Neutral Citation Number: [2022] EWCA Civ 1264

Case Nos: CA-2022-000281
CA-2022-000454
CA-2022-000537

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)
Mr Justice Miles
[2022] EWHC 302 (Ch), [2022] EWHC 449 (Ch) and [2022] EWHC 661 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 October 2022

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE NUGEE

- -

Between :

(1) BUSINESS MORTGAGE FINANCE 4 PLC **(2) BUSINESS MORTGAGE FINANCE 5 PLC** **(3) BUSINESS MORTGAGE FINANCE 6 PLC** **(4) BUSINESS MORTGAGE FINANCE 7 PLC**	**Claimants / Respondents**
- and –	
RIZWAN HUSSAIN	**Defendant/ Appellant**

- -
- -

James Counsell QC and Alex Haines (instructed by **Janes Solicitors**) for the **Appellant**

Anna Dilnot QC and Alexander Riddiford (instructed by **Simmons & Simmons LLP**) for the **Respondents**

Hearing dates: 6 and 7 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 4 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Nugee:

Introduction

1. This judgment deals with a series of appeals (or proposed appeals) by the Defendant, Mr Rizwan Hussain, against decisions of Miles J in relation to an application by the Claimants to commit Mr Hussain for contempt of court. The Claimants are four companies which have each issued notes by way of securitisation of portfolios of commercial mortgages and I will refer to them as **"the Issuers"**.

2. On 8 February 2021 Miles J made an Order in which among other things he granted a wide-ranging injunction against Mr Hussain (**"the Injunction"**) for the reasons given by him in a judgment dated 3 February 2021 at [2021] EWHC 171 (Ch) (**"the Injunction Judgment"**). On 28 June 2021 the Issuers issued a contempt application against Mr Hussain. It ultimately came on for hearing before Miles J in February 2022 and on 2 March 2022 he handed down a judgment at [2022] EWHC 449 (Ch) (**"the Liability Judgment"**) in which he found Mr Hussain guilty of a number of counts of contempt in breaking the terms of the Injunction. After a further hearing to determine sanction, he gave a judgment on 11 March 2022 at [2022] EWHC 661 (Ch) (**"the Sentencing Judgment"**) in which he sentenced Mr Hussain to an immediate term of 24 months in prison for all the contempts. Mr Hussain did not attend the hearing, and has neither been apprehended nor surrendered to custody, so he has not yet served any part of this sentence.

3. The matters before the Court can be summarised as follows:

   (1) In appeal CA-2022-000281 Mr Hussain sought to appeal a number of ancillary rulings made by Miles J (**"the Interlocutory Appeal"**).

   (2) In appeal CA-2022-000537 Mr Hussain appealed the findings of contempt in the Liability Judgment (**"the Liability Appeal"**).

   (3) In appeal CA-2022-000454 Mr Hussain appealed the sentence imposed in the Sentencing Judgment (**"the Sentencing Appeal"**).

4. It was accepted that Mr Hussain needed permission to pursue the Interlocutory Appeal. Having considered the written submissions of Mr Hussain on one aspect of the proposed appeal, and heard from Mr James Counsell QC (as he then was), who appeared together with Mr Alex Haines for Mr Hussain, on the remaining aspects, we dismissed the application for permission to appeal for reasons to be given later.

5. It was not suggested that Mr Hussain needed permission for the Sentencing Appeal. Although the parties seem to have assumed that Mr Hussain did need permission for the Liability Appeal, we expressed the view at the outset of the hearing that he did not need permission for that either. That was undoubtedly the view taken by Miles J who at the end of the Liability Judgment said that Mr Hussain had the right to appeal without permission (at [397]), and who made an Order dated 2 March 2022 on the handing down of that judgment which extended time for Mr Hussain "to appeal against the finding of contempt … and any sanction" and (by way of contrast) for him "to seek permission to appeal any other part of this order". He repeated this view at the end of the Sentencing Judgment (at [74]) where he said that Mr Hussain was entitled to appeal

"the findings of contempt and the sentence" without permission.

6. We did not hear any argument on the point but that seems to me to be right. By CPR r 52.3(1)(a)(i) a person committed to prison can appeal the committal order without permission and where, as must happen in a large number of cases, a judge makes findings of contempt and proceeds to commit the contemnor to prison on the same occasion, I consider that that entitles the contemnor to appeal, without needing permission, either the findings of contempt or the sentence or both. If that is right, it cannot make any difference that in a complex case like the present the findings of contempt are made first, and the sentencing is dealt with in a separate and subsequent hearing.

7. We therefore proceeded to hear the Liability and Sentencing Appeals. At the conclusion of the hearing we announced our decision that both would be dismissed, again for reasons to be given later.

8. In this judgment I therefore give my reasons for concurring in the decisions to dismiss the application for permission in the Interlocutory Appeal and to dismiss the Liability Appeal. So far as the Sentencing Appeal is concerned, I have had the opportunity to read the judgment of Arnold LJ below and I entirely agree with it.

Background

9. There is a long background to the contempt application. It can be found detailed in a series of judgments that are publicly available, including *Business Mortgage Finance 6 plc v Greencoat Investments Ltd* [2019] EWHC 2128 (Ch) (Zacaroli J), *Business Mortgage Finance 6 plc v Roundstone Technologies Ltd* [2019] EWHC 2917 (Ch) (myself), *Oyekoya v Business Mortgage Finance 4 plc* [2020] EWHC 1910 (Ch) (Birss J) and *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 171 (Ch) (Miles J). The last of these is the Injunction Judgment and contains a detailed procedural history up to that point.

10. The Injunction Judgment also contains a convenient introduction as follows:

> "1. I have heard the trial of two closely related Part 8 claims: FL-2020-000023 ("the Injunctions Claim") and CR-2020-003605 ("the BMFH Claim"). In very broad terms the Claimants say that there has been a sustained and determined assault by the principal Defendants on a group of securitisation structures in which the Claimants are the issuers of publicly traded notes. They say that the Defendants have purported since early 2019 to assume various roles and offices in relation to those structures (as directors, trustees, receivers and otherwise) and have usurped the existing office holders. The Defendants have used those assumed positions to interfere with the business of the Claimants: they have purported to change the registered offices, sell the underlying securitised assets, sought to change bank account mandates, forfeit and sell the Issuers' shareholdings, make filings at Companies House, and make regulatory news service announcements to the capital markets. The Claimants say that the Defendants have done all this without any right or basis – they say indeed that the Defendants are strangers to the securitisation structures. They say that the Defendants have done this in

the teeth of the Claimants' protests and repeated legal proceedings designed to halt the Defendants' conduct.

2. The Claimants have sought and obtained numerous earlier rulings and orders of other judges (including Zacaroli J, Nugee J and Birss J) each of whom have found that the Defendants or parties associated with them had none of the rights or offices they had assumed. Some of those courts have granted final injunctive relief. The Claimants have been successful in all of the litigation to date and have been awarded their costs (mostly on the indemnity basis). But they are some £2.4 million out of pocket, a loss which will ultimately fall on the noteholders under the securitisations. The Claimants hoped that these rulings would halt the Defendants' campaign against the structures and their assets. But that did not happen. The Claimants have therefore brought the Injunctions Claim to seek declarations and wide-ranging injunctions with a view to creating a more effective protective barrier. In the BMFH Claim they seek orders to rectify filings made by the Defendants at Companies House which they say were made falsely and without authority.

…

4. The four Claimants in the Injunctions Claim ("BMF4", "BMF5", "BMF6," and "BMF7"; together "the Issuers") are the issuers of notes issued as securitisations of various portfolios of commercial mortgages relating to property in the UK which are owned by the Issuers (the "BMFH Securitisations").

5. The structure of the BMFH Securitisations is in broad terms that the noteholders, as a class, are represented by, and act through a note trustee, which in the case of each Issuer is BNY Mellon Corporate Trustee Services Limited ("BNY" or "the Trustee"). The notes are constituted by Trust Deeds entered into by each of the Issuers and the Trustee dated 12 April 2006, 18 October 2006, 18 May 2007 and 23 November 2007 respectively. The terms and conditions of the notes are appended to the Trust Deed.

6. The notes are currently held in global form entrusted to a common depository on behalf of Clearstream and Euroclear and the interests of noteholders are recorded electronically in the books and records of Clearstream and Euroclear.

7. The Issuers' obligations under the notes are secured in favour of the Trustee (for itself and on trust for the other secured creditors) by security granted under the terms of Deeds of Charge between, amongst others, each of the Issuers and the Trustee. The income stream to fund the Issuers' obligations under the notes is derived from the portfolio of commercial mortgages.

8. The Deeds of Charge grant various first fixed charges and security over the Issuers' interests in the commercial mortgages which are the subject of the BMFH Securitisations, and a floating charge over all the Issuers' assets and undertakings."

11. I will adopt the same abbreviations as Miles J does in this passage. Against that background the main steps taken by various individuals or entities to take control of the BMFH Securitisations can be summarised as follows:

    (1) Greencoat Investments Ltd (**"GIL"**), an Isle of Man company that has now been wound up and of which Mr Hussain was formerly a director, claimed to have acquired a beneficial interest in the notes issued by the Issuers. It applied to put BMF6 into administration. That application was struck out for failure to put up security for costs but Zacaroli J later held that it was doomed to fail for lack of standing on the part of GIL in any event.

    (2) Next GIL purported to appoint new trustees of the notes issued by BMF6; these new trustees then purported to appoint receivers, including a Mr Oyekoya, of BMF6's assets, and new directors of BMF6; and the receivers purported to sell the loan portfolio to Roundstone Technologies Ltd (**"Roundstone"**), a BVI company whose ultimate beneficial owner was Mr Hussain. That led to BMF6 taking action first against GIL, the new trustees, the receivers and a new director, and subsequently against Roundstone. The first claim was heard and upheld by Zacaroli J; the second by myself.

    (3) Mr Oyekoya then claimed to have assumed the position of trustee and brought a number of claims as purported trustee of the Issuers, most of them later struck out by Birss J.

    (4) Meanwhile Mr Hussain purported to summon board meetings of each of the Issuers; claimed that he, Mr Oyekoya and a number of others had become directors of them; claimed that these purported directors had made calls on their majority shareholder BMF Holdings Ltd (**"BMFH"**), had removed the existing directors, substituted a new secretary and had changed the registered office; and filed notice of the various purported changes in relation to the Issuers at Companies House. A purported forfeiture of BMFH's shares for non-payment of calls and purported sale of the shares followed.

12. This necessarily somewhat brief summary omits a considerable amount of detail of these and other actions (which can all be found set out with great clarity by Miles J in the Injunction Judgment at [17]-[93]), but is sufficient to indicate the nature of the steps taken by Mr Hussain and others to gain control of the BMFH Securitisations. Whenever any of these actions has been considered by a judge, it has been found to be entirely ineffective as a matter of law. Indeed they were described by Birss J as an "absurd series of actions" and by Miles J as "legally absurd". But they could not be ignored by the Issuers. Companies House in fact processed the various purported changes that were filed and in July 2020 Mr Hussain contacted Barclays in relation to the Issuers' bank accounts in an attempt to give instructions in relation to payments to noteholders. The risks for the Issuers of doing nothing are obvious.

The Injunction

13. It was in those circumstances that the Issuers applied for wide-ranging injunctive relief against Mr Hussain and others. As already referred to, Miles J granted the Injunction by his Order dated 8 February 2021. The Injunction Judgment gives his detailed reasons for that decision but it is worth citing his own summary of his conclusions in

that judgment at [252] as follows:

> "The Defendants have targeted these securitisation structures relentlessly. One or other of them have pretended to occupy the roles of directors of the Issuers, trustees for the noteholders, receivers of the underlying assets, Servicers, advisers to the Issuers, and other positions. They purported (in their assumed role of directors) to forfeit the shares held by BMFH in the Issuers and sell them to Highbury. They managed to change important company filings at Companies House and made misleading announcements to investors over the RNS. None of this is legitimate. The Defendants have never occupied any of these roles. They are, for legal purposes, strangers to the Securitisations. The reasons they have given for their actions are spurious. The corporate assault has been going on for the best past of two years, in the teeth of earlier orders of the courts and the Claimants' reasoned protests. It must now stop. I shall grant relief in respect of both claims. This includes orders for the rectification of the Companies House registers for the Issuers, declarations and final injunctions…"

14. By his Order he made a whole series of declarations, including declarations that each and every act purportedly done by various named defendants (including Mr Hussain) in various purported capacities was done without authority and was invalid and of no effect, and then by paragraph 14 granted an injunction against those defendants in wide terms. This included the following:

> "Each of the Injunctions Claim Defendants [which included Mr Hussain] … **SHALL NOT** (whether acting alone, or in combination with any other individual or entity):
>
> …
>
> (2) hold out any person other than those persons identified at paragraph 4 above [ie the lawfully appointed directors] as being directors of the Issuers;
>
> (3) hold out any person other than Target, BNY, Simmons & Simmons LLP or those persons identified at paragraph 4 above (or cause, procure or permit any other person to do so), as having any authority whatsoever to act on the Issuers' behalf and/or as having any authority to dispose of or otherwise deal with the Issuers' assets (whether as receivers, agents, attorneys or otherwise);
>
> …
>
> (5) hold out any person other than BNY as (or cause, procure or permit any other person to be held out as):
>
> a) a trustee under the terms of any of the Trust Deeds or Deeds of Charge and Assignment;
>
> …
>
> (7) hold out any other person as (or cause, procure or permit any other person to be held out as) taking or purporting to take or to have taken any of the following steps, on the basis that that other person is or is claimed to be a Noteholder … or Instrumentholder …:

a) the signing or passing of any resolution of Noteholders … or Instrumentholders …;

…

(9) hold out any person other than Target as if they are Special Servicer … or Cash/Bond Administrator …, or as having any authority to act on behalf of the Special Servicer … or Cash/Bond Administrator …, or cause, procure or permit any other person to do so;

…

(13) purport to terminate or to have terminated (or to cause, procure or permit any other person to purport to terminate or to have terminated):

a) the appointment of BNY as trustee under the Trust Deeds or Deeds of Charge and Assignment;

b) the appointment of any directors, company secretaries, agents, receivers or other representatives of the Issuers or of any directors, agents, receivers or other representatives of any other party to any of the transaction documents; or

c) the appointment of any person or entity carrying out any function pursuant to the terms of the transaction documents (such as, without limitation, the function of trustee under the terms of the Trust Deeds or Deeds of Charge and Assignment, or the functions of Special Servicer … or Cash/Bond Administrator …);

(14) purport to appoint or to have appointed (or to cause, procure or permit any other person to purport to appoint or to have appointed):

a) any director, company secretary, agent, receiver or other representative of any of the Issuers;

…

c) any person to carry out any function pursuant to the terms of the transaction documents (such as, without limitation, the function of trustee under the terms of the Trust Deeds or Deeds of Charge and Assignment, or the functions of Special Servicer or Cash/Bond Administrator), or to act on behalf of any person carrying out any such function;

…

(18) take, or threaten or attempt to take, any step in relation to any of the Issuers' bank accounts or the bank accounts of any other party to the transaction documents."

This Order contains a number of defined terms but nothing turns on them for present purposes and it is not necessary to set them out. The general purpose of the Injunction, namely to protect the Issuers from the defendants purporting to act in relation to the securitisation structures, is clear enough.

The committal application

15. The Issuers issued their committal application against Mr Hussain on 28 June 2021.

The general thrust of the application was summarised by Miles J in the Liability Judgment at [10] as follows:

> "In broad outline the claimants allege that Mr Hussain knew of the Injunction by 7 April 2021 at the latest; that between then and 18 June 2021 he took a series of steps which constituted breaches of the Injunction; and that he knew of the facts which made his conduct a breach of the Injunction. Mr Hussain has not taken any of the relevant steps in his own name. The claimants say that Mr Hussain has indeed deliberately taken the relevant steps in the names or other individuals and entities (or in collaboration with them) and has thereby breached the Injunction; or that he has caused or procured others to act in breach of the Injunction. They also say that there have been further steps after 28 June 2021 which, while not forming the subject matter of the charges of contempt, are further evidence that Mr Hussain has taken or caused or procured the steps taken by or in the names of others."

16. The application set out particulars of Mr Hussain's alleged breaches of the Injunction under 7 counts. I will have to look at this in more detail below as one of the points argued by Mr Counsell on the Liability Appeal was that the application notice was insufficiently particularised, but in general terms each count alleged that Mr Hussain was in breach of one or more of the sub-paragraphs of the Injunction which I have set out above, in that he produced or sent (or caused or procured another person to produce or send) certain specified documents (such as letters, notices, claim forms and the like). The fact that the documents were produced or sent was not realistically capable of being disputed; the essential question was whether it was Mr Hussain who was responsible for them.

17. The application came on before Miles J. There was a complicated procedural history to the hearing of the application. Again this is all set out by him with conspicuous clarity (in this case in the Liability Judgment at [11] to [36]), and it can be summarised as follows:

(1) On 27 September 2021 Miles J gave directions for the hearing including a direction that Mr Hussain attend in person.

(2) The hearing was listed for a window of 2 to 8 February 2022.

(3) On 1 February, Mr Hussain issued an application for Miles J to recuse himself. Miles J in the event refused that application for reasons given in a ruling on 8 February at [2022] EWHC 302 (Ch) ("**the Recusal Judgment"**).

(4) Also on 1 February notices of discontinuance, purportedly on behalf of each of the Issuers, were filed on ce-file. Mr Hussain filed submissions to the effect that that meant that the committal proceedings must cease. Miles J ruled against that contention in a ruling on 9 February (for which there is no neutral citation number) (**"the Discontinuance Judgment"**).

(5) On (Wednesday) 2 February, which was the first day of the trial, Mr Hussain did not attend, claiming to have Covid-19. Miles J concluded that there was no proper evidence that he did, granted a bench warrant and adjourned the trial. Mr Hussain could not be found but after he had been granted legal aid, the trial,

having been adjourned again on (Monday) 7 February, in the event resumed on (Tuesday) 8 February with Mr Hussain absent but represented by solicitors and counsel (at that stage Mr Haines; Mr Counsell attended from 9 February).

(6) Mr Hussain had not served any evidence either from himself or from any other witness in answer to the charges in the committal application. On 9 February however he sought to introduce a witness statement of a Mr Andreou Artemiou. Miles J refused that in a ruling given that day (again without a neutral citation number) (**"the Artemiou Judgment"**).

(7) The trial continued until 11 February. There was no oral evidence. The Issuers' witnesses were available for cross-examination but Mr Counsell explained that he lacked instructions to enable him to cross-examine. Nor was he able to advance any positive case.

18. In the Interlocutory Appeal permission was sought to appeal a number of these rulings. Mr Hussain himself sought to challenge the decision of Miles J that the notices of discontinuance were of no effect. Mr Counsell sought to challenge Miles J's refusal to recuse himself and his refusal to allow Mr Artemiou's evidence to be admitted.

The Liability Judgment

19. In the Liability Judgment Miles J, after an introduction at [1] to [10], and a statement of the procedural history at [11] to [36], summarised the relevant legal principles at [37] to [42]. He then considered various aspects of the new CPR Part 81 which came into force on 1 October 2020. At [45] he said that he was satisfied that the application notice contained the details of the alleged contempts required by CPR r 81.4(2)(a), (b) and (h). That was challenged by Mr Counsell on the Liability Appeal who submitted that the particulars were inadequate.

20. Miles J then dealt with a question concerning the penal notice on the Injunction (which although placed prominently and in bold at the beginning of the Order was on page 2 because of the length of the title). That point was not argued before us but the next point was, which concerned the service of the Injunction on Mr Hussain. The Injunction was not personally served on him. Miles J held that the Court had power to dispense with personal service and proceeded to dispense with it. The question whether he had power to do this was one of the points argued by Mr Counsell on the Liability Appeal.

21. Miles J then set out the various steps taken by way of letters, notices, filings at Companies House and proceedings (at [80]-[157]). These started with a letter dated 30 March 2021 from Mr Artemiou (previously unknown to the true directors of the Issuers) asserting that the secretary to each of the Issuers had been changed, and continued in similar vein.

22. Miles J then considered the substantive question on the committal, which was whether Mr Hussain had taken these various steps or had caused or procured others to do so. This took him from [158] to [291] where he examined with meticulous care the various matters relied on by the Issuers. At [292]-[298] he expressed his conclusion which was that he was satisfied to the criminal standard that Mr Hussain had either himself created and transmitted the various communications and other documents which were said to

constitute breaches of the Injunction or had caused or procured Mr Artemiou and others to do so. At [300]-[309] he sought to summarise the ten most salient elements or strands of the history which led him to this conclusion, while noting that there was a danger involved in emphasising particular parts of the evidence as his conclusion was based on the cumulative weight of the evidence (at [299]). As he had said at [296]:

> "The court must consider the various strands of evidence cumulatively. Circumstantial evidence works by cumulatively, in geometrical progression, eliminating other possibilities."

23. He then set out the particular sub-paragraphs of the Injunction said to have been broken, and at [315]-[394] considered each of the counts, and the particulars relied on, in turn. Count 5 and, save in one respect, Count 6 were not pursued by the Issuers, and he found Count 1 and some of the particulars in Counts 2 and 4 not proved. But he found Counts 3 and 7 proved, Count 2 substantially proved, Count 4 proved in part and the remaining sub-count of Count 6 proved (at [395]), and directed that there would be a further hearing to determine sanction.

24. That further hearing took place on 11 March 2022 and as already referred to Miles J sentenced Mr Hussain to an immediate term of 24 months in prison for all the contempts for the reasons given in the Sentencing Judgment.

The Interlocutory Appeal – (1) Notices of Discontinuance

25. With that introduction I can now consider the Interlocutory Appeal. The first point taken was taken by Mr Hussain himself by way of written submissions and Mr Counsell did not address us on it. This was that Miles J was wrong to dismiss the arguments based on the notices of discontinuance that had been filed. Mr Hussain submits that he should either have held that he had no jurisdiction to continue with the committal application, or adjourned it to await the determination of a Part 8 claim which had been issued.

26. There is nothing in this point and we refused permission to appeal on the grounds that it had no real prospect of success (and for completeness there is no other compelling reason to hear an appeal on it). The validity of the notices of discontinuance depends on a series of steps which once again purport to have the effect of displacing the persons who in fact occupy particular roles in the securitisation structures (here the true directors of the Issuers) by strangers who have no arguable right to that position. Indeed the position of the Issuers is that by advancing the contentions that he does Mr Hussain is in further breach of the Injunction (a matter that was not argued and on which I express no view).

27. The particular steps (or purported steps) here relied on can be summarised as follows:

(1) Mr Hussain and others were appointed directors of the Issuers.

(2) In that capacity they issued calls on BMFH, and on or about 10 July 2020, forfeited BMFH's shares in each of the Issuers and sold them to a Marshall Islands company associated with Mr Hussain called Highbury Investments Ltd (**"Highbury"**).

(3) Highbury then in August or September 2020 sold 65% of the shares to three more Marshall Islands companies called Blue Side Services SA, Cherry Services Ltd and Corelli Capital AG.

(4) These three companies then convened EGMs of each Issuer and replaced the directors with themselves and two individuals.

(5) The new directors of each Issuer then resolved to discontinue the committal proceedings, and on 1 February 2022 served notices of discontinuance in respect of each Issuer.

(6) The three Marshall Islands companies then issued a Part 8 claim against BMFH seeking various declarations premised on the assumption that they had acquired the majority of the shares in each Issuer.

28. In the Discontinuance Judgment of 9 February 2022 Miles J held that there was no realistic or plausible factual or legal basis for the case being advanced, and decided to continue with the committal application. He subsequently also struck out the Part 8 claim for reasons given by him in a judgment dated 18 March 2022 at [2022] EWHC 714 (Ch) (**"the Part 8 Judgment"**).

29. It is not necessary to examine all his reasoning in detail, although I have considered it and see no arguable error in his decisions. It is sufficient for present purposes to refer to one point, which is that the validity of the notices of discontinuance depended among other things on the validity of the forfeiture of BMFH's shares in the Issuers and their sale to Highbury. As Miles J pointed out in the Discontinuance Judgment at [16] he had already decided in the Injunction Judgment in February 2021 that the forfeiture and sale were a nullity. That meant that Highbury did not acquire title and could not pass title to the three Marshall Islands companies.

30. Mr Hussain argues that although Highbury was a party to those earlier proceedings, the three Marshall Islands companies were not and were therefore not bound by the declarations he made. On this Miles J concluded in the Part 8 Judgment that there was no realistic prospect of the three companies establishing anything different. I agree.

31. Mr Hussain says that in the Discontinuance Judgment Miles J did not address an argument based on the Articles of each Issuer to the effect that the title of a purchaser is not affected by any irregularity in or invalidity of the proceedings connected with the forfeiture or disposal. It is true that Miles J did not then address this point, but he dealt with it in the Part 8 Judgment. He held that the relevant provisions of the Articles had no application. This was not a case where the board of each Issuer had purported to forfeit and sell the shares but there was some irregularity or invalidity in those proceedings. This was a case where the persons purporting to forfeit and sell the shares were simply interlopers: see at [56]. I agree. Any other interpretation would mean that a complete stranger could confer title to shares on a purchaser by the simple expedient of claiming to act for the company. That cannot possibly be what the Articles were intended to provide.

32. For these reasons I agreed that an appeal on this ground would have no real, or indeed any, prospects of success and hence that permission to appeal should be refused.

Interlocutory Appeal – (2) Recusal

33. The next point taken in the Interlocutory Appeal was that Miles J had wrongly refused to recuse himself. As referred to above, Mr Hussain made an application that he recuse himself, which was refused by Miles J on 8 February 2022 for the reasons given in the Recusal Judgment.

34. Under this head there is one ground of appeal which is that Miles J should have recused himself for apparent bias (actual bias is not alleged). The legal test was not in dispute: the question is whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see *Porter v Magill* [2001] UKHL 67 at [103] per Lord Hope.

35. Mr Counsell also drew our attention to a passage in the judgment of this Court in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [26] where the Court referred to the case where a judge had in a previous case rejected the evidence of a person "in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion". By contrast the mere fact that a judge earlier in the same case or in a previous case "had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable" would not without more found a sustainable objection.

36. In the present case Mr Counsell referred to the previous judgments that Miles J had already given, namely the Injunction Judgment in February 2021; a judgment dealing with various applications, including directions for the committal, given in September 2021 at [2021] EWHC 2766 (Ch); and two judgments in another related action given in November 2021 and January 2022 at [2021] EWHC 3306 (Ch) and [2022] EWHC 140 (Ch) respectively. He accepted that the fact that Miles J had made decisions adverse to Mr Hussain or made adverse comments about him did not by itself justify recusal, but said that the committal application was based on inferences and that Miles J's previous knowledge of Mr Hussain would make it more difficult to judge the committal fairly. He gave the example of Miles J's refusal of an application by Mr Hussain (who was then in prison) to adjourn the hearing of the application for the injunction. I do not see anything in that decision, the reasons for which were explained by Miles J in painstaking detail (see the Injunction Judgment at [107]-[121]), that would suggest to a fair-minded observer that he was unable to try the committal application fairly. Nor do I think that the other decisions, singly or cumulatively, would suggest that either.

37. Mr Counsell also referred to the language used by Miles J. He accepted that a judge is entitled to be robust, but said that he had been so outspoken as to give rise to the perception that he might not be able to exercise judgment objectively. He instanced the way in which Miles J had referred in one of his judgments to "utter outsiders" and "complete strangers". And when asked for his best example of outspoken language, Mr Counsell referred to the concluding paragraph ([252]) of the Injunction Judgment where Miles J referred to the actions of Mr Hussain and others as a "corporate assault": see Paragraph 13 above where the relevant passage is set out. Mr Counsell said that "corporate assault" was an unnecessarily aggressive description with criminal connotations.

38. For my part I unhesitatingly reject these submissions. By referring to "utter outsiders"

and "complete strangers" Miles J was not simply adding unnecessary adjectives; he was making the point that Mr Hussain and others had no sustainable claim at all to be truly occupying the roles they pretended to have in the securitisation structure as directors of the Issuers and the like. This was not for example a case where the appropriate organs of a company had attempted to appoint someone as a director but due to some slip had failed to do so properly; this was a case where those who stood entirely outside the securitisation structure had attempted to gain control of it by claiming to hold positions of authority without the slightest basis in law. That was a perfectly proper point for him to make.

39. And as for "corporate assault" I see nothing inappropriate about it. The image it conjures up in my mind is in fact not so much that of one person attacking another, but of someone laying siege to a citadel. That seems to me an entirely apt metaphor for the activities of Mr Hussain that Miles J had found. Indeed Mr Counsell accepted that he could not have complained if Miles J had referred instead to a "sustained campaign"; and the suggestion that the reasonable and informed observer would regard the reference to "corporate assault" as making all the difference seems to me, with respect, to verge on the absurd.

40. Those were the reasons why I agreed that this ground of appeal has no real prospect of success and that permission should be refused.

Interlocutory Appeal – (3) refusal to admit Mr Artemiou's second witness statement

41. The third and final point taken in the Interlocutory Appeal concerns the decision by Miles J to refuse to allow Mr Hussain to rely on the second witness statement of Mr Artemiou.

42. On 27 September 2021 Miles J gave directions for the hearing of the committal application. This included a direction that Mr Hussain file and serve any evidence on which he sought to rely by 4pm on 5 November 2021, such evidence to be given by affidavit; and a direction giving Mr Hussain permission to rely on the oral evidence of all witnesses who swore an affidavit on his behalf and directing that he should tender each of those witnesses for cross-examination.

43. No such evidence was filed or served, either by 5 November 2021 or at any time before the day on which the committal hearing commenced on 2 February 2022. Instead the second witness statement of Mr Artemiou, which was dated 8 February 2022, was provided to the Claimants and the Court on the morning of 9 February 2022. Mr Hussain, who was not attending the trial, sent an e-mail asking for it to be admitted, and Mr Counsell, who had by then been instructed, put it before Miles J and invited him to decide whether to admit it. Miles J declined to do so for the reasons given by him in the Artemiou Judgment.

44. The circumstances in which an appellate court can disturb a case management decision of this sort are well established and were not disputed before us. They are neatly summarised by Lewison LJ in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51] as follows: "where [the first instance judge] has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree". In the present case

Mr Counsell sought permission to appeal on the ground that Miles J's failure to admit it was so unreasonable that no reasonable judge could have failed to do so, his submission being that Mr Artemiou's evidence was so central to Mr Hussain's case that it was unreasonable to refuse to admit it.

45. The reasons given by Miles J in the Artemiou Judgment can be summarised as follows:

(1) He had given detailed directions for evidence on 27 September 2021. The purpose of that order was to enable the trial to take place in a proper and orderly fashion and to give the parties proper opportunity to prepare, including by putting in any evidence in response and by preparing cross-examination [3].

(2) Mr Artemiou's witness statement was not in compliance with those directions: it was served months after the time required and indeed a week after the committal hearing started, and it was not an affidavit but a witness statement [4]-[5].

(3) There would be serious and obvious prejudice to the Claimants if it were admitted. They had had no opportunity to consider putting in evidence in response or to prepare to cross-examine Mr Artemiou, and would require an adjournment. A week of the hearing had already been lost by Mr Hussain's actions, and Miles J had explained in another ruling why any further delay would be seriously prejudicial [6]. (The reference to another ruling is to a judgment given by him on 8 February 2022 at [2022] EWHC 353 (Ch) in which he refused a further adjournment, one of the factors which he took into account being that the Claimants would be unduly prejudiced, not only because of the real risk that their leading counsel would no longer be available but because of potential prejudice to their businesses).

(4) No reason had been advanced for the witness statement being put forward so late. Mr Artemiou had signed another witness statement more than a week before; and in his new statement said that he had been in communication with Mr Hussain since 24 December 2021. Neither Mr Artemiou nor Mr Hussain had explained why it had been submitted so late [7].

(5) Although committal proceedings are serious proceedings and the consequences for Mr Hussain potentially very grave, his liberty being at stake, they must, like other proceedings, be conducted in accordance with the orders of the Court. There was no suggestion that the evidence could not have been provided earlier and no explanation for the delay in its production. To admit it would unfairly prejudice the Claimants and disrupt the trial still further [8].

46. It would be sufficient to say that I can see no arguable flaw in this analysis. It was in my judgment plainly a decision that was open to the judge, being one within the generous ambit of the discretion entrusted to him.

47. But one can in fact go further. Although it was not put before him in these terms, the application to admit the evidence (never formally made) necessarily in fact involved an application for relief from sanctions, the sanction in the directions order being that no evidence could be admitted unless the directions were complied with. As such, it fell to be considered by reference to the well-known criteria in *Denton v TH White Ltd*

[2014] EWCA Civ 906. Although Miles J was not asked to deal with it by reference to these criteria, and does not refer to them in terms, it can be seen that in his judgment he in fact deals in turn with each of the relevant requirements in a way that precisely tracks the guidance in *Denton*.

48. Thus the first *Denton* stage is to consider whether the breach is serious or significant. So far as this is concerned, Miles J identifies that the evidence was grossly non-compliant with his order, not only being months late but also not, as required, in the form of an affidavit. Moreover where the Court directs something to be done by a particular date, the seriousness and significance of a breach is not only to be measured by the number of days late it is done, but by the consequences of the lateness. Here the very purpose of giving the directions was, as identified by Miles J, to ensure that the trial could take place in a proper and orderly fashion and to enable the Claimants to prepare to meet any such evidence. The evidence was served so late that this purpose would be frustrated if it were admitted. That reinforced why the breach was both serious and significant.

49. The second *Denton* stage is to consider why the default occurred. Here, as Miles J says, there was not only not a good explanation; there was no attempt to provide an explanation at all.

50. The third *Denton* stage is to assess all the circumstances of the case so as to enable the Court to deal with the application justly. Here Miles J identifies the very real and serious prejudice to the Claimants, and the requirement that committal applications, like other applications, be conducted in accordance with orders of the Court (echoing the requirement under CPR r 3.9(1)(b)).

51. In these circumstances his conclusion that justice required the application to be refused seems to me not only one that was open to him, but one that was a model of its kind that cannot be faulted in any way.

52. Those were the reasons why I agreed that permission to appeal on this ground should also be refused.

Liability Appeal – (1) Dispensing with personal service

53. Three grounds are advanced in support of the Liability Appeal. The first is that Miles J erred in retrospectively dispensing with personal service of the Injunction on Mr Hussain.

54. The underlying facts are as follows:

(1) The hearing of the Claimants' application for an injunction took place on 18 and 19 January 2021. The hearing was conducted fully remotely. Mr Hussain was then serving a sentence of imprisonment for (a separate) contempt of court at HMP Hollesley Bay. The prison authorities had made a laptop available to him and he was able to participate. At the outset of the hearing he attended remotely and applied for an adjournment, an application which Miles J refused. He then decided to play no further part in the hearing, even as an observer.

(2) Miles J handed down the Injunction Judgment on 3 February 2021. There

was no attendance at that hearing, but there was a further hearing to settle various consequential matters on 8 February 2021. Mr Hussain did not attend that either, having informed the Governor of the prison that he did not wish to attend the hand-down or the consequentials.

(3) An order giving effect to the judgment and containing the Injunction was then drawn up. It is dated 8 February 2021 and was sealed on 12 February 2021.

(4) The Claimants did not attempt to serve the Injunction personally on Mr Hussain. He was still in prison and it was not possible to serve him personally because visitors were not allowed due to the Covid-19 pandemic. Instead they sent it to him at the prison by a courier service on 15 February 2021.

(5) At the time the Claimants thought this letter had reached Mr Hussain (and indeed it is quite likely that it did). But they did not place any reliance on it in their committal application because they later learned from the Government Legal Department that there was a reasonable doubt whether he had in fact received it. By the time they discovered this Mr Hussain had been released from prison and the Claimants did not know where he was.

(6) They had however sent him an e-mail on 7 April 2021. That was sent to two e-mail addresses that they had for him. Among other things it enclosed a letter, and also referred to, and attached a copy of, the sealed Injunction. Miles J held that he was satisfied to the criminal standard that this e-mail had reached Mr Hussain and that he was aware of the Injunction by 7 April 2021. This conclusion is challenged on this appeal and I deal with that point below.

(7) The Claimants issued the committal application on 28 June 2021. It alleged breaches by Mr Hussain of the Injunction on numerous dates between 8 April 2021 and 18 June 2021. The committal application was on Form N600. That form is designed to ensure that the information required by CPR r 81.4(2) is included. I give the text of the rule below but one of the matters required is the date of personal service or of any order dispensing with personal service. In the relevant section of the form the Claimants applied for an order retrospectively dispensing with the requirement for personal service.

55. Miles J granted that application for the reasons given by him in the Liability Judgment at [52]-[77]. He first held that he had power to do so (at [52]-[57]), and that the relevant test was whether injustice had been caused to the defendant by the applicant's failure to effect personal service (at [58]). He then considered whether it had been proved that Mr Hussain was aware of the Injunction and its terms, concluding to the criminal standard that he was so aware by 7 April 2021 (at [59]-[75]). He then considered whether he should dispense with personal service and concluded that he should (at [76]-[77]).

56. Two points were taken by Mr Counsell in support of this ground of appeal. The first was that the Court has no power to dispense with personal service retrospectively. The second was that if there was power to do it, Miles J erred in exercising the power.

57. The first point raises an issue of general importance. I am satisfied that Miles J was

right that the Court does have power to dispense with personal service retrospectively. I will now try and explain why.

58. The procedural rules governing proceedings for contempt are found in CPR Part 81. Part 81 was completely rewritten with effect from 1 October 2020. I will refer to the current rules as **"the new rules"** and the rules in force before October 2020 as **"the old rules"**.

59. CPR r 81.1 provides as follows:

> **"81.1 Scope**
>
> (1) This Part sets out the procedure to be followed in proceedings for contempt of court ("contempt proceedings").
>
> (2) This Part does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law.
>
> (3) This Part has effect subject to and to the extent that it is consistent with the substantive law of contempt of court."

60. CPR r 81.3(1) provides that a contempt application in existing proceedings is made by an application under Part 23 in those proceedings.

61. CPR 81.4 then provides as follows:

> **"81.4 Requirements of a contempt application**
>
> (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
>
> (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
>
> (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
>
> (b) the date and terms of any order allegedly breached or disobeyed;
>
> (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
>
> (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
>
> (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
>
> (f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public."

62. There are no other relevant provisions of the new rules. It can be seen that one of the requirements of CPR r 81.4(2) is that the contempt application must include confirmation that the order allegedly breached was personally served, unless the Court dispensed with personal service, in which case the application must include a statement of the date and terms of such order.

63. Mr Counsell's submission was simple. It was that the rule envisages only two possibilities. One is that the order was personally served. The other is that the Court has already dispensed with personal service. In the present case the Injunction was not personally served. Nor had the Court dispensed with personal service. So the application for contempt could not be proceeded with.

64. As Miles J accepted (in the Liability Judgment at [57.ii)] a strictly literal reading of the rule would appear to support that submission. But is this really the effect of the rule? There are several reasons for thinking that it cannot be.

65. Mr Counsell's submission was that any order dispensing with service had to be made before *breach*. But this would cause serious inconvenience, and radical changes in the long-standing practice of the Court when granting injunctions. It would mean that a respondent who was perfectly well aware of the terms of an injunction made against him could disobey the order with impunity on the grounds that no service had yet been effected on him.

66. Take the case where an application for an injunction is made on notice and both parties are present in Court for the hearing. At the end of the hearing the judge delivers judgment granting the injunction and says that he will make an order in terms of a draft handed by counsel. This is an everyday occurrence. Even if the terms of the order are settled there and then, the order is not usually served until it has been sealed, and these processes usually take a little time, the order not being sealed or served instantaneously. Or it may be that although the judge makes clear the terms of the injunction he is granting, the order itself is not finally settled immediately and it takes a little time for the formal order to be drawn up. If Mr Counsell is right, the respondent, present in court and with full knowledge of the injunction the judge has granted, could immediately leave court and deliberately do the acts he was restrained from doing without risk of committal. That seems a most unlikely intention to ascribe to the rules committee.

67. Or take another type of case, equally familiar to all those whose practice includes applying for urgent injunctions. These are often made without notice and often that is precisely because of the risk that if tipped off the respondent might frustrate the proposed order by pre-empting it. In such a case the applicant attends Court ex parte, and, if successful in persuading the judge to grant the injunction, immediately notifies the respondent, by telephone or e-mail, of the terms of the injunction the judge has granted. The very purpose of doing this is to put the respondent on notice of the injunction as soon as possible. But if Mr Counsell is right, telephoning the respondent to tell him that the Court has granted an injunction against him, far from stopping him in his tracks, will provide him with the perfect opportunity to do the very act restrained before he can be served. Again this cannot be what was intended by the rules.

68. These very familiar types of case were in fact dealt with expressly under the old rules. The structure of the old rules was rather different. CPR r 81.4 provided that if a person failed to do an act that he was ordered to do, or disobeyed an order not to do an act, the order could be enforced by committal. CPR r 81.5(1) provided that unless the Court dispensed with service under r 81.8, an order could not be enforced by committal under r 81.4 unless a copy of it had been served on the person in question; and CPR r 81.6 provided that subject to r 81.8 copies of orders had to be served personally. CPR r 81.8 then provided:

"**81.8 Dispensation with personal service**

(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –

(a) by being present when the judgment or order was given or made; or

(b) by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may –

(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place."

69. It can be seen that in the case of a negative injunction, r 81.8(1) expressly provided for the cases where the respondent had notice of the injunction by being present in court, or by being notified of it by telephone, e-mail or otherwise. In addition r 81.8(2) contained a general power to dispense with service, or make an order for substituted service, in relation to any type of injunction. And PD81 para 16.2 also contained an express power for the Court to waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice had been caused to the respondent by the defect. This power could be used to waive a failure to serve the order: see *Khawaja v Popat* [2016] EWCA Civ 362 at [40] per McCombe LJ where it was held that the judge was entitled to exercise the power to waive where the respondent to the order was well aware of its terms. None of these powers, it seems to me, was confined to the case where the Court dispensed with service in advance. Each of them could be used to dispense with service, or waive the failure to serve, retrospectively.

70. So the question is whether the introduction of the new rules was intended to deprive the Court of its powers to commit a person who could be shown beyond reasonable doubt to know of an order but where the order had not been personally served on him (and no prospective order dispensing with personal service had been made). I have no hesitation in saying that I cannot believe that that was what the new rules were designed to achieve. The power of the Court to commit for contempt those who deliberately disobey its orders is an essential part of the machinery of the administration of justice: see *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411 per Rix LJ at [188]. It would tend to stultify this vital power of the Court if the rules were interpreted in the way Mr Counsell submitted they should be.

71. Quite apart from the very undesirable consequences of Mr Counsell's interpretation there are to my mind some further indications that this is not what was intended by the new rules. First there are the terms of CPR r 81.1(2) and (3) (paragraph 59 above) which show that the new rules were not intended to alter the scope of the Court's jurisdiction, and took effect subject to the substantive law of contempt. Without getting into a debate as to quite where the boundary should be drawn between the substantive law of contempt and procedural matters, or quite what is meant by the scope of the

jurisdiction, one can see from these provisions, prominently placed at the head of the new rules, that the new rules were not designed to make substantive changes. But if the effect of CPR r 81.4(2)(c) and (d) was that the Court could no longer proceed by way of committal proceedings against a respondent who, although not yet served, was present in court when the injunction was made, or was notified of its terms, and proceeded deliberately to flout the order, then this does look like a substantive change, and for the reasons I have given, a most significant one that would have a radical effect on the ability of the Court to enforce its orders in the gap between the Court pronouncing the order and the formal order being drawn up, sealed and served. That seems to me a powerful indication that this was not what the new rules were intended to do.

72. Second, Ms Anna Dilnot QC (as she then was), who appeared with Mr Alexander Riddiford for the Claimants, told us that there was no hint in the consultation paper that led to the new rules that it was intended to cut down the Court's powers in this way. We were not shown the whole of the consultation paper but Mr Counsell did not suggest that she was wrong.

73. In those circumstances I am satisfied that the new rules should not be interpreted as requiring any order dispensing with service to have been made before the alleged breach.

74. It is perhaps not quite so easy to identify where the Court's powers to dispense with service retrospectively derive from. As Ms Dilnot pointed out, CPR r 81.4(2)(c) and (d) do not *confer* power on the Court to dispense with personal service (as the old CPR r 81.8 had done); they *assume* that the Court already has such power. That is in keeping with the way in which CPR r 81.4 is drafted. It does not confer powers on the Court; what it does is specify what information the committal application must contain. The purpose of CPR r 81.4 (which had no counterpart in the old rules) was to set out in one place what was required by way of procedural fairness, to be encapsulated in a single new form. It was intended to act as a reminder to the parties and the judge of what the requirements of procedural fairness and open justice were: see *Civil Procedure (The White Book) 2022* at note 81.4.1, and the consultation paper produced by the rule committee at the note on 81.4.

75. Ms Dilnot suggested that the requisite power could be found in a combination of CPR r 1.2(b) (which provides that the Court must seek to give effect to the overriding objective when it interprets any rule) and CPR r 3.1(2)(m) (which provides that the Court may make any other order for the purpose of managing the case and furthering the overriding objective). Neither seems to me clearly in point.

76. I would have thought more promising candidates were to be found in CPR r 3.10 which provides that where there has been an error of procedure, the error does not invalidate any step taken in the proceedings and the Court may make an order to remedy the error; and in CPR r 6.28 which provides that the Court may dispense with service of any document which is to be served in the proceedings (a power which can be exercised retrospectively). As I understood it, Ms Dilnot was hesitant about relying on CPR Part 6 because CPR r 6.1(a) provides that Part 6 applies to service of documents "except where another Part … makes different provision", and in *ICBC Standard Bank plc v Erdenet Mining Corporation LLC* [2017] EWHC 3135 (QB) at [43] Cockerill J held that Part 81 was a "distinct regime" and did make different provision for service. But

that was said in relation to the old rules which contained express provisions for service of the injunction sought to be enforced (as well as, of course, express power for such service to be dispensed with). I do not think Cockerill J's reasoning applies to the new rules which say nothing about service of the relevant injunction, except for CPR r 81.4(2)(c) and (d). These presuppose that personal service of the injunction is in general required but again do not in terms provide for it. What they provide, as I have already said, is for certain information to be contained in the committal application.

77. But I do not think it is necessary to reach any final conclusion on where the requisite power is to be found. What is clear from the terms of CPR r 81.4(2)(c) and (d) is that the Court does have such a power, whether that is found in CPR r 1.2(b), r 3.1(2)(m), r 3.10, r. 6.28 or the Court's inherent jurisdiction to control its own procedure.

78. Where does this leave us? In my view the position is as follows. In general an application for committal for breach of an injunction can only be brought where there has been personal service of the injunction which is sought to be enforced. That is not expressly provided for by Part 81, or anywhere else in the rules, but it is recognised by CPR r 81.4(2)(c) which presupposes that this is the general rule. As Arnold LJ pointed out in the course of argument this must be because of the underlying requirement for due process before a person is committed to prison; that requirement for due process means that there are certain procedural safeguards required for the benefit of the respondent; one of those safeguards is that the respondent should have proper notice of the injunction before he is at risk of being committed for breach of it; and in general proper notice requires personal service of the injunction. This requirement appears to long pre-date the CPR, and indeed the Judicature Acts: see the detailed historical survey by Nicklin J in *MBR Acres Ltd v Maher* [2022] EWHC 1123 (QB) at [67]-[97], who came to the same conclusion.

79. But as that survey also shows, the requirement for personal service was never an absolute one if it could be shown that the respondent had actual knowledge of the terms of the order: see for example at [74] where Nicklin J refers to such cases as *Hearn v Tennant* (1808) 14 Ves 136 where Lord Eldon LC held that it was sufficient if the respondent was present when the order was made, and *ex parte Langley* (1879) 13 Ch D 110 where this Court accepted that a telegram might in a suitable case be sufficient notice of an injunction to sustain proceedings for contempt. We were not taken to any of these old cases but CPR r 81.4(2)(c) clearly presupposes that the Court has power to dispense with personal service, and in my judgment that is a reflection of the long-standing practice of the Court under which the Court would not insist on personal service where it could be shown that the respondent had actual knowledge of the injunction.

80. There is nothing in the language of CPR r 81.4(c) and (d) which suggests that such service can only be dispensed with prospectively and not retrospectively. In my judgment therefore the power to dispense with personal service of the injunction which is recognised by those rules can indeed be exercised retrospectively. I would therefore reject Mr Counsell's first way of putting this ground.

81. For the sake of completeness I note that on the wording of the rules, an alternative argument might have been made that although the power to dispense with service could be exercised retrospectively (and hence did not need to be exercised before breach), it nevertheless had to be exercised before the committal application was brought. Mr

Counsell did not in fact make that submission. In my judgment he was wise not to do so. Once it is accepted, as I have, that there is no requirement for the power to dispense with service to be exercised before breach, it makes no sense to interpret the rule as requiring it to have been exercised before a committal application is brought. As Ms Dilnot pointed out, the question whether service should be dispensed with will involve an investigation as to whether the respondent had actual knowledge of the injunction, which is a matter that the Court has to be satisfied of on the substantive application to commit. To require a separate application for dispensation to be made first and decided before the committal application was launched would therefore lead to unnecessary duplication and extra cost with no apparent benefit to anyone.

82. In my judgment therefore Miles J was right to hold that the Court had power on the hearing of the committal application to dispense retrospectively with personal service of the Injunction if satisfied (as he was) that Mr Hussain had actual knowledge of its terms before the dates of the alleged breaches.

83. Mr Counsell's second point under this ground of appeal was that if Miles J had power to dispense with service he erred in doing so. This was very much a subsidiary point which was addressed only briefly in his written submissions and not at all in his oral ones. The essence of Mr Counsell's submission was that in circumstances where Mr Hussain denied receiving the e-mail sent to him on 7 April 2021, there was insufficient material to justify the inference that he did. It is not necessary to go into it in any detail. I am satisfied that Miles J did not commit any error of principle, and that there was sufficient material to justify him in concluding that Mr Hussain did have actual knowledge of the terms of the Injunction. The e-mail was undoubtedly received, as a letter sent to the Claimants' solicitors the same day (purportedly from a company called Kipling Firs Ltd (**"Kipling"**)) referred to the letter and quoted from it, and also acknowledged the existence of the Injunction. There was a further e-mail from Mr Hussain (in his own name) on 21 April which referred to the Injunction. Miles J of course had no evidence from Mr Hussain at the hearing. He did however take account of evidence that Mr Hussain had adduced for various interlocutory hearings to the effect that his e-mail addresses had been blocked, and rejected it as not credible in the light of the documentary record for reasons that he set out in detail. In these circumstances the factual conclusions that he reached were in my judgment plainly open to him, and indeed seem to me entirely right.

84. Those are the reasons why I agreed that this ground of appeal should be dismissed.

Liability Appeal – (2) Particularisation

85. The second ground of appeal in the Liability Appeal is that Miles J erred in failing to strike out the particulars of contempt on the grounds that they were inherently defective and/or insufficiently or inadequately particularised.

86. There was no dispute as to the law. As appears above (paragraph 61) CPR r 81.4(2)(h) requires that the committal application includes "a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order". This reflects a long-standing requirement that the defendant to a committal application should know exactly what it is that he is accused of: see *Harmsworth v Harmsworth* [1987] 1 WLR 1676 at 1683C per Nicholls LJ, *re L (A Child)* [2016] EWCA Civ 173 at [73] per Vos LJ and *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch)

at [38] per Hildyard J. In *Deutsche Bank AG v Sebastian Holdings Inc* [2022] EWHC 3536 (Comm) at [77] Cockerill J summarised the cases and formulated the test as follows:

> "Would such a person, having regard to the background against which the committal application notice is launched, be in any doubt as to the substance of the breaches alleged?"

This formulation of the test was accepted by both parties.

87. In the present case the form of committal application was as follows. It followed Form N600. This included a box at paragraph 12, for which the rubric is:

> "Summary of facts alleged to constitute the contempt (set these out very briefly in chronological order in numbered points)"

The Claimants filled this in with a cross-reference to Particulars of Contempt annexed. Those Particulars set out the alleged contempts under 7 breaches. Each breach identified the relevant provisions of the Injunction said to have been breached, and how Mr Hussain was said to have breached them. I can give as an example Count 2, which was as follows:

> "**BREACH TWO:** Mr Hussain breached paragraphs 14(2), 14(3), 14(13)(b) and/or 14(14)(a) of the Injunction:
>
> (1) by holding out persons other than the true Directors of the Issuers as being directors of the Issuers (paragraph 14(2));
>
> (2) by holding out (or causing, procuring or permitting to be held out) various persons other than Target, BNY, S&S or the Directors, as having authority to act on behalf of the Issuers (paragraph 14(3));
>
> (3) by purporting to terminate or to have terminated (or by causing, procuring or permitting other persons to terminate or to have terminated) the appointment of the Directors of the Issuers (paragraph 14(13)(b)); and/or
>
> (4) by purporting to have appointed (or by causing, procuring or permitting others to purport to appoint or to have appointed) persons other than the true Directors as directors of the Issuers (paragraph 14(14)(a)),
>
> specifically by:
>
> (1) producing or sending the following letters, or causing, procuring or permitting another person to produce or send the following letters; or
>
> (2) producing or issuing at Court the following Claim Forms, or causing, procuring or permitting another person to produce the Claim Forms or issue them at Court,
>
> with each occasion amounting to a separate breach of each of paragraphs 14(2), 14(3), 14(13)(b) and/or 14(14)(a) of the Injunction:"

There then followed a table listing a series of documents with their dates, descriptions and reference. The first document for example is listed as follows:

> "9 April 2021 Letter from Kipling to Barclays [ref]".

88. Mr Counsell's submission was that this was not enough. The reference in sub-paragraph (1) to holding out "persons other than the true Directors … as being directors" did not tell Mr Hussain who he was supposed to have so held out. Mr Counsell said that the particulars should have set out the names of those concerned. He pointed to the fact that this could have been done: in closing the Claimants produced a "Table of Breaches" which identified each and every letter and how it constituted a breach. Thus for example the letter of 9 April 2021 was said to be a breach of paragraph 14(3) of the Injunction by holding out someone other than Target "namely Mr Kipling and Mr Artemiou" as having authority to act on behalf of the Issuers.

89. That was the main point made by Mr Counsell and the only one which he developed orally. I do not think this complaint is made out. As Ms Dilnot said, the requirement in CPR r 81.4(2)(h) to set out "a *brief summary* of the facts alleged to constitute the contempt" does not require a fully particularised pleading (cf Form N600 which refers to setting out the facts "*very briefly*"). It is more akin to a count on an indictment. It must leave the defendant in no doubt as to the substance of the breaches alleged, but it does not need to do more than that. Here the substance of the breaches alleged was that Mr Hussain had been responsible for producing or sending (or causing, procuring or permitting someone else to produce or send) the various letters and other documents itemised. In relation to the 9 April letter, for example, what was being said was that Mr Hussain was responsible for that letter. That was the gravamen of the charge, and was what he was supposed to have done. I do not think he was left in any real doubt what he was accused of. There was no doubt the letters had been sent; there was no doubt what they said; what was in issue, and what Mr Hussain was charged with, was whether he was responsible for them.

90. In reply Mr Counsell submitted that a useful test for whether the charges had been adequately particularised was whether Mr Hussain could sensibly have admitted them, in whole or in part, and he could not have done that because there was no allegation of who was supposed to have been held out as a director and the like. I do not think it is necessary to decide if Mr Counsell's test is indeed a useful one, but assuming it is, I do not see the difficulty. Mr Hussain could certainly have admitted writing and sending, or procuring or causing others to write and send, any or all of the letters and other documents which were referred to one by one in each of the counts. That would have been an admission of the factual basis of the charge. He could also have gone further and accepted that each such letter did hold out someone other than those named in the Injunction (the lawfully appointed directors of the Issuers and the like) – that could have been done, whether or not such other persons were named. Mr Counsell's test to my mind in fact illustrates that Mr Hussain *was* told the substance of the charges against him.

91. Moreover, it is noticeable, as Ms Dilnot said, that no submission was made to Miles J during the hearing that the particulars were inadequate, and quite apart from anything else, it is difficult to complain that a judge has failed to strike out a committal application when he was never asked to. No doubt the Court has a jurisdiction to do this of its own motion, but in general – and particularly when parties are represented by

competent counsel – judges understandably deal with the points they are asked to deal with rather than hunt around for others. And even in an appeal against a committal, which can be pursued as of right, there is recent authority of this Court that it is not open to the appellant to raise new matters on appeal which could and should have been taken below, and that it may be an abuse of process to do so: *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671 at [29] per Coulson LJ, *Farrar & Co v Meyer* at [2022] EWCA Civ 706 at [40] per Males LJ. Mr Counsell pointed out that he was only instructed at a very late stage and had a number of other matters to deal with but I am not sure this is an answer. I think it likely that this by itself would have justified rejecting this ground of appeal, although I do not need to resolve the point as I have in fact considered and rejected this ground on its merits.

92. Mr Counsell made some other points in writing. He said that Miles J had required the Claimants to amend the particulars during the hearing, which illustrated how unsatisfactory they were. What actually happened is that shortly before the hearing the Claimants decided to drop any reliance on Mr Hussain "permitting" others to do things. This had always been an alternative to their primary case that Mr Hussain had done those things himself or caused or procured others to do them; and the Claimants accepted that it was unnecessary (as if their primary case succeeded they did not need it, and if their primary case failed they were unlikely to succeed on it). In addition some of the other particulars were repetitious. In the course of the hearing Miles J said that he thought it would be helpful to produce another version of the particulars where the allegations of "permitting", and anything else not relied on, were crossed out; and that was done. No new allegation was added, no change was made to the allegations that survived, and no further particulars were given. In those circumstances the request from Miles J for an amended version cannot sensibly be regarded as lending any support to the suggestion that the original version was inadequate; it was simply an exercise in decluttering.

93. As to the Table of Breaches, this was produced by the Claimants along with their closing submissions as an aid to Miles J in writing his judgment. It is the sort of document that in an intricate case counsel often produce to assist the judge. A judgment of course tends to be much more detailed than "a brief summary of the facts alleged to constitute the contempt" which is all that is required by CPR r 81.4(2)(h). I do not think the mere fact that the Claimants could (as the Table of Breaches shows) have produced a much more detailed account means that they were obliged to. Indeed too much detail can tend to obscure rather than elucidate and I do not think we would be doing defendants any favours if we insisted on lengthy particulars. The purpose of the brief summary of facts required by CPR r 81.4(2)(h) is to give the defendant a clear statement of the counts that he faces and leave him in no doubt as to the substance of what he is alleged to have done (or not done). It is not to set out all the supporting material, which will be found in the affidavit(s) or affirmation(s) required by CPR r 81.4(1).

94. Those were the reasons why I agreed that the appeal on this ground should be dismissed.

Liability Appeal – (3) Inferences

95. The third ground of appeal in the Liability Appeal is that Miles J erred in inferring guilt from facts which were equally consistent with conclusions other than that the contempt had been committed; that the inferences he drew were not ones that any reasonable judge could have come to; and that he was wrong to conclude that Mr Hussain's silence

could only sensibly be attributed to his having no answer, the Claimants having failed to establish a case to answer.

96. There was again no dispute as to the legal principles applicable to Miles J's findings of fact. They were summarised by him in the Liability Judgment at [37]-[42] and Mr Counsell did not criticise this summary. In those circumstances I need not repeat it all, but just draw attention to the points specifically identified by Mr Counsell. These were that:

(1) Contempt has to be established to the criminal standard of proof: *re L-W (Children)* [2010] REWCA Civ 1253 at [34] per Munby LJ.

(2) As in criminal cases, inferences can be drawn but only where the jury (or in this case the judge) is able to exclude all realistic possibilities consistent with the defendant's innocence: *R v Masih* [2015] EWCA Crim 477 at [3] per Pitchford LJ.

(3) Where the evidence relied on is entirely circumstantial the Court must be satisfied that the facts are inconsistent with any conclusion other than that the contempt has been committed: *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 at [146] per Christopher Clarke LJ.

(4) Where a number of contempts are charged it is not right to consider individual heads of contempt in isolation: they are details on a broad canvas, and the individual details of the canvas should be informed by the overall picture, although each head of contempt must still be proved beyond reasonable doubt: *Gulf Azov Shipping Co Ltd v Chief Idisi* [2001] EWCA Civ 21 at [18] per Lord Phillips MR.

(5) If after considering the evidence the Court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with contempt, the claimants fail: *Daltel v Makki* [2005] EWHC 749 (Ch) at [30] per David Richards J, *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm) at [8] per Teare J.

97. None of this was in dispute. Ms Dilnot drew our attention to one other point on circumstantial evidence that emerges from the authorities. I can take it from a passage cited by Miles J himself (at [40]), namely *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411 per Rix LJ at [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." "

98. We did receive some submissions on the nature of an appeal against a factual finding of this type. It was not disputed that proceedings on a contempt application such as this are civil proceedings. That means that the ordinary provisions of CPR Part 52 apply to appeals, including CPR r 52.21(1) which provides that every appeal is limited to a review of the decision of the lower court not a re-hearing unless a practice direction makes different provision or the Court considers that it would be in the interests of justice to hold a re-hearing. It was not suggested that we should hold a re-hearing. On such an appeal the question for the appeal court is whether the lower court was wrong (CPR r 52.21(3)(a)). Where an appeal is a pure factual appeal, there are numerous recent statements of the Supreme Court and this Court as to the very limited circumstances in which an appellate court can properly interfere with a factual finding.

99. Mr Counsell expressly accepted that the same applies in an appeal against a finding of contempt. He drew our attention to two matters however: first, the requisite standard is that of proof beyond reasonable doubt, and second that there was here no oral evidence. Both these are true but I do not think they affect the principle. So far as there being no oral evidence is concerned, the limitations on the appellate court's ability to disturb findings of fact are not based solely on the advantage that a trial judge has of assessing witnesses who give oral evidence (although if there is oral evidence this may be an added reason). So far as the standard of proof is concerned, this means that the question is whether Miles J was "wrong" to conclude that the case had been established beyond reasonable doubt. But in considering whether he was "wrong" in that conclusion, I think the same applies as in any other factual appeal, namely that the appellant must point either to there being no evidence that would support the conclusion, or to some identifiable flaw in his assessment such as a gap in logic, a lack of consistency or a failure to take account of some factor which materially undermines the cogency of his conclusion. What cannot be done in practice is to invite the appellate court to review all the evidence below with a view to substituting its own view of the facts. Duplicating the role of the trial judge is not the function of the appellate court, and cannot be done: *FAGE (UK) Ltd v Chobani (UK) Ltd* [2014] EWCA Civ 5 at [114] per Lewison LJ.

100. The combination of the fact that this was a circumstantial case (where Miles J's conclusions were based on evidence which works cumulatively (by what Lord Simon

characterised as geometric progression)) and the fact that it is not possible to ask the appellate court to duplicate that exercise makes this ground of appeal very difficult to pursue. It is not suggested that Miles J misdirected himself in law. It is not suggested that there is some irrationality or illogicality in his analysis. What this ground of appeal really amounts to is a challenge to his conclusion that the cumulative impact of all the evidence excluded any other realistic possibility. But as that formulation shows that cannot really be done without looking at *all* the evidence, and as I have already said, that is not something that it is possible for the appellate court to do. A similar situation arose in *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411 where a challenge was made to a judge's factual conclusions in a case of contempt. At [49] Rix LJ said that:

> "However, especially in a case such as this, where this court is at such a disadvantage in comparison with the trial judge, who not only heard the oral witnesses, but had so long to consider the material before him over the course of a 15-day trial and against the background of his huge and unrivalled experience in this litigation over many years, the appellant needs to be able to point to at least some substantial error of law or reasoning, or of factual misunderstanding, in order to open the gate to an appeal: and to do so, whether the test is the normal test on a civil appeal, which is that the judge is wrong, or the test on a criminal appeal of whether a conviction, here the finding of contempt, is unsafe."

The present is not a case where there were oral witnesses, but I have already said that that is not determinative. In the present case I agree that what needs to be shown is some substantial error of law or reasoning or factual misunderstanding.

101. I will say straightaway that I am not persuaded that any such error in Miles J's reasoning has been shown, and that this ground of appeal should be dismissed. Indeed Mr Counsell did not really attempt to show some pervasive flaw in his analysis. What he sought to do was pick up the passage towards the end of Miles J's judgment (at [300] to [309]) where he summarised the ten elements or strands of the history which seemed to him most salient. Mr Counsell took each strand in turn and suggested that there were other reasonable possibilities that could not be eliminated. This however is in itself an unsatisfactory exercise. Miles J himself said (at [299]) that he reached his conclusion in the light of the compelling and overpowering cumulative weight of the evidence, and that there were dangers involved in emphasising particular parts of it. His consideration of the evidence took him from [80] to [291] and is far more detailed and compelling than the brief summary of the ten strands which he adds at the end. Again at [310] he says that taking the ten features cumulatively "and considering the broader canvas" he considered that there was an overwhelming case that Mr Hussain was directly involved in all of the steps taken in the name of Mr Artemiou or Kipling that were complained of by the Claimants. That means that it is not sufficient to suggest that some other explanation might be available for this strand of the evidence or that strand taken in isolation. What is required is something that undermines the cumulative weight of all the evidence. I do not think that Mr Counsell came anywhere close to identifying any such flaw.

102. That is sufficient to justify dismissing this ground of appeal. But conscious as I am of the serious nature of the findings against Mr Hussain, I have subjected Mr Counsell's individual points to careful scrutiny. I do not find any of them sufficiently cogent to

persuade me that Miles J erred in his overall conclusion. I do not intend to set them all out in detail, but I will briefly note the ten strands.

103. The first was that there were very clear resemblances of presentation, format and stylistic quirks between documents in the name of others and documents which were in Mr Hussain's own name. One example will suffice. At [186] to [190] Miles J compared an application for a private prosecution that had admittedly been made in March 2021 by Mr Hussain with another application made (ostensibly) by Kipling. This details many idiosyncratic similarities between the two documents including the use of the phrase "in the alternate" (as opposed to the more normal "in the alternative") and an identical grammatical error ("the allegation … are substantially true"). Miles J held that they had been drafted by the same person or at least that one had been used as a template for the other, something which called for an explanation. But Mr Hussain had not provided any such explanation. Mr Counsell said that if Miles J had admitted Mr Artemiou's second witness statement that would have given an explanation, namely that there was a legal team which had assisted both Mr Hussain and others. But leaving aside the fact that Miles J quite properly refused to admit this evidence, the similarities were so marked and so extensive that this explanation was itself highly implausible and raised more questions than it answered.

104. The second strand was that Mr Artemiou did not have the necessary expertise to produce the documents but Mr Hussain did. Mr Counsell criticised Miles J for finding that Mr Hussain had the necessary expertise. But he had many examples of documents in Mr Hussain's own name which demonstrated this, and he certainly also had evidence that Mr Artemiou had no relevant expertise.

105. The third strand was that the steps taken in 2021 were very similar to those taken by Mr Hussain in 2020 against the Claimants (and again in 2021 in relation to another structure called Clavis). Mr Counsell said that this was not a reliable basis for inferring that Mr Hussain was behind the 2021 steps; none of them was unique or something that other investors might not have done themselves. That I think seriously underplays the cogency of this point. The idea that some other investor would independently come up with the same plan as Mr Hussain had, a plan that was legally absurd but dangerously close to being effective, is one that Miles J was entitled to regard as not a realistic possibility.

106. The fourth strand was indeed the very fact that the steps taken were legally spurious and misguided. Mr Counsell said that that was an inadequate basis on which to draw the inference that Mr Hussain was behind everything. But what Miles J inferred was that the various steps were the product of a single mind, and that there was no other plausible candidate than Mr Hussain.

107. The fifth and sixth strands were that there were other striking resemblances between the events of 2021 of which the Claimants complained and those of 2020 and in relation to Clavis, including the use, ostensibly by Mr Artemiou, of the same Marshall Islands address as Mr Hussain, and the use of the same shared office accommodation address for Kipling and Mr Hussain. Miles J regarded these as showing that Mr Artemiou and Mr Hussain were not acting independently. Mr Counsell said that there had been no inquiry whether the Marshall Islands address was unusual. That I think again underplays the point Miles J was making. The idea that those behind the 2021 steps might have used the same address as Mr Hussain by pure coincidence might be a

possible explanation if it had happened once; when there are repeated similarities, the theory that this is all just a coincidence becomes increasingly unrealistic.

108. The seventh and eighth strands concerned Mr Hussain's use of e-mail, specifically the use of an address similar to that of Mr Artemiou (which Miles J again said could not be a coincidence) and the fact that he had an automatic link to e-mails sent to Mr Artemiou. Mr Counsell said that if he had had Mr Artemiou's second witness statement he would have found a denial of the first point, and on the second point there was no expert evidence. Neither point seems to me to undermine the force of Miles J's conclusions.

109. The ninth strand concerned evidence that many e-mails ostensibly sent by Mr Artemiou were sent from Preston where there was ample evidence that Mr Hussain was at the time while there was nothing to link Mr Artemiou with Preston. Mr Counsell again referred to Mr Artemiou's second witness statement which said that he had family in Preston and had frequently been there. But this evidence had not been admitted and without it there was indeed nothing to connect Mr Artemiou with Preston. It is just the sort of point that illustrates why Miles J directed Mr Hussain's evidence to be filed by November 2021. If that had been done the Claimants would have had time to prepare cross-examination on the point.

110. The tenth strand was that activity ceased when Mr Hussain was in prison and started again within weeks of his release. Mr Counsell said that there could be other explanations. This is a good illustration of a point that no doubt by itself could not prove beyond reasonable doubt that it was Mr Hussain behind the steps taken in 2021, but when added to everything else could strengthen the case.

111. Having examined the points raised by Mr Counsell on each of the ten strands I am firmly convinced that not only was Miles J entitled to reach the factual findings that he did but that he was entirely right to do so.

112. The remaining point taken by Mr Counsell was that Miles J was wrong to conclude that Mr Hussain's silence could only sensibly be attributed to his having no answer, the Claimants having failed to establish a case sufficiently compelling to call for an answer. I do not think there is anything in this point. The Claimants had in my view plainly done enough to establish a sufficient case to answer. Mr Hussain chose not to give evidence. He was not obliged to, but the necessary consequence is that Miles J did not have the benefit of any explanation from him. What Miles J said was (at [311]):

> "The features highlighted above clearly call for an explanation. Mr Hussain has, without good reason, chosen not to attend the trial. He has also chosen not to give evidence. It is his right to remain silent. But I infer that he has chosen not to give evidence because he recognises that he is unable to give exonerating evidence, and that cross-examination would further damage his case. This supports and strengthens the conclusions I have already stated."

In my judgment that was a view Miles J was entitled to come to. In any event, as he says, it only strengthened the conclusion he had already come to on the other evidence.

113. Those were the reasons why I agreed that this ground of appeal too, and the Liability Appeal as a whole, should be dismissed.

Lord Justice Stuart-Smith:

114. With one slight gloss I agree entirely with the judgments of Nugee and Arnold LJJ. The slight gloss is that, although I agree with Arnold LJ's questioning of Lord Simon's use of the term "geometric progression", I would not wish that to detract from the observation by Miles J that, when considering the effect of circumstantial evidence, the sum is often greater than the parts. To my mind, the present case provides a perfect illustration of that truth, for the reasons explained by Nugee LJ.

Lord Justice Arnold:

115. I agree with the reasons given by Nugee LJ for refusing Mr Hussain's applications for permission to appeal (the Interlocutory Appeal) and for dismissing his appeal against the findings of contempt of court (the Liability Appeal).

116. Although I entirely agree with Nugee LJ's analysis in paragraphs 95-113 of his judgment of Mr Hussain's third ground of appeal against the Liability Judgment, I would deprecate the use in this context of the expression "geometrical [or, more correctly, geometric] progression", a usage which derives from the speech of Lord Simon of Glaisdale in *R v Kilbourne* [1973] AC 729 at 758. A geometric progression is a sequence of non-zero numbers in which each term after the first is found by multiplying the previous one by a fixed, non-zero number called the common ratio. For example, the sequence 2, 6, 18, 54, ... is a geometric progression with common ratio 3. In my view this mathematical concept is not merely inapposite as a description of the cumulative effect of a number of different strands of circumstantial evidence, but positively distracting and unhelpful.

117. In this judgment I shall address Mr Hussain's appeal against the sanction imposed by Miles J on Mr Hussain of 24 months' imprisonment (the Sentencing Appeal). The judge imposed that sanction for the reasons he gave in his judgment dated 11 March 2022 [2022] EWHC 661 (Ch) (the Sentencing Judgment).

118. In *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 the Supreme Court stated at [44]:

> "General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57–71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:
>
> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.

3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.

4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.

5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children o[r] vulnerable adults in their care.

6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension."

119. In addition to *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392, [2019] 1 WLR 3833 and certain other authorities, the judge cited the summary of the relevant principles set out by Leech J in *Solicitors Regulation Authority Ltd v Khan* [2022] EWHC 45 (Ch) at [52], which includes the following additional points:

"(1) There are no formal sentencing guidelines for sentence/sanction in committal proceedings.

(2) Sentences/sanctions are fact specific.

(3) The Court should bear in mind the desirability of keeping offenders and, in particular, first-time offenders, out of prison: see *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35 and *Otkritie International Investment Management Ltd v Gersamia* [2015] EWHC 821 (Comm).

…

(6) Committal to prison may serve two distinct purposes: (a) punishment of past contempt and (b) securing compliance: see *Lightfoot v Lightfoot* [1989] 1 FLR 414 at 414-417 (Lord Donaldson MR).

(7) It is good practice, for the Court's sentence to include elements of both purposes (punishment and compliance) 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: see *JSC Bank v Soldochenko (No 2)* [2012] 1 WLR 350.

(8) Committal may be suspended: see CPR Part 81.9(2) . Suspension may be appropriate: (a) as a first step with a view to securing compliance with the

Court's orders: see *Hale v Tanner* [2000] 1 WLR 2377 at 238 ; and (b) in view of cogent personal mitigation: see *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35.

…"

120. The judge assessed the seriousness of the contempts by reference to a checklist of factors most of which derives ultimately from the judgment of Lawrence Collins J in the case of *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch) together with an additional point added by Popplewell J in *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Comm):

"(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;

(h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

121. Before turning to the checklist the judge made the following general observations (at [9]-[16]):

i) Mr Hussain had committed repeated and numerous breaches of the Injunction.

ii) Mr Hussain started committing the contempts only a couple of weeks after being released from imprisonment for an earlier, unrelated contempt of court.

iii) The contempts were deliberate, premeditated and contumacious.

iv) Mr Hussain had tried to conceal what he was doing by acting through others.

v) The breaches of the order were cynical.

vi) The breaches included causing or procuring four sets of proceedings to be issued in the name of the Issuers without their authority. This not merely contravened the Injunction but also interfered with the proper administration of justice more broadly.

vii) Mr Hussain was an intelligent man, a seasoned litigant, and someone who understood from his previous experience that a breach of the injunction could result in imprisonment.

viii) The breaches involved the unlawful harassment of third parties and not just the Issuers.

122. The judge's assessment of the seriousness of the breaches (at [18]-[35]) may be summarised as follows:

i) The breaches had caused serious prejudice to the Issuers. They had caused disruption and nuisance. They had also been put to enormous costs which had not been recovered and were unlikely to be recovered and would therefore fall on the innocent noteholders. These consequences meant that the committal application had to be made.

ii) There was no evidence that Mr Hussain had acted under pressure.

iii) The breaches were deliberate, knowing and contumacious.

iv) There was an extremely high degree of culpability, particularly given that this was a repeated, clandestine and carefully planned series of steps.

v) Mr Hussain had not breached the order due to the conduct of others, on the contrary he had used others as a cloak for his own activities.

vi) Mr Hussain had appreciated the risk of imprisonment.

vii) Mr Hussain had not cooperated, on the contrary he had seriously disrupted the trial of the committal application and made it much longer than it would otherwise have been. Even since being found to have been in contempt, Mr Hussain had chosen to breach the judge's order to attend the sanction hearing.

viii) There had been no acceptance of responsibility, apology, remorse or reasonable excuse. Mr Hussain appeared to think that he was above the law or beyond its reach.

ix) Mr Hussain had provided no personal mitigation. Although his counsel had relied upon what had been said about Mr Hussain's health by the judge when sentencing Mr Hussain for the previous contempt, Mr Hussain had filed no medical evidence for the instant hearing.

123. The judge's reasoning as to the appropriate sanction (at [38]-[44]) may be summarised as follows:

i) Given the extreme seriousness of the breaches a fine would not be appropriate, only a custodial sentence would do.

ii) The shortest sentence required to meet the circumstances of the case was 24 months.

iii) A suspended sentence would not do justice because only an immediate custodial sentence would properly mark the seriousness of the contempts which had been established, the absence of any significant mitigation, the absence of any likelihood that a suspended sentence would alter Mr Hussain's behaviour and the difficulty for the Issuers of proving breach of any condition given that Mr Hussain was likely to remain in the shadows.

124. The correct approach to an appeal against a sentence for contempt of court is that stated in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524 in which Hamblen and Holroyde LJJ said:

> "37. In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge. …
>
> 38. It follows from that approach that there will be few cases in which a contemnor will be able successfully to challenge a sentence as being excessive. If however this court is satisfied the sentence was 'wrong' on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision."

125. As they went on to state at [47], "it is the sentence actually imposed which must be outside the range reasonably open to the judge if an appeal is to succeed," rather than, for example, any starting point from which the judge may have been working.

126. This test is essentially the same test as the "manifestly excessive" test applied by the Court of Appeal Criminal Division to criminal sentences: see *Hussain v Vaswani* [2020] EWCA Civ 1216 at [50] and *Solicitors Regulation Authority Ltd v Khan* [2022] EWCA Civ 287 at [26].

127. Mr Hussain appealed against the sentence imposed by the judge on three grounds. The first ground was that the judge had erred in principle by not specifying a part of the total term of imprisonment which represented a coercive element which Mr Hussain could seek to have remitted if he purged his contempt, and thus the whole of the term was punitive.

128. I do not accept that the judge made any error in this respect. As noted above, committal for imprisonment may serve the purpose of securing compliance with the court's order as well as the purpose of punishing the contemnor for past breaches. Lord Bingham MR explained in *Lightfoot v Lightfoot* [1989] 1 FLR 414 at 417 that "a coercive sentence" may be imposed "where the contemnor had been ordered to do something and is refusing to do it". In such a case, "if the contemnor is aggrieved he had a remedy in his own hands – he can seek his immediate release by ceasing his defiance, complying with the order and thereby purging his contempt". Similarly, Hamblen and Holroyde LJJ stated in *FCA v McKendrick* at [41]:

> "… it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. Where that is the case, that element of the sentence is in principle one which may be remitted if the contemnor subsequently purges his contempt by complying with the order. In the present case, however, no coercive order was necessary or appropriate, and the judge was accordingly concerned only with the appropriate sentence by way of punishment for the past breaches of the [orders]."

129. Where a sentence of imprisonment is designed both to secure compliance with the court's order and to punish the contemnor for past breaches, it is good practice for the sentencing judge to specify a punitive element of the term and a coercive element of the term so that both the contemnor and the court hearing any subsequent application for remission know what element may appropriately be remitted if there is belated compliance, although this is not binding on the court hearing that application: see *JSC BTA Bank v Solodchenko (No 2)* [2011] EWCA Civ 1241, [2012] 1 WLR 350 at [56] and [69] (Jackson LJ). As counsel for Mr Hussain rightly accepted, however, this is not a mandatory requirement.

130. Turning to the present case, the judge sentenced Mr Hussain for his past breaches of the order. Since the injunction was prohibitory rather than mandatory, the sentence was not designed to secure belated compliance with the order. Any future breaches of the order by Mr Hussain would constitute fresh contempts exposing him to further penalties, but that is a different point. Furthermore, as was common ground between counsel, the fact that the judge did not specify a coercive element of the sentence would not prevent Mr Hussain from applying to the court in future for remission of part of the term of imprisonment on the grounds of belated acceptance of responsibility, remorse and apology.

131. Mr Hussain's second ground of appeal was that the Issuers should not have suggested to the judge that the maximum term of imprisonment of 24 months should be imposed, and that the judge had been wrongly influenced by this. Counsel for Mr Hussain relied in support of this ground upon the statement of Nicklin J in *Oliver v Shaikh* [2020] EWHC 2658 (QB) at [16] that "[s]imilar to the role of the prosecution in a criminal court where the court is considering sentence, the party seeking punishment of the contemnor does not urge the imposition of any particular penalty on the contemnor". Since then, however, this Court has held that applicants for committal are not under a duty to act wholly impartially, but on the contrary have a legitimate private interest in the outcome of the application: see *Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 2 All ER 995 at [132]-[138] (Carr LJ). Furthermore, applicants may appeal on the ground that the sentence imposed was unduly lenient: see e.g. *AAA v CCC* [2022] EWCA Civ 479. It follows, in my judgment, that there was nothing improper in the Issuers suggesting to the judge that the maximum sentence be imposed.

132. Mr Hussain's third ground of appeal was that the judge wrongly assessed the severity of the breaches. This is a difficult ground of appeal to sustain for the reasons explained in *FCA v McKendrick*. Counsel for Mr Hussain advanced a number of arguments in support of this ground, but none came close to identifying an error which would justify the intervention of this Court. First, he submitted that the only harm suffered by the Issuers was the costs they had incurred, but this is incorrect for the reasons the judge explained. Moreover, it overlooks the harm to third parties and to the administration of

justice more broadly. Secondly, he submitted that the contempts were not the worst that can be imagined. That may be, but the judge was entitled to regard them as extremely serious. As was made clear in *FCA v McKendrick* at [40], the maximum sentence of 24 months is not reserved for the very worst contempts. Thirdly, he submitted that the judge had wrongly made no allowance for Covid-19, contrary to the guidance given in *R v Manning* [2020] EWCA Crim 592, [2020] 4 WLR 77. This is a hopeless submission given (i) the advances in vaccinations against, and treatments for, Covid-19, since 2020, (ii) the absence of any medical evidence from Mr Hussain (including any evidence as to his vaccination status) and (iii) the fact that Mr Hussain had not then (and still has not) surrendered to the jurisdiction of the court, but was (and remains) a fugitive from justice. Fourthly, he suggested that the sentence ought to have been suspended, but again this is a hopeless submission for the reasons given by the judge.