure of any conclusion on a disputed piece of evidence before it can be taken into account. The Court may reach conclusions on the balance of probabilities in relation to disputed pieces of evidence. Such conclusions may be sufficient, when taken together with each other, to satisfy the criminal standard in relation to the essential ingredients which have to be proved to that higher standard. The position was explained by Rix LJ in *JSC BTA Bank v Ablyazov (No 8)* [2013] 1 WLR 1331:

“51. The error of law alleged is that the judge failed to apply the correct criminal standard of proof because he sometimes adopted the language of a civil trial, saying that something was “improbable”, or “likely”, or words to that effect. It is true that the judge so expressed himself on occasions. However, the judge overwhelmingly used the language of the criminal standard (of being sure, or of rejecting the possibility that something may be as suggested), and he uniformly did so when reaching his conclusions on any essential plank of the bank’s case. Examples of that are so numerous as to be unnecessary to exemplify. Moreover, it is not true that every single aspect of a criminal case has to be proved to the criminal standard, although of course the elements of the offence must be.

52 It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: *R v Hillier* (2007) 233 ALR 634, cited in *Archbold’s Criminal Pleading, Evidence and Practice*, 2012 ed, para 10-3. Or, as Lord Simon of Glaisdale put it in *R v Kilbourne* [1973] AC 729, 758, “Circumstantial evidence. . . works by cumulatively, in geometrical progression, eliminating other possibilities”. The matter is well put by Dawson J in *Shepherd v The Queen* (1990) 170 CLR 573, 579—580 (but also *passim*):

“the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact—every piece of evidence—relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of

evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.”

53. I have no doubt that the judge, whose language so often reminded him of the appropriate criminal standard of proof, remained true to his self-direction. It is simply that, in a reasoned judgment which covers so much ground and so many factual issues, and where each dispute is covered by analysis, the judge is often forced into a position where, unlike the jury, he has to express a view as to individual pieces of evidence separately. However, ultimately he had to consider the charge against Mr Abyazov cumulatively, and he was sure that the three alleged contempts were proved and that they were deliberate.”

29. A person accused of contempt, like a defendant in a criminal trial, has a right to decline to give oral evidence: *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67. However where he chooses to do so, the Court may draw an adverse inference just as it can from a defendant’s silence in criminal proceedings: *Inpayer Ltd v Thorogood* [2014] EWCA Civ 1511 at paragraph [40]. As is the case in criminal proceedings, and by analogy with s. 35 of the Criminal Justice and Public Order Act 1994, the Court may draw the inference that a deliberate decision not to give evidence by a person charged with contempt in relation to matters within his own knowledge has been made because he does not believe that his case will withstand scrutiny when tested by cross examination, provided the case against him is such that it calls for an answer. I am satisfied that such an inference is justified in Mr Brooke’s case in a number of respects I identify below, where Mr Brooke’s evidence on affidavit is unsatisfactory and in circumstances where for the reasons given in my judgment of 2 August 2016 I am satisfied that he has deliberately chosen to absent himself from the committal hearing despite being available and medically fit to attend.

#### *The alleged contempts*

*Paragraph 3: failure by Mr Brooke to the best of his ability to cause or procure Cable Plus to make a payment of €3,801,339.15 or any payment to the Court Funds Office by 3 May 2016 or at all, in breach of paragraph 4 of the order of Phillips J dated 29 April 2016*

30. On behalf of Mr Brooke it was argued that the relevant period of time within which his conduct fell to be scrutinised was up to 3 May 2016 and no further, because the order was to be construed as limiting the obligation to use the best of his abilities to that period. Once the 3 May 2016 deadline had passed, it was argued, Mr Brooke was under no continuing obligation to do anything.
31. Although my conclusion does not depend upon it, I have little hesitation in rejecting this argument. The order was in common form requiring something to be done by a particular time. Such an order imposes a continuing obligation to carry out the required activity. The temporal qualification identifies the time which is allowed for performance before the respondent will be in breach of the order. It does not, however, put an end to the continuing obligation or prevent the

respondent from being in continuing breach if there is non-compliance by the stated time. The obligation on Mr Brooke was to continue after 3 May 2016 to use the best of his ability to cause and procure Cable Plus to transfer the funds into Court.

32. This is not only the correct construction of Phillips J's Order but was clearly also how Mr Brooke himself understood it. In an email late on 3 May 2016 when he did not expect the transfer to be made by the deadline, Mr Brooke said that he would of course continue to do what he could to cause and/or procure Cable Plus to make the transfer. He says in his second affidavit that he returned from abroad on 12 May 2016 in order to seek to arrange the transfer. He relies on an email of 24 May 2016 as giving instructions for the transfer.
33. Mr Brooke's affidavit evidence in relation to this allegation can be summarised as follows:
  - (1) His conduct must be judged against the background of his advanced years and ill health. He is 78 and had a fall on 16 January 2016 in which he fractured 5 ribs one of which punctured a lung. He was in intensive care for 50 days and in hospitals in the south west of England for two months, from which he was only released on 14 March 2016. There is a consultant's letter dated 15 February 2016 which confirms the seriousness of his condition arising from the effect of the fall on his existing chronic lung disease. After his release he needed "3-4 weeks of rehabilitation before [he] would have been fit enough to deal with this matter". By the end of April he was staying with friends in Somerset, but had been suffering from several bouts of pneumonia since his discharge from hospital. He then received advice that "the stress of the litigation was not helping and that, if possible he should travel overseas for a break of 10 days or so" which he did on 5 May, planning to be away until 15 May but in fact returning to the UK on 12 May. He was then "advised that he should try to find [himself] some intensive rehabilitation to assist [his] walking and breathing" and was by the time of his second affidavit (8 June 2016) attending a residential rehabilitation course at an unidentified clinic in Europe. It is to be inferred from the address of the notary before whom this was sworn that he was near Hyeres in the south of France, and this was where he was examined by Therium's appointed examiner, Dr Alliot, on 23 June 2016.
  - (2) Mr Brooke received the Order of Phillips J by email on the afternoon of the day it was made, Friday 29 April 2016. He "immediately attempted to contact Gregory Elias" but was "unable to make contact that day".
  - (3) Monday 2 May 2016 was a bank holiday in Curacao, but Mr Brooke did manage to make contact with Mr Elias that day and asked him to ensure that Cable Plus complied with the order.
  - (4) He confirmed his request in a letter attached to an email to Mr Elias at 2.36 pm BST on 3 May 2016 which was exhibited to his second affidavit. "Nothing Mr Elias told me in the several conversations I had with him had led me to believe that he would not be complying with the Order and my requests to transfer the money".

- (5) He then went abroad on 5 May 2016, where on 10 May 2016 he received a copy of a letter from Mr Parkes, Therium's solicitor, threatening contempt proceedings for failure to comply with paragraph 4 of Phillips J's order. He returned to England on 12 May 2016 because he was determined to find out from Mr Elias why the latter had not transferred the money but being away had made it harder to communicate with him. He tried to contact Mr Elias immediately on his return but was unable to do so.
  - (6) Having seen Mr Parkes' first affidavit on 19 May 2016, in which Mr Parkes recorded that Mr Elias had told him that he, Mr Elias, had received no instructions from Mr Brooke to transfer the money (see below), Mr Brooke sent another letter to Mr Elias by email on 24 May 2016 which he exhibited, asking him to transfer the funds into court. Mr Brooke received a response from Mr Elias, also exhibited, indicating that Mr Elias' duties under Curacao law as director were to look after the best interests of the company and not exclusively those of the shareholder.
  - (7) This prompted Mr Brooke to seek advice on Curacao law. Mr Brooke exhibited advice from Mr Jaap Maris of BZSE, a Curacao lawyer, which confirmed the position under Curacao law that where a board of directors had refused to comply with a request of a shareholder on the grounds that it was contrary to the interests of the company, that was a decision for the board to take exercising its own judgment as to the interests of the company; and that a shareholder could not get round it by appointing a new board because the new board would also be bound to act in the best interests of the company if that conflicted with the will of the shareholders. This Curacao law advice was not controversial as a matter of general principle, but it did not address whether there was any reason why in this case Mr Elias should decline to follow the wishes of the sole shareholder if Mr Brooke had instructed him to make the transfer.
34. Mr Parkes' evidence, which as I have explained was not challenged despite his being tendered for cross examination, included the following:
- (1) On 12 May 2016 he telephoned Mr Elias. He exhibited an attendance note of the call, in which:
    - (a) Mr Elias said that, contrary to Mr Brooke's assertions, he and UIT had received no instructions from Mr Brooke to effect any transfer;
    - (b) Mr Elias said that UIT had received the Phillips J Order, but in the absence of instructions from Mr Brooke he didn't know what to do;
    - (c) Mr Elias asked Mr Parkes to send an email setting out the need for Mr Brooke to give instructions for the transfer so that Mr Elias could forward the email to Mr Brooke.
  - (2) Mr Parkes sent such an email and had a further conversation with Mr Elias the following day, 13 May 2016. Again an attendance note was exhibited. In that conversation Mr Elias told him that:

- (a) Mr Brooke could authorise the transfer on his own (no other parties needed to be involved);
  - (b) Mr Brooke could give those instructions by email;
  - (c) The transfer would take two “value dates” which Mr Parkes took to mean two working days.
- (3) Mr Parkes interpreted Mr Elias’ answers as being premised on the money remaining in the account, although Mr Elias refused to confirm that that was so on the grounds that the information was confidential to the account holder.

35. Mr Van den Heuvel gave evidence for Therium. He is a practising lawyer at a law firm in Curacao specialising in corporate and commercial litigation, Dean of the Curacao Bar Association and a lecturer at the University of Curacao. Dealing with Curacao company structures and corporate directors forms a regular part of his work and he was well qualified to assist the Court as an expert in relevant aspects of Curacao law and practice. His evidence, which I accept, included the following:

- (1) UIT is one of the largest corporate service providers in Curacao, and is very reputable, as is Mr Elias its managing director. Mr Elias has a highly successful professional reputation and owns the United International Bank which is a sister company. He knows of no grounds to doubt Mr Elias’ honesty or integrity.
- (2) Although it is possible as a matter of strict law for a director to refuse to follow a request by a sole shareholder, in practice it is extremely rare and happens only if there is a clear conflict between the shareholder’s direction and the company’s interests, for example because performance of the request would be illegal or make the company insolvent. Curacao is a jurisdiction in which large numbers of companies are established for shareholders who live outside the country, often with a single corporate director. No corporate director would remain in business in Curacao for long if he refused proper requests from sole shareholders: he would simply be replaced as a corporate director.
- (3) It would ordinarily be regarded as in a company’s best interests to comply with a foreign court order to preserve funds to which its creditor was making a claim pending arbitration of the dispute.
- (4) It is inconceivable that a corporate director such as Mr Elias would decide that it was contrary to the interests of Cable Plus to make a payment which a foreign court had ordered it to pay and which the sole shareholder had instructed it to pay which was merely an order preserving funds pending resolution of the arbitration.
- (5) If in such circumstances a director were to refuse to make the transfer, he would provide the shareholder with clear reasons for his refusal and an explanation of why in his opinion it was not in the best interests of the company. He would be under an obligation to do so as a matter of Curacao

law which requires that the management, properly carrying out its functions, should communicate its decisions and reasons to the sole shareholder.

- (6) He had seen the attendance note of the conversation in which Mr Elias had told Mr Parkes that all that would be required would be emailed instructions from Mr Brooke. That accorded entirely with what he would expect to be required.
- (7) If for some unexplained reason UIT did refuse Mr Brooke's instructions to effect the transfer, it would be simple for Mr Brooke as sole shareholder to replace UIT and install a director who would accept that it was in the interests of the company to comply with his instruction.
36. I am sure that Mr Brooke has at all material times since 29 April 2016 had the ability to procure the transfer of funds held by Cable Plus at the United Investment Bank in Curacao into court, simply by giving unequivocal instructions to Mr Elias in writing, including by email; and that he has knowingly and deliberately failed to give such unequivocal instructions in order to avoid giving effect to Phillips J's order. I have reached that conclusion for the following reasons.
37. Mr Brooke is the sole shareholder of Cable Plus, whose only *raison d'être* was as a vehicle to pursue the professional negligence proceedings for Mr Brooke's benefit. Mr Elias is a professional corporate director with no commercial interest in the company other than administering it in accordance with Curacao law for the benefit of its shareholder. Mr Brooke was described by Mr Williams in a skeleton argument for an earlier hearing as Cable Plus' controlling mind. He swore an affidavit on behalf of the company. He offered an undertaking to the English Court on its behalf. Mr Brooke clearly regarded Cable Plus as a vehicle under his control, and there is no reason to think he had any grounds for being mistaken in that belief.
38. Mr Elias told Mr Parkes on 12 and 13 May 2016 that he had had no instruction from Mr Brooke to transfer the funds, but that all he needed was an instruction from Mr Brooke by email, which would enable him to make the transfer. Mr Parkes' evidence is not challenged. There is no room for some mistake on Mr Elias' part, nor any apparent reason for him to lie to Mr Parkes. Mr Van den Heuvel knows him well and regards him as of the highest integrity, as befits the managing director of one of the largest corporate services providers in Curacao. I can see no realistic ground for doubting that what was said by Mr Elias (which is unchallenged) was true.
39. There is no evidence of any reason why Mr Elias should decline to comply with Mr Brooke's instruction as sole shareholder. Mr Williams speculated that there might be reasons why a director in Mr Elias' position might have regarded it as contrary to the interests of the company because it involved putting the assets of the company in the control of the English Court outside Curacao. I found these speculations unconvincing. But in any event, they cannot assist Mr Brooke for two reasons. First, they were not reasons which were ever advanced by Mr Elias, even on Mr Brooke's account. On the contrary the evidence of Mr Elias, as recounted to Mr Parkes, is that there was no difficulty in transferring the funds, provided Mr Brooke emailed his instructions; and Mr Van den Heuvel's evidence

is that that is entirely what would be expected as a matter of Curacao practice. Secondly, when these speculations were put to Mr Van den Heuvel in cross examination, he rejected the view that they could have led a director in the position of Mr Elias to treat transfer of the funds as contrary to the company's interests. His evidence on this point was cogent and convincing and I accept it.

40. By contrast, Mr Brooke's account is not merely contradicted by the evidence of Mr Elias and Mr Van den Heuvel, but is unsatisfactory in many respects:

- (1) The starting point is that Mr Brooke can be seen to have been dishonest and/or misleading in a number of respects throughout the history of the dispute. He secretly arranged for the Claim Proceeds to be sent to Curacao even though he knew that he was not entitled to do so; his email of 23 November 2015 was misleading as to the progress of negotiations and status of the settlement agreement; he persistently failed, despite repeated requests, to tell Therium what had happened to the Claim Proceeds until ordered to do so by Teare J (this evasion both preceded and post-dated the period of two months from 16 January to 14 March 2016 when his medical condition may genuinely have rendered him unable to deal with the matter). In his first affidavit he gave as his address what purported to be a residential address in Taunton, but turned out to be a rented mailbox whose operator had been specifically instructed by Mr Brooke not to sign for any letters sent there. His second affidavit gave his address as "no fixed abode". His third "affidavit" was not sworn. He has consistently declined, without good reason, to reveal his whereabouts. I am therefore cautious of attaching weight to Mr Brooke's uncorroborated assertions especially where they are contrary to the inherent probabilities.
- (2) The assertion of an attempt to contact Mr Elias on Friday 29 April 2016 is no more than that. Mr Brooke does not say how he sought to make contact or when; nor does he explain what the difficulty was in making contact. There would have been a considerable part of the working day in Curacao within which to have done so. There is no documentary evidence of any such attempt. Mr Brooke was aware that Mr Elias had a copy of the order and had been forwarded the relevant forms (by Mr Parkes) to enable the account to be opened at the Court Funds Office. All that was required was a brief email of instruction. There is nothing in Mr Brooke's age or health, when he was staying with friends in Somerset, which would have made a short email difficult. He did not leave the country, on his account, until towards the end of the following week, and then apparently more because of the stress of the litigation than his underlying physical health.
- (3) The assertion that he made contact with Mr Elias on 2 May 2016 is equally unparticularised and unsupported. It is not said how he did so and there is no corroborative documentary support. Moreover this is the only specific occasion identified on which Mr Brooke asserts that he spoke to Mr Elias. This is inconsistent with his reference to "several" conversations in which Mr Elias is supposed to have said nothing to lead Mr Brooke to believe that he would not be transferring the money. Therium's solicitors asked in correspondence for a summary of the content of those conversations, which Mr Brooke through his counsel refused to provide. The absence of any detail and the deliberate decision to refuse details and avoid cross examination leads

to the inference that Mr Brooke has no confidence that his assertion would be believed against Mr Elias' clear statement to the contrary.

- (4) The so called email of 2.36 pm on 3 May 2016 said to be exhibited to Mr Brooke's second affidavit in fact comprises two hard copy documents. One appears to be an email dated 3 June 2016 from Mr Brooke to his counsel, Mr Williams, which states in its text that at 2.36 pm on 3 May 2016 Mr Brooke wrote to Mr Elias "please see attached". It is not clear from the format of the document itself whether it is, as was submitted on Mr Brooke's behalf, the forwarding to Mr Williams of an email actually sent to Mr Elias. The second document is dated 2 May 2016 and addressed to Mr Elias purporting to confirm a request made in a conversation earlier that day to ensure that Cable Plus complied with the order. It ends by seeking confirmation of receipt of "this letter/email" by return. Therium's solicitors asked in correspondence for electronic copies of the two documents, which Mr Brooke has refused to provide. There has been no explanation from Mr Brooke why if the "attached" letter was drafted on 2 May following the phone call, as is implicit in its dating and content, it was not sent until the following afternoon. There is no response from Mr Elias exhibited or attested to, as there surely would have been from a professional receiving such a request, especially given the last line of the request which sought a specific confirmation of receipt. Mr Brooke's refusal to attend the hearing to explain these anomalies again gives rise to an adverse inference.
- (5) On Friday 6 May 2016 Mr Williams had a conversation with Mr Parkes in which Mr Williams said he had been assured by Mr Brooke that he would telephone Cable Plus as soon as its office opened to find out what was happening and would phone Mr Williams to update him; and that Mr Williams would in turn update Mr Parkes that Friday afternoon or on Monday 9 May 2016. Mr Brooke does not purport to have made any such call and the promised updating of Mr Parkes did not occur, save that on 9 May 2016 Mr Williams told him that Mr Brooke would not be in a position to update Therium until 11 May 2016. This is all of a piece with Mr Brooke's conduct since the settlement agreement in November 2015 of failing to keep Therium properly informed, motivated by a desire to keep from Therium the Claim Proceeds.
- (6) The assertion that Mr Brooke again attempted to contact Mr Elias without success on 12 May 2016 is once more unparticularised and unsupported by documentary evidence. There is no explanation of how or why he was unable to get hold of Mr Elias. Nor is there any explanation as to why it was not until 24 May 2016 that on his account he next tried to contact Mr Elias.
- (7) The purported exchange on 24 May 2016 and 6 June 2016 once again raises more questions than it answers. As to the 24 May "instruction", what was exhibited were two hard copy documents. One was an email from Mr Brooke to Mr Williams purporting to forward an email sent by Mr Brooke to Mr Elias on 24 May saying "please read attached document. Looking forward to hearing from you". The second was a hard copy document in the form of an email addressed to Mr Elias, also bearing the date 24 May 2016, stating that he had previously requested compliance with the order by transfer of the funds,



repeating the request for transfer “immediately”, and seeking confirmation by return email “that you have complied with my request and why the funds have not been transferred.” The terms of this document are difficult to square with what would be expected of someone who is accused of being in contempt of court, has made a previous and timely request for compliance, and has learned that Mr Elias is denying any such request. On Mr Brooke’s own account he had returned from abroad early because he was very concerned about being committed to prison for contempt and determined to find out why Mr Elias had not transferred the money. Yet there is no real complaint or concern expressed about non-compliance, nor any complaint or concern about what on Mr Brooke’s case was a false denial by Mr Elias of ever having received instructions to effect the transfer. Therium’s solicitors asked in correspondence for electronic copies of the two documents, which Mr Brooke has refused to provide. It is therefore impossible to have confidence that the 24 May document was indeed sent as a request to Mr Elias.

- (8) Similar problems surround Mr Elias’ purported response. The document exhibited is an email from Mr Brooke to Mr Williams purporting to forward an email sent by Mr Elias on 6 June 2016. Its content and format is as follows:

“Dear Mr Brooke,

Thank you for this note.

Whilst we appreciate that you are the shareholder, we as the managing director have to adhere to our duties and obligations stipulated under Curacao corporate rules and regulations.

One of them being to look after the best interest of the company. And not exclusively or partially to those of the shareholder or shareholders

Whatever the case may be.

We look forward to hearing from you.

Best Regards

Gregory Elias”

This does not appear to be responsive to the contents of the purported 24 May request. The subject line is different. It starts by thanking Mr Brooke for “this note” which is not an apt description of the 24 May document. It ends “we look forward to hearing from you”, which again makes no sense as a response to the 24 May document. Further, it is highly improbable that Mr Elias would not have responded to something in the terms of the 24 May request for almost a fortnight, against the background of a foreign court order of which Mr Brooke was alleged to be in contempt, especially since it asked for a response by return email. Mr Brooke proffers no explanation for the delay. The 6 June document is general in tone, rather than an explanation for non-compliance with a specific transfer request. As such it would be entirely contrary to Curacao practice, as explained in Mr Van Der Heuvel’s evidence, which

would have involved a clear explanation of the reasons for declining to comply with the request of the sole shareholder.

(9) Moreover Therium's solicitors asked for confirmation that there were no other communications between Mr Brooke and Mr Elias which have not been referred to or disclosed. Mr Brooke refused to answer the request. I can have no confidence, therefore, that even if an email was sent in the terms of the 24 May document, it was not rendered nugatory by some ancillary, contemporaneous or subsequent communication to different effect. On the contrary, I am quite satisfied that it was not an unequivocal request for transfer, either because it was not sent at all, or because there were other communications which qualified or retracted it.

41. I am fortified in my conclusion on this issue by the fact that Mr Brooke was responsible for causing the bulk of the Claims Proceeds to be transferred out of the Curacao account after the orders of Teare J and Walker J in April 2016, as I conclude for the reasons set out below. The natural inference from this conduct, and his earlier conduct since November 2015 in putting the Claim Proceeds offshore in Curacao and concealing that fact from Therium, is that he was intent on seeking to keep the funds from Therium, and that he never intended or desired that Phillips J's order should be complied with because it would have removed the funds from his control.

42. In reaching this conclusion, and those below, I have not overlooked Mr Williams' submission that Mr Brooke is of advanced years, has been in poor health and has been without access to his laptop, so as to be substantially hampered in responding swiftly and efficiently to court orders and to evidence. Those circumstances are not, however, sufficient to explain his conduct on grounds of impairment of ability, incapacity, incompetence or inadvertence. He sought to conceal the location of the Claim Proceeds from Therium even before his fall in January 2016. In early May 2016, when he should have arranged transfer of the funds to Court, he was suffering not so much as a result of the fall but rather from "the stress of litigation". He has prepared and served detailed affidavit evidence, until he chose not to respond on affidavit to the most recent allegations of contempt and not to appear at the hearing, in each case a deliberate choice. He claims to have been able to communicate effectively with Mr Elias by email and phone when he chose to. He had no difficulty in sending the Court an email on the eve of the hearing. He has been sufficiently on top of affairs to instruct English counsel and to instruct a Curacao lawyer to provide a report. There is no independent evidence of his whereabouts or his medical condition since 23 June 2016, and his credit card statement shows that the card was used in early July to purchase a ferry ticket and for a meal in Cobham. He does not say that he has remained at the clinic in the South of France and I do not feel able to draw the inference that he has, in the absence of any evidence. The only evidence of a laptop problem is an assertion that he was without one on 13 July. The picture is of someone unwilling to comply with the Court's orders, not someone doing their best to do so in the face of personal difficulties.

43. Accordingly I find this contempt proved.

*Paragraphs 4 & 5: dealing with and/or disposal of the Claim Proceeds in breach of paragraph 6(1) of the order of Teare J and paragraph 5(1) of the order of Walker J.*

44. Following the revelation by United International Bank on 1 July 2016 that only €147,292.05 remained in the account, Mr Brooke said in his third “affidavit” (unsworn but dated 13 July 2016) that he had no idea where the remainder of the Claim Proceeds were and it was as much of a surprise to him as to Therium that they were no longer in the account. He went on to say “Since receiving a copy of the Order I have repeatedly tried to contact Gregory Elias to ascertain their whereabouts but without success.” This is ambiguous as to whether he was unsuccessful in attempts to contact Mr Elias, or whether having successfully contacted Mr Elias the latter would not reveal what had happened to the bulk of the Claim Proceeds. Neither is credible. At the date of the “affidavit” Mr Brooke had had well over a week to contact Mr Elias and if what he says is true would have been pressing urgently to speak to him. It is highly improbable that he could not have made contact. Moreover he had had almost two months to do so by the date of the hearing. He advances no reason why Mr Elias should have declined to tell him where the money was, and none was advanced in argument by Mr Williams. The assertion is unsupported by any detail or documentation and Mr Brooke has declined to attend to be cross examined about it. I conclude that this is a further deliberate untruth by Mr Brooke.
45. I was for a while hesitant as to whether I could conclude that any more than the €147,292.05 which was in the account on 1 July 2016 had in fact been in the account at the date when the orders were made by Walker J and Teare J in April 2016. In the end I was persuaded that I should do so for two reasons. First, that is the evidence of Mr Brooke in his email of 18 April 2016, and his first affidavit. The account there given is very specific as to amount and the natural inference is that it was verified by contemporaneous inquiry, as it would have to have been in the case of an interest bearing account. Secondly the impression received by Mr Parkes from his conversation with Mr Elias on 13 May 2016 was that the money was still in the account, and Mr Parkes was not cross examined to suggest that he might have been mistaken in the impression he received.
46. I conclude therefore that the bulk of the proceeds were transferred out of the account following the orders of Teare J and Walker J. The remaining question is whether that took place as a result of the instructions of Mr Brooke or with his assistance. I have little hesitation in finding that he was responsible for directing the transfer of the funds. The same reasons as led me to conclude that he could have instructed Mr Elias to transfer the money into Court by simple email instructions support the conclusion that he could equally procure transfer of the funds elsewhere by the same method. The beneficial interest in the funds lay with him alone, as sole shareholder, and there is no credible argument, let alone evidence, as to why Mr Elias should transfer the bulk of the money out of the account without Mr Brooke’s knowledge or consent and without any explanation of the reason for doing so or information as to its destination. The fact that Mr Brooke has lied about his knowledge of the transfer reinforces the conclusion that it was at his direct behest.
47. Accordingly I find these contempts proved.

*Paragraph 6(c): breach of paragraphs 10(1) and 10(2) of the WFO in failing to provide any information whatsoever by 4pm UK time on 8th July 2016.*

48. This breach is admitted.

*Paragraph 6(d): breach of paragraphs 10(1) and 10(2) of the WFO in failing to make full disclosure of his worldwide assets to the best of his ability;*

49. Paragraph 6(d) alleges breach in three respects. The first two are admitted, namely that Mr Brooke failed to give details of the contents of the NatWest bank accounts and failed to disclose his shareholding in Cable Plus.

50. The third, which is in issue, is that it is to be inferred that he has assets other than those in the NatWest accounts, which he has failed to disclose. Therium argues that Mr Brooke's declared income, as evidenced by his NatWest account statements, is modest and obviously insufficient to support what must be the very considerable expenses of residential medical care in the South of France; and that the same statements do not disclose any payments for legal expenses or the full amount of what would be required for a minimum of living expenses, even for someone at a residential medical facility. As well as expenditure for Mr Williams to appear at a number of hearings, there must have been expenditure on an identified Dutch lawyer, Mr Cornegoor, and the Curacao law advice procured from Mr Maris.

51. I am persuaded that the assets disclosed would fall well short of being sufficient to support the legal and living expenses which Mr Brooke must have been incurring. But it does not follow that Mr Brooke has other assets of his own from which he has funded these legal and living expenses which he has failed to disclose. It is possible that they have been being provided by a third party. He has a partner. He may have family and friends. The credit card statements reveal his card being used at retail outlets at a time when he himself was in intensive care, giving rise to the inference that it was being used by someone else. I cannot be sure that the reverse has not been occurring, that is to say someone else incurring expenditure on his behalf. On the current evidence I cannot be sure that this aspect of the alleged contempt has been proved.

52. Accordingly I find this contempt proved only in the respects admitted, namely failure to disclose the content of the NatWest accounts and the Cable Plus shareholding.

*Paragraphs 6(e) and (g): breach of the disclosure provisions in Teare J's order and the WFO as to the whereabouts of the Claim Proceeds because £14,211.96 had been transferred into Mr Brooke's personal NatWest account on 9 December 2016.*

53. There can be no doubt that the transfer was made and that Mr Brooke did not disclose it. The only issue is whether the sum represented part of the Claim Proceeds. Mr Williams argued that Cable Plus may have had other assets than those derived from the Claim Proceeds, and that this sum might therefore represent funds other than the Claim Proceeds. I am satisfied that that cannot be the case for a number of reasons. Cable Plus was a single purpose vehicle set up to pursue and recover the Claim Proceeds. It had no other business and there is

nothing in the evidence to suggest that it was intended to have, or did have, any other source of income. The payment in question came shortly after the settlement agreement and shortly after the date on which it is to be inferred that the Claim Proceeds were paid into the Curacao account. Mr Brooke has chosen not to provide any explanation for this payment. He has not even sought to suggest that it did not derive from the Claim Proceeds, that being merely a speculation advanced in argument by Mr Williams. Mr Brooke has not come to give evidence about it. The inevitable inference is that it does indeed represent part of the claim Proceeds.

54. Mr Brooke cannot have forgotten about this late 2015 payment when he came under the obligation to give information as to the location of the Claims Proceeds in April and July 2016. It was a significant sum compared with his modest income from state benefits of about £1,450 per month, and took his account from a balance of about £154 to £14,300.

55. Accordingly I find this contempt proved.

*Paragraph 6(f): breach of the WFO in failing to disclose the whereabouts of the assets derived from the Claims Proceeds.*

56. I have already explained my conclusion that Mr Brooke was responsible for directing the transfer of the bulk of the Claims Proceeds from the Curacao account and that his avowed ignorance and surprise as to the fact and destination of the transfer is a lie. He directed the transfer and the funds remained within his control. It follows that he has failed to the best of his ability to disclose their whereabouts and of any assets derived from them.

57. Accordingly I find this contempt proved.

*Paragraph 6(h): Breach of paragraph 10(3) of the WFO in failing to provide bank and card statements or a letter of authority*

58. This breach is admitted

*Paragraph 6(i): breach of paragraph 12(1) of the WFO in spending money on living and legal expenses without informing Therium's solicitors;*

59. Therium's case on this contempt fails for the same reasons as apply to the disputed contempt under paragraph 6(d): I cannot be sure that Mr Brooke does not have any third party source of funding for his legal and living expenses.

### ***Conclusion***

60. Therium has proved that Mr Brooke is in contempt in the respects alleged in the re-re-amended application notice save as alleged in paragraphs 6(d)(iii) and 6(i).