CL-2019-000035

Neutral Citation Number: [2023] EWHC 135 (Comm)

Case No: CL-2019-000035

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

AND IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF ARBITRATION

7 Rolls Building
Fetter Lane
London,
EC4A 1NL

26 January 2023

Before :

MRS JUSTICE COCKERILL

- -

Between :

ADM INTERNATIONAL SARL **Claimant**
(a company incorporated in Switzerland)

- and –

GRAIN HOUSE INTERNATIONAL S.A. **Defendant**
(FORMERLY KNOWN AS COMPAGNIE
AGRICOLE DE COMMERCIALISATION ET DE
CONDITIONNEMENT
DES CEREALES ET LEGUMINEUSES S.A.)
(a company incorporated in Morocco)

AND IN AN APPLICATION BETWEEN

ADM INTERNATIONAL SARL

Claimant

-and-

(1) GRAIN HOUSE INTERNATIONAL S.A. (FORMERLY KNOWN AS COMPAGNIE AGRICOLE DE COMMERCIALISATION ET DE CONDITIONNEMENT DES CEREALES ET LEGUMINEUSES S.A.)

(2) ELHACHMI BOUTGUERAY

(3) BRAHIM BOUTGUERAY

Defendants

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Lawrence Akka KC and Patrick Dunn-Walsh (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
Robert Moxon-Browne KC and George Hilton (instructed by **Sterling Stamp Law**) for the **Defendants**

Hearing dates: 16 January 2023

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This judgment was handed down in Court 1 by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 26 January 2023 at 10:30am.

Mrs Justice Cockerill:

INTRODUCTION

1. This is an application by the Claimant ("ADM") to commit the Defendants for contempt of court. There is a considerable procedural history, which has dictated the shape which the application took and which has meant that the application before me has taken a rather different shape to the application as lodged.

FACTUAL BACKGROUND

2. ADM is a Swiss company which buys, processes and sells agricultural products. It is a subsidiary of the Archer Daniels Midland Company, an American Company which is listed in the Fortune 500.

3. Copragri ("GHI") is a Moroccan company which claims to be a leader in the import of cereals in Morocco.

4. ADM's application arises out of GHI's failure to pay a GAFTA Award dated July 2018 in ADM's favour ("the Award") awarding ADM the sum of USD 3,423,711.14 plus interest and EUR 152,058.07 plus interest together with £7,865.00 in arbitration fees and expenses.

5. The background to the Award is that in 2014-2016 ADM had entered into several contracts with GHI for the sale of various agricultural commodities ("the Sale Agreements"). In accordance with the Sale Agreements, ADM delivered the goods and GHI paid the purchase price.

6. During its performance of the Sale Agreements, ADM incurred certain costs which the parties had agreed, would be reimbursed by GHI. However, GHI failed to pay those sums when they were due.

7. On 19 September 2017 the parties orally agreed to an "Acknowledgement and Instalment Agreement" between ADM and GHI.

8. This was subsequently confirmed in writing and signed by the parties on 26 October 2017 and 1 November 2017 ("The Instalment Agreement"). The Instalment Agreement sets out the undisputed amounts of US$ 3,391,809.63 and EUR 185,320.35 that GHI owed ADM at the time, details of the accrued interest and a payment schedule. The Instalment Agreement is governed by English law and contains a clause providing for disputes to be resolved through GAFTA Arbitration.

9. On 19 October 2017, GHI paid the first instalment to ADM under the Instalment Agreement payment schedule. GHI then failed to make any further payments.

10. On 8 December 2017, the GAFTA arbitration was commenced against GHI for breach of the Instalment Agreement under the applicable GAFTA Arbitration rules No.125. GHI refused to participate.

11. On 17 July 2018, the GAFTA Tribunal published the Award against GHI for US$3,423,711.14 plus interest and EUR 152,058.07 plus interest, together with £7,865.00 in arbitration fees and expenses. On the same date a copy of the Award was sent to GHI by email and courier at its Morocco address. There is a 30 day period under the GAFTA Arbitration Rules for appealing to the GAFTA Board of Appeal. No appeal was made, nor had an application been made to the Court to challenge the Award. GHI was subsequently posted as a defaulter by GAFTA.

12. On 23 January 2019, the Casablanca Commercial Court gave ADM permission to enforce the Award in Morocco. That Order included an order for provisional enforcement notwithstanding any appeal.

13. An order under s.66 Arbitration Act 1996 was made on 30 January 2019 before Mr Justice Bryan giving permission to enforce the Award against GHI as if it was an order or judgment of the court, and to serve the Claim Form and other documents out of the jurisdiction on GHI in Morocco.

14. At a hearing on 22 March 2019, Mr Justice Waksman granted an asset disclosure order requiring GHI to serve an affidavit disclosing details of its worldwide assets above certain financial values within 14 days of service of the order, as well as awarding costs assessed on a summary basis ("the ADO"). GHI did not attend the hearing.

15. At a without notice hearing on 5 June 2019, Mr Justice Teare granted ADM a worldwide freezing order ("the Teare WFO") against GHI's assets up to the sum of US$ 4 million. He gave permission for the order to be served out of the jurisdiction and by email to inter alia the email addresses of the Second and Third Defendants, who are (or were) Directors of the First Defendant.

16. On 21 June 2019, at the return date hearing, Mrs Justice Moulder granted ADM a final worldwide freezing order ("the Final WFO") on substantially the same terms as the Teare WFO. The Final WFO ordered that GHI pay costs assessed at £67,000. Again GHI did not attend the hearing and costs have not been paid.

17. In November 2019, ADM received correspondence from Sterling Stamp (the solicitors who are now on the record for all three Defendants), who said they were acting on behalf of GHI and attaching a "Statement of Case/Defence" document. In that document it was claimed (for the first time) that GHI was not served with the ADO.

18. ADM then applied to the court for an order striking out the Statement of Case/Defence and requiring GHI to file a CPR-compliant relevant application seeking any relief it considered it was entitled to in a procedurally correct manner. This application was served on Sterling Stamp by email on 2 December 2019 and by courier on 3 December 2019.

19. On 6 December 2019, I ordered GHI to pay costs of £44,000 and struck out the Statement of case/Defence/ of case document. Again, GHI did not attend the hearing. I also gave express permission to GHI to apply to discharge the Final WFO by a CPR and Commercial Court-compliant application by 20 January

2020, but no such application was made. Again costs for this hearing were not paid.

20. On 17 December 2019, the Casablanca Commercial Court cancelled the Moroccan enforcement order. ADM appealed to the Moroccan Court of Cassation and the Court of Appeal judgment was subsequently quashed.

21. On 17 August 2020, ADM issued its First Committal Application.

22. Mr Justice Butcher's Order of 23 October 2020 dispensed with the requirement for the ADO to be personally served, and granted permission for service out and by alternative means of the committal application.

23. On 12 February 2021,7 days before the hearing of the First Committal Application, GHI purported to comply with the ADO by an affidavit which Mr Elhachmi Boutgueray, sworn on 11 February 2021. To allow time to consider it, ADM agreed by consent order, on 19 February 2021, to adjourn the hearing. The hearing was eventually relisted to be heard on 14 May 2021.

24. To address the deficiencies in disclosure (in particular the fact that no addresses for properties had been given, no details of extent of GHI's interest, no source of legal funds stated, no details of credit facilities, etc), ADM issued a further disclosure application on 29 April 2021 (the "Further Disclosure Application").

25. On 7 May 2021, (a week before the hearing) GHI served two further affidavits by Mr Elhachmi Boutgueray (dated 21 and 26 April 2021). The parties agreed that the hearing could not proceed, but disagreed about terms of the order.

26. On 21 May 2021, a Directions hearing therefore took place. GHI were represented by Counsel. Mr Justice Calver formally ordered the adjournment of the First Committal Application with costs reserved, that it be dismissed unless relisted by 24 June 2021, and that the costs of the application be reserved. He also confirmed that ADM are not prevented from bringing fresh committal proceedings in due course. Mr Justice Calver ordered GHI to pay £10,000 costs of the hearing. Those costs remain unpaid.

27. On 10 June 2021 GHI served a further affidavit by Mr Elhachmi Boutgueray (dated 3 June 2021), in response to the Further Disclosure Application. It was deficient, because proper details of various credit facilities were still not provided, and the source of funds for legal expenses were still not identified. On 2 July 2021, I made the Further Disclosure Order ("FDO"). Again GHI were represented by Counsel. It was ordered that GHI disclose details of credit facilities and the source of legal funds and that they were to pay costs of £20,000. Those are still not paid**.**

28. On 13 August 2021, three weeks after the deadline that I set (and a week after an extension agreed by consent), GHI served a further affidavit by Mr Elhachmi Boutgueray (dated 12 August 2021). That information was again seen as deficient by ADM who raised queries in September. In particular ADM sought unredacted copies of the credit facilities, the copies which had been provided having been redacted to remove absolutely all material information.

29. On 12 November 2021 a response was provided. That response included unredacted copies of two of the three credit facilities – though not that from Société Générale. At the same time GHI said that it was preparing a claim to be brought in Morocco for "*compensation for all the losses sustained as a result of the Arbitration Award that was cancelled by the Casablanca Court of Appeal*.".

30. On 17 February 2022, the present committal and anti-suit application was issued. Ms Katie Pritchard provided her 7th Affidavit in support.

31. On 12 March 2022, Mr Adbellatif Oumary provided his Affidavit in response to the present application.

32. On 5 May 2022, yet further material was provided – in particular the unredacted Société Générale credit facility.

33. Also on 5 May 2022, Mr Justice Andrew Baker ordered that the hearing listed for half a day on 6 May 2022 be vacated. The hearing was then re-listed for 16-17 January 2023.

34. On 19 May 2022, the Morocco Court of Cassation ruled in ADM's favour, quashing the Court of Appeal's decision and ordering a rehearing.

THE LAW

35. The legal backdrop was not really in issue between the parties.

36. As is well known, all allegations of contempt, both civil and criminal, must be proved to the criminal standard; this standard applies even where the applicant seeks only a non-custodial penalty (i.e. a fine): e.g. *Sarayiah v Williams* [2018] EWHC 342 (QB) per Sir David Eady at [30] (sitting as a High Court Judge).

37. This standard is frequently cited as being "*beyond a reasonable doubt*". This is of course not the modern way of directing the criminal standard of proof in criminal cases. The current preferred direction is that the jury must be "*satisfied so that they are sure*" (Crown Court Compendium paragraph 5.2). This is in effect the same thing as the traditional "beyond reasonable doubt" (see *R v Ching* (1976) 63 Cr App Rep 7), but should probably be adopted also in contempt cases.

38. It is common ground that in order to establish that someone is factually in contempt of an order it is necessary to show to the criminal standard that:

    i) They knew of the terms of the order;

    ii) They acted (or failed to act) in a manner which involved a breach of the order; and

    iii) They knew of the facts which made their conduct a breach.

39. Knowledge that acts are a breach is not necessary. Rose LJ recently said in *Varma v Atkinson & Another* [2020] EWCA Civ 1602 at [54]:

> "once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach."

40. The authorities were well summarised in Mr Hilton's skeleton and I highlight only the key passages for the purposes of the contentious issues before me.

41. Specifically he placed emphasis on the caution with which the question should be approached, both generally and in terms of other possibilities. As to the first he cited *Re Clements* (1877) 46 L.J. Ch. where at 375 Sir George Jessel MR said:

> "It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges, to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject."

42. As to the latter he pointed to *Redwing Ltd v Redwing Forest Products Ltd* [1947] 64 RPC 67, at p71 where Jenkins J held:

> "… a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question".

43. Mr Hilton also drew attention to the possibility for an application to commit for contempt being an abuse of process and to the category of "technical breaches" by reference to the judgment of Marcus Smith J in *Absolute Living Developments Ltd v DS7 Ltd* [2018] EWHC 1717 (Ch) at [36]:

> "(2) Where the defendant – albeit in past breach of the order – has now complied with the order or has taken steps to regularise his breach (for instance, by seeking an extension of time for compliance, and apologising for the past non-compliance), that is a factor suggesting that contempt proceedings may not be necessary.
>
> (3) Whether that factor is determinative depends upon the seriousness of the breach. Seriousness has two aspects to it:
>
> (a) Deliberation. In [47] of *Sectorguard*, Briggs J. classified breaches of order into (i) serious, (ii) technical or (iii) involuntary. "Technical" breaches are breaches where the defendant's conduct was intentional and where he knew of all the facts which made that conduct a breach of the order, but

> where the defendant did not appreciate that his conduct did breach the order. "Involuntary" breaches are those cases where even this element of deliberation is absent. "Serious" or "contumelious" breaches are those going beyond the technical, generally because the defendant has deliberately breached the order."

THE CONTEMPT ALLEGATIONS

44. There are four contempt allegations which I will deal with in turn. However in the light of the history of the matter, the centre of gravity of the allegations relates to Ground 4: breach of the WFO, which interlinks with Ground 3: failure to declare encumbrances.

Knowledge of the terms of the orders

45. I can deal with this point first and globally. It was not seriously in issue that all three Defendants knew all of the terms of the FDO, the ADO and the WFO.

46. The WFO was served on the Second and Third Defendants via email, by way of alternative service on the First Defendant.

47. While the ADO and FDO did not contain specific provisions regarding service it is clear that the orders did reach the Defendants in that they responded to them as set out above, including by serving documents and evidence and by appearing at hearings represented by Mr Hilton and Sterling Stamp.

48. All the relevant orders were endorsed with Penal Notices addressed not just to the First Defendant but also to the Second and Third Defendants by name.

49. I now turn to whether in respect of each alleged contempt there was a breach of the terms of the order.

Grounds 1 and 2: Breaches of the FDO

<u>Failure to provide an unredacted copy of GHI's Société Générale credit facility</u>

50. ADM's first ground of contempt is that GHI "*impermissibly supplied, on 12 August 2021, redacted copies of the credit facilities ordered to be provided; and (ii) as of today's date, has failed entirely to provide an unredacted copy of its credit facility with Société Générale*".

51. Paragraph 2(i) of the FDO required that GHI provide "*[t]he terms of each credit facility, and shall provide copies of any relevant contractual or other documentation setting out those terms.*"

52. The material initially disclosed (three weeks late) was heavily redacted. The order did not provide or allow for redactions. It is not seriously in issue that this was a breach of the order (and to the extent it was I reject that suggestion).

53. These documents were of course provided. Two out of three were provided in November 2021; the remaining one was provided just before the Second Contempt Application was due to be heard.

54. While Mr Hilton tried to persuade me that in the circumstances there was no contempt and that the application was abusive, given the failure to provide the Société Générale Credit Facility in unredacted form until May 2022, this was not an argument which could really gain traction. There was a breach and a contempt, that was partially remedied in November 2021, but there remained an active contempt until well after the issuance of the Second Contempt Application.

55. However, given the fact that the facility was eventually provided in unredacted form the contempt is past and purged. The seriousness of that breach depends on whether I accept the explanation given by the Defendants which would place the contempt into the "technical" category in the light of the facts that Mr Oumary (GHI's legal officer) has explained that:

    i) "*By providing redacted copies of credit facilities, the Defendants did not intend to be in contempt of court, as a legal department, we were simply trying to protect the company's confidential information*."

    ii) Of the delay in providing the unredacted Société Générale facility: "*we requested the Credit Facility from Société Générale but we were not provided with it to the date of today; we will communicate to Claimant as soon as we receive it.*"

56. ADM contends that these responses are incredible and that there can be no reasonable doubt on the evidence that GHI deliberately withheld this document from ADM, in breach of the FDO, and only provided a copy immediately before (what was expected to be) the hearing of the committal application:

    i) GHI had legal advice at the time;

    ii) GHI has (and disclosed) a redacted version of the credit facility. It must therefore have had its own, unredacted, copy of the material (and indeed it must have a copy of its own credit facility documentation in any event, for commercial reasons); and

    iii) It is impossible that had GHI asked Société Générale for a copy of the credit facility, one would not have been provided in short order. No correspondence with Société General is exhibited by GHI.

57. Were this allegation of contempt standing alone I would by a very small margin (given the illogic of GHI's position and the lack of full explanation) conclude that I was not sure that the contempt was deliberate. I would as regards that Ground therefore concludes that any contempt was technical and historic and has since been purged. It would therefore attract no penalty save in costs of the committal proceedings.

Ground 2: Missing Bank Statements In Alleged Breach Of The FDO

58. Paragraph 2(ii) of the FDO ordered GHI to disclose "*Periodic Statements of account showing transactions affecting each facility since June 2019 onward*". GHI's disclosure of August 2021 omitted several months of bank statements that were required to be provided.

59. The second ground of contempt is particularised as follows:

> "… In breach of paragraph 2 of the Further ADO, the First Defendant's disclosure of Period Statements of account on 12 August 2021 omitted to provide the following Periodic Statements:
>
> (1) Periodic Statements for Arab Bank for the months April and May 2021
>
> (2) Periodic Statements for Banque Populaire for September and December 2019
>
> (3) Any statements, for any bank, in respect of August 2021".

60. In relation to category (1), these have now been provided on 4 May 2022. Mr Oumary's evidence maintains that this omission was made by mistake, that GHI has nothing to hide and that it was willing to provide copies of these statements to ADM. GHI provided Arab Bank statements under cover of the May 2022 letter referred to above (immediately before this application was due to be heard last year). ADM says that the excuse for the delay was unconvincing and that in any event GHI is in contempt because it did not provide the documents in time.

61. Again in relation to this part of this ground, I would (taken alone) not be inclined to conclude that the criminal standard for deliberation was surmounted, I would (just) accept that contempt here was technical as the documents were "*omitted by mistake*", and that contempt has now been purged.

62. In relation to category (2), Mr Oumary's position was that GHI was not obliged to provide these, but that in any event it was willing to do so. However, nothing was actually provided. It is also said, albeit in solicitors' correspondence and without any supporting documentation, that there were no movements on the Banque Populaire account, and "*hence no documents are available*". To similar (but not identical) effect Mr Hilton submits on one credible reading because the FDO sought statements "*showing transactions affecting each facility*" and there were no transactions affecting the Banque Populaire account in either September or December 2019 there was no obligation to disclose those statements.

63. The Claimants say that the second (and third) explanation(s) is inconsistent with Mr Oumary's offer to provide the statements and that the Court is entitled to disbelieve GHI.

64. Here the documents fall squarely within the ambit of the order. I do not accept that on any sensible reading of the order (which was plainly directed to "Periodic

Statements") that a statement with no transactions is not covered. It is not credible (certainly without better evidence and a more forthcoming explanation) that in months where there are no transactions Banque Populaire does not produce a statement at all. It follows that I am sure that GHI (at least) was in contempt. There continues to be no compliance.

65. In relation to this part of this ground, I would (if this ground were taken alone) not be inclined to conclude that the criminal standard for deliberation was surmounted, I would again (just) accept that the contempt here was technical as it is conceivable that a non-English speaker might take the view that nil returns were not necessary and the documents not disclosed are only two in number. This would, however, be a charitable view since the Defendants had English Law advice.

66. When one looks at this ground in the context of later conclusions the question of whether I can be sure of deliberation effectively shifts, as I explain later.

67. As to category (3), I am not attracted by the argument that there was a breach by failure to supply August statements.

Ground 3: Breach of the ADO by non-disclosure of encumbrances

68. Paragraph 1(c) of the ADO required GHI to disclose "*all other assets in Morocco exceeding US$75,000 in value, whether in its own name or not and whether solely or jointly owned, giving the value, location, and details of all such assets*".

69. The question is whether such disclosure was required. The Defendants say paragraph 1(c) of the ADO did not expressly require GHI to detail encumbrances of the sort listed at paragraphs 3(1) – (6) of the Particulars of Contempt over the Moroccan Property that it had disclosed. Accordingly, paragraph 1(c) was not breached by any failure to do so.

70. This is all about the meaning of "value". ADM submits that there can be no doubt that the reference to "value" in the order is a reference to **unencumbered value**. This is, it is said, obvious in view of the fact that the purpose of an asset disclosure order is to identify assets against which enforcement can be made, and for that purpose it is only unencumbered value that can be relevant: *Aspinall v Lim* [2019] EWHC 2379 (QB) [56] (Murray J). Although that case concerned the disclosure provisions of freezing injunctions, the same logic must apply to a free-standing disclosure order; both are concerned with identifying assets against which enforcement can be made. Reliance is also placed on *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 482 (Ch) at [36] to [38].

71. The Defendants say the analogy is a false one in that these references are considering the meaning of "value" in the context of the words "*up to the value*" in the standard form commercial freezing order which follows the template in Appendix 11 to the Commercial Court Guide. That is not the same context in which "value" appears at paragraph 1(c) of the ADO, which is obviously not a standard form commercial freezing order but rather bespoke wording that was described (or approved) by Waksman J.

72. The Defendants also submit that the use of "value" in the ADO can be contrasted with its use in paragraph 7 of the subsequent Freezing Orders of Teare J and Moulder J, which clearly state: "unencumbered value". It submits that the ADO (22/3/2019) significantly pre-dates (and was not ancillary to) those freezing orders (5/6/2019 Teare J; 21/6/2019 Moulder J) and so, unlike in *Aspinalls*, it is not appropriate that the use of "value" in the ADO should be construed by reference to the language used in orders which post-dated it.

73. Finally the Defendants submit that even assuming that the term "*unencumbered value*" is to be substituted in place of "value", it is still not clear and obvious that the ADO should be interpreted as obliging GHI to disclose a list of all encumbrances listed over its Moroccan Property.

74. On this, my view is that the clear meaning of the word "value" in context is "*unencumbered value*". While this is not a freezing order case the focus is identical – the identification of sums to satisfy a judgment. This is not a case where there are two properly arguable meanings. Indeed the terms of the freezing orders can only hinder rather than help the Defendants. If there were a distinction within a single order one might be forced to reach the conclusion that unencumbered value meant something different to value. So too if the freezing orders came first, as the concept of "*unencumbered value*" would already be in play. But the Order must be construed at the time it was made. The reason for it being made is to disclose where assets are to satisfy the judgment. There would be no point in that context knowing the locations of [worthless] assets with a [meaningless] value of US$4 million.

75. That being the case, there is really no scope for dispute that the order was not (and still has not been) complied with. Enquiries by CWA, ADM's local lawyers, revealed some 19 mortgages, preventative seizures, and an expropriation, none of which is listed in the 21 April 2021 affidavit ("the Undisclosed Encumbrances").

76. The question again is whether this is a technical breach or a deliberate one. On this point two explanations/defences were offered. First, as to the 13 or so undisclosed pre-March 2019 encumbrances, representing at least some US$45m and also demonstrating that one of the properties (claimed by GHI to be worth some US$4.7m) is not in fact owned by GHI at all, it is said that GHI "*assumed that all the charges ulterior to that date were not required by the ADO*" (Sterling Stamp email of 12 November 2021).

77. The first point is that GHI knew of these encumbrances and chose not to disclose them. The question is whether I am sure that the explanation of a misunderstanding is not a good one. I conclude that I am sure of this.

78. I agree with ADM that there is nothing in the Order itself to support such an interpretation and it is really impossible to understand how anyone could have reached this conclusion. What is more had (the available) English law legal advice been taken, it is inconceivable that it could have been to this effect. The wording is plain. Given the (obvious) purpose of the order there could be no reason for charges outside that date range to be excluded. It seems that either GHI chose not to take legal advice and to rely on a plainly bad interpretation of the order or that they took the advice and chose to ignore it. On either analysis, there

was deliberation. Ignoring the advice would be worse in the sense of more deliberate than choosing not to take it, and I will therefore proceed on the basis that this was not the course taken. But choosing not to take available advice still places GHI in deliberate rather than technical breach of the order.

79. It is this situation which then affects the view as to whether Ground 2(2) was a deliberate breach. Both points depend upon an obvious misreading of the order in question, which would have been clarified by taking the (available) legal advice. If one is deliberate, the other, logically, must be so also. With both the case for deliberation is strengthened.

80. The second explanation relates to the fact that Mr Oumary says that he did not know about the "*precautionary orders or mortgages registered in 2020 and 2021*" because (i) they would not in the ordinary course of events be notified to GHI and (ii) he was working off a copy of the Land Registry title which was "*requested when the Order was issued*". In other words it is implied that no search was made post 2019.

81. But there are problems (again) with this explanation. Sterling Stamp's email of 12 November 2021 suggests that there are four precautionary encumbrances, registered on 10 June 2020, 26 October 2020, 28 October 2020 and 10 June 2021 ("the 2020 Encumbrances"). The disclosure provided in February 2021 does not mention any encumbrances at all. The fact that the 2020 Encumbrances were only mentioned in April 2021 suggests that that the Land Registry search (which Mr Oumary fails to exhibit) was shortly before that date. In addition, the April 2021 Affidavit did disclose a number of other 2020 encumbrances and confirmed that they were "*still registered*" (i.e. that someone had checked the register). If the Land Registry extract were taken and examined at this point it would have revealed at least the 2020 Encumbrances. The implicit assertion that no search had been carried out post-2019 therefore appears to be inaccurate.

82. It follows that I am sure that there was a deliberate breach in relation to the "precautionary" encumbrances. That breach was serious. It was not purged, but prejudice is limited because the true position is now clear from a combination of the material provided and ADM's own enquiries.

Ground 4: Breach of the WFO

83. Paragraph 4 of the WFO prohibits GHI from dealing with or disposing of its assets up to the value of US$4m. The ordinary course of business exception is modified (because this is a post-judgment order) to apply only to perishable assets, and only then provided that GHI tells ADM's legal representatives within 24 hours of any dealing, identifying the source of the assets dealt with or disposed of (paragraphs 8(2) and (3)). GHI has given no notices under paragraph 8(3).

84. ADM has submitted that it is obvious that GHI has dissipated assets.

85. While Mr Hilton made valiant efforts to suggest that I could not be sure that this was so, I am persuaded that I can be sure.

86. Mr Boutgueray himself effectively says that initially no mind was paid to the WFO because GHI regarded it as illegitimate.

87. But also there is GHI's skeleton argument for the hearing before me, which said in terms that "*GHI conducts business and trades commodities frequently with direct competitors of ADM either with members of the ABCDG group or other competitors*". While this formed part of a submission as to why disclosure of financial records should not be given, it spoke of continuing trading after the WFO.

88. There are also manifestly debit entries which bear every semblance of continuing trading on the disclosed bank statements.

89. I note that ADM asked GHI expressly to confirm that it had not disposed, dealt with or diminished the value of any of its assets (up to the value of US$4m) otherwise than in accordance with the WFO. The answer from Sterling Stamp was "*Copragri/GHI has not since the 5th June 2019 disposed, dealt with or diminished the value of any of its assets up to the value of US$4m*". However (i) this was not on oath and (ii) it is not apparently an accurate translation of what was said (what GHI actually said was "*we have not sold any assets since March 2019)*". There has been no confirmation that there has been no purchase or transfer.

90. The next question is whether I am sure that this trading was in breach of the order. Mr Hilton once again made strenuous efforts to suggest that I cannot be sure because of the limitation in the order – i.e. that there might be (1) Moroccan assets below the USD 75,000 threshold; (2) bank accounts with a balance of less than USD 50,000 or (3) any other assets outside Morocco valued at less than USD 50,000 which GHI was not obliged to disclose which in total were sufficient to make up any gap. He submitted that at least I could not be sure that there were not.

91. That is an ambitious submission, particularly in circumstances where (i) the value hurdle is there to exclude amounts which are unlikely to be of material effect on the sums frozen (ii) GHI has chosen to rest its case on broad assertions of assets "well in excess" of US$4m, and not given any intimation of what assets within these categories exist.

92. While I accept the suggestion that I should not base any conclusion on the reports commissioned by ADM from Carre Immobilier, which were not Part 35 expert reports and which were not tested before me, there is an apparent large gap even on GHI's own figures once the many encumbrances are counted, as I have concluded they must be.

93. It follows that there was a deliberate breach by GHI of the WFO, and it appears that such breaches have continued.

THE POSITION OF THE SECOND AND THIRD DEFENDANTS

94. The position of the Second and Third Defendants is key, because as is plain from (i) GHI's location and (ii) the failure thus far to enforce the Award or obtain payment of the costs orders, any sanction which I can impose on GHI may well be of little effect.

95. There may also be room to question the efficacy of sanctions against the individual Defendants, who are also resident in Morocco. However I have been persuaded that as regards them there is greater scope for any sanction to personally inconvenience them.

96. But naturally they can only be personally sanctioned if the conditions for concluding that they were themselves in contempt can be met.

97. Thus it is necessary to show that each of them knew of and was responsible for the company's breach (*Dar Al Arkan Real Estate Development Co v Al-Refai* [2014] EWCA Civ 715, [2015] 1 WLR 135 [35] (Beatson LJ).

98. While both were directors of GHI (Mr Brahim Boutgueray has apparently resigned in 2022) I conclude that these conditions are met as regards the Second Defendant, but not as regards the Third Defendant. Each of the personal Defendants were (as I have noted) named in the penal notice on the relevant orders, making it clear that they as Directors were to be held to account for the actions of GHI.

99. As regards the Second Defendant, he is, on the face of it, the person who would naturally be aware of and responsible for such matters. He was at all material times the President and General Manager of GHI. The third entity authorized to act for GHI was Anouar Invest (a company represented by the Second Defendant). I can be sure that he was personally aware of the terms of the Orders and engaged with them because of the fact that he swore affidavits (which have proved to be defective) on GHI's behalf. I am satisfied that with a limited field of possible persons in control the Second Defendant is the person who must logically have known of the facts which amount to breaches of the orders and is thus responsible for them. With the evidence and the logic aligning, I am sure that Mr Elhachmi Boutgueray was himself in contempt of court in the same respects as was GHI.

100. As regards the Third Defendant, his proximity to the company was plainly less, he has now resigned, he made no affidavits, and he is effectively nowhere in the documents. The only route to establishing his knowledge is via a Board Meeting which may or may not have taken place, and which may or may not have condescended to particulars if it did. This is not sufficient to make me sure that he has committed or is responsible for acts of contempt of court.

101. A further point as to service was taken by the Defendants, pointing out that the Second and Third Defendants were never personally served with the ADO and FDO and that the application did not provide the confirmation required in CPR 81.4 (c)-(d) (Confirmation of personal service of the breached order or details of

order dispensing with service). On the face of CPR 81.4 this seems to be a very sound point.

102. However in *BMBF 4 PLC v Rizwan Hussain* [2022] EWCA Civ 1264 ([70]-[80]) the Court of Appeal clarified the position thus:

> "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 [this] way …
>
> 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.
>
> 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."

103. This aligns to some extent with *MBR Acres Ltd v Maher* [2022] 3 WLR 999 at [50]–[105], where Nicklin J also agreed that retrospective dispensation was possible. However he emphasized at [106]–[119], the test for retrospective alternative service or dispensing with service in the case of an injunction order was akin to the similar tests for claim forms in CPR rr.6.15 and 6.16, and will not be granted merely on the basis of expediency.

104. Here a consideration of whether there is "good reason" to justify the making of the order results in an answer favourable to ADM – it is plain that (as I have indicated) the orders did come to the Second and Third Defendants' knowledge and were responded to by them. The method used was used precisely because of difficulties in effecting service on GHI and alternative service was granted in respect of the WFO. Therefore had an application been made at the time it seems clear it would have been granted. In those circumstances I am prepared to dispense with the requirement for personal service and the inclusion of the statement going to those points.

EVENTS FOLLOWING CIRCULATION OF THE DRAFT JUDGMENT

105. A draft of this judgment, to enable focused submissions to be made on mitigation and sentence was circulated to the parties on 20 January 2023. In it I reached the conclusions set out above. I also gave a preliminary indication, following a review of the authorities, that the sentence I would impose was 18 months immediate custodial sentence.

106. It is fair to say that this indication - and the very frank advice which they plainly received - has apparently focused the minds of the Defendants. Yesterday the Second Defendant swore an affidavit himself, to some extent apologizing to the Court and providing a fairly significant amount of material.

107. The thrust of what has been said is that the Defendants have belatedly appreciated the seriousness of their position and particularly the urgent need to make full and detailed disclosure of their relevant assets, including especially assets which may total $4 million in value, and if they cannot, to make good any dissipations. The avowed intention has been (to quote the skeleton argument lodged on their behalf) *"to put the Defendants in a position from which they can persuade the Court that the sentence for their contempts should be structured so as to focus on coercion and incentivisation to comply with the Court's Orders, so far as it remains necessary to do that, rather than on punishment, however well-deserved."*

108. I have been assured that the Second Defendant takes the prospect of a custodial sentence very seriously indeed – well beyond the inconvenience which I speculated might present itself as a result. I am told that has expressed a wish to apologise formally and sincerely to the Court for his contempts, and those of GHI. He has said via Counsel and his statement that he recognises his personal responsibility for the contempts, and does not seek to blame his or the company's advisers, or anyone else. Mr Moxon Browne says that he is apologetic, contrite and remorseful.

109. As to substance, the Defendants have now produced (without fanfare during the course of yesterday) hundreds of pages of material including accounting material in French. It is said that this shows that there are assets considerably in excess of the key figure and that this shows that this is a case of a mere failure to produce the requisite detail. For example the provisional balance sheets for 2022 are said to show assets in excess of a quarter of a billion dollars. As regards property, a certificate has been produced asserting values in excess of US$10 million. However it is said that more will have to be done to reconcile this material with previous evidence and points made on the evidence by the Claimants. Mr Moxon Browne says (relying on *Gulf Azov Shipping v. Chief Idisi* (unreported 16 January 2001) given that I must be sure that the mitigation advanced is wrong the Defendants should be given an opportunity to make these figures good.

110. In addition (and said to underline the genuineness of the engagement) a parent company has been offered both as to the existence of the assets but also as to a Moroccan judgment in the enforcement proceedings as well as a letter of comfort from Credit Agricole. It is said that this is serious bolstering of the material provided. That is obviously not relevant to the purging of contempt but is said to be a step in the right direction.

The Submissions and the application to adjourn

111. It was submitted that while the Defendants had not purged the contempt, the Defendants had made a good *bona fide* start toward compliance. On that basis and praying in aid the complexity of the material and the shortness of time an application to adjourn was made. Mr Moxon Browne sought to persuade me that it was necessary for expert evidence or consideration in order to assess the very detailed financial and French language material which has now been produced. It was submitted that given the various steps taken it would be appropriate to exercise the discretion to adjourn this hearing. It was also said that it would be of more utility to the Claimants and to the Court to enable the Defendants to continue.

112. That application to adjourn has not found favour with me. The question of adjournment is a discretionary one. I do not by any means fault Mr Moxon Browne for making the application, but he is new to this case and this application must be considered against (i) the history of this case as a whole and (ii) the nature of the hearing which is being sought to be adjourned.

113. On the history, as is clear from the timeline which I have rehearsed above, there has been a continued history in this case of non-compliance followed by late but only partial compliance, leading to derailing of hearings, but with full compliance never forthcoming, and with contradictory material emerging. That does not form a promising basis for an adjournment application, even if the reason for adjournment were directly relevant.

114. The second point is that the purpose of hearing is the hand down of the judgment on the committal application, and the consideration of arguments as to sentence and mitigation. The facts of the contempt were argued at the hearing last week; they have been found. The details of the material are not relevant to mitigation of those breaches. Purging contempt is a separate question. If the Defendants wish to purge their contempt they must apply to do so. They cannot derail a properly scheduled sentence hearing by asserting a wish to purge.

115. As for the submission that I should adjourn because the contemnor has not had sufficient opportunity to reflect on his fault and prepare mitigation, I cannot accept that submission. This is not a suggestion was made at the hearing last week. Mitigation itself is of small compass. Even to the extent that we are talking about belated attempts to comply/purge it should be borne in mind that the disclosure order should have been complied with within 14 days from 22 March 2019. There was never any doubt that this was a serious matter - that order was served with a penal notice. There have been other notices served with penal notices attached. There have been various sets of evidence served.

116. There has therefore been ample opportunity to comply since 2019, and some of the ambit of what needs to be done has on the Defendants case already been done. In addition there has been a week since the draft judgment was served. During this period much more could have been done – at the very least to give notice of intent to comply and indeed of what was to be produced.

117. Therefore having carefully considered this application, I am quite clear that it would not be appropriate to accede to the application to adjourn.

118. So far as the issue of mitigation is concerned, before me today Mr Moxon Browne KC has emphasized these points fully, as well as reminding me of:

    i) The Second Defendant's good character;

    ii) The limited scope of the breaches in the greater scale of breaches of court orders;

    iii) The lack of any allegation of dissipation;

    iv) The need to consider whether an immediate custodial sentence is absolutely necessary;

    v) The advisability of leaving "head room" in less significant cases bearing in mind the 2 year maximum.

119. There is obviously also some relevance in terms of the position as at sentence, and as to remorse/mitigation in the extent to which the breaches have now been purged. As to this I conclude:

    i) The breach relating to Ground 2 appears to have been purged.

    ii) The breaches relating to Ground 3 and 4: These have not been purged. It is accepted, and it is quite manifest, that while some material has been put in, it is a long way from compliance and purging of past breaches. It may be a start, but it is no more than that. Although it is said that time has been short, the original disclosure order provided a short period, and certainly as I have already indicated more could have been done and more notice given of an attempt to comply to enable ADM to assess and make submissions on the question of purging the contempt.

SENTENCE

120. I then turn to the question of penalties bearing in mind both the past and recent developments and submissions. I deal first with the Second Defendant, where the focus is on whether I make an order for imprisonment.

121. As I have indicated, the centre of gravity of the contempts lies in the later grounds. Those are deliberate, unremedied breaches. Ground 3 is substantial. The substance (in terms of the amount of trading/dissipation) is unclear, but the evidence suggests it is substantial, as a correlate of the gap in the assets secured, and the numbers of debit entries apparent in the bank statements. Ground 4 is also a continuing breach of a WFO.

122. The judgment of Jackson LJ in *JSC BTA Bank v Solodchenko (No 2*) [2012] 1 WLR 350 [51, 55] indicates that breaches of freezing orders and disclosure orders within freezing orders are regarded very seriously and are likely to result in custodial sentences. While Mr Hilton submitted that the disclosure orders here

were not to be regarded in this light, I reject that submission. The disclosure orders were effectively allied to the freezing orders and should be regarded *pari passu* with orders within freezing orders.

123. I also note that at [56] Jackson LJ said this:

> "In the case of continuing breach, out of fairness to the contemnor, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches and (b) what portion of the sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive, but not binding upon a future court."

124. There are a variety of cases where the courts have indicated that in the case of deliberate serious breaches of disclosure obligations linked to a freezing order, in particular, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor. See for example: *Solodchenko*, *Thursfield v Thursfield* [2013] EWCA Civ 840, *JSC Mezhdunarodniy Promyshelenniy Bank & Another v Sergei Pugachev* [2016] EWHC 258 (Ch.). I note that reliance was placed by the Defendants on the *Azov* case where a somewhat lesser sentence was imposed n the context of serious breaches of an anti-suit order. However I am satisfied that the authorities which I have cited represent the up to date and relevant authorities for sentencing contempts in relation to orders of this sort.

125. In terms of where to place the sentence this needs to be calibrated by reference to the concepts of culpability and harm used in criminal sentencing exercises. See Eder J in *Otkrite v Gersamia* [2015] EWHC 821 (Comm).

126. I should however also consider the possibility of suspending the sentence. See for example *Templeton Insurance v Thomas* [2013] EWCA Civ 35 where the court said this:

> "whereas it will always remain appropriate to consider in individual cases whether committal is necessary, and what is the shortest time necessary for such imprisonment, and whether a sentence of imprisonment can be suspended, or dispensed with altogether: nevertheless, it must now be accepted that the attack on the administration of justice which is made when a freezing order is breached usually merits an immediate sentence of imprisonment of some not insubstantial amount."

127. In this context it is right to consider also the relevant Guideline which applies to the imposition of suspended sentences in criminal cases. That guideline (Imposition of Community and Custodial Sentences Definitive Guideline) gives "*History of poor compliance with Court Orders*" and "*Appropriate punishment can only be achieved by immediate custody"* as factors militating in favour of a custodial sentence. Both of these are engaged here. Factors militating in favour of suspension do not currently feature in this case.

128. While I consider the breaches as serious I do not see them as being at the very top of the culpability/harm matrix. They were deliberate, but there was basic disclosure which enabled the position to be clarified – this is not a case of a failure to provide even any basic disclosure. This was also not a proprietary injunction – though it was nearly as serious, being a post judgment freezing order. It is not clear that the breaches have caused serious harm.

129. Provisionally I would not prior to today have regarded there as being much in the way of mitigation. I noted in the draft that:

    i) There had been no relevant admission of breach, or apparent appreciation of the seriousness of the breach.

    ii) There has been very limited co-operation to mitigate the consequences of his breach.

    iii) There has been no genuine expression of remorse or sincere apology.

130. Matters have obviously changed somewhat in recent days. The position now is as set out in the previous section. That provides both a slightly narrower base for the imposition of sentence and greater mitigation. But there remain serious unpurged contempts.

131. Sentences toward the top of the range have been given for persistent breaches of non-disclosure provisions:

    i) 21 months in the *JSC (No.2)* case.

    ii) 24 months in *Thursfield*, even without breaches of the expenditure provisions.

    iii) *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411, the Court of Appeal upheld at [106] a 22-month sentence where the contempts were described as "*multiple, persistent and protracted*" and which had included non-disclosure of assets and dealing with assets in breach of the order – and this was a case where there had been at least some compliance with the orders in question.

    iv) In *Pugachev* Rose J imposed a two year sentence just for the contempt in relation to the two car sales. The other contempts relating to dissipations led to similar sentences, running concurrently although subject to an overall two year maximum.

132. In addition the fact that I would sentence these two grounds of contempt concurrently means that the total sentence would require an upward adjustment for totality. The way it is put at page 7 of the relevant Guideline is this:

> "Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences."

133. At the same time I entirely take on board Mr Moxon Browne's points as to good character (always given status as a significant mitigating factor in Guidelines) and as to the limited ambit of the breaches. Though at the same time, within the context of the orders it might be said that there was not much more scope for disobedience than was apparently taken, that absence of dissipation cannot be relied on when the material to ascertain this has not been disclosed, and "head room" does not seem to figure large in the previous sentence exercises.

134. However I do in particular bear in mind the Second Defendant's good character (albeit there is also a record of failing to comply with payment orders of this court). I also bear in mind the apology given on behalf of the Defendants by its counsel and the remorse expressed. While there have been previous apologies, and yet been failures to comply, I do accept that there is now a fuller understanding and an apology being made. I also accept that some considerable steps appear to be being taken towards putting the Defendants in a position to purge their contempt, which does reinforce the apology.

135. I do nonetheless conclude that it would be appropriate to sentence the Second Defendant to a custodial sentence. However bearing in mind the points made on their behalf by Mr Moxon Browne as outlined above I would be minded to reduce the period of imprisonment somewhat.

136. I therefore impose a custodial sentence composed of:

    i) 12 months in relation to Ground 3

    ii) A concurrent sentence of 6 months for Ground 4,

    iii) No separate penalty in respect of Grounds 1-2.

137. I also note and draw the Defendants' attention to:

    i) CPR 81.8 which requires me to inform the Defendant of the right to Appeal without permission to the Court of Appeal. The time limit within which any appeal must be brought is 28 days (and to the extent necessary I extend time accordingly).

    ii) CPR 81.10, which contains the rules for applying to discharge a committal order.

138. Bearing in mind what has been said inter alia in *Solodchenko* at [56], I have considered whether I should indicate what portion of this sentence might be likely to be remitted if the Second Defendant were to belatedly engage with the Orders, ensure that GHI provide full asset disclosure to identify whether there are assets up to the US$4 million level and if not, to make good the dissipations.

139. As Rose J indicated in *Pugachev,* it is difficult in advance to indicate how much of the sentence should be regarded as punitive and how much as coercive. However if the Second Defendant were to ensure that GHI were to do those things he would then be in a position to apply to the Court to purge his contempt and reduce his sentence. I would provisionally consider that at that point the Court

hearing that application would be looking at a very different situation and might well conclude that (i) some reduction in the overall sentence (well within single figures in terms of months) was appropriate and (ii) that that sentence could then be suspended.

140. As regards the First Defendant it appears that my effective powers are limited to a fine and costs, since there is no reason to believe that confiscation (which proceeds via sequestration proceedings) will be effective. I would currently be provisionally minded to impose a fine of £75,000 and make a suitable costs order. No alternation falls to be made to this order in the light of the mitigation given that the previous payment orders of this Court have been ignored and the sum in question is small in the context of the sums in question.

THE APPLICATION FOR AN ANTI-SUIT INJUNCTION

141. The Claimant also apply for an anti-suit injunction based on the Governing Law and Jurisdiction clause in the contract. It relies on the usual *Angelic Grace* principles.

142. The breach or threatened breach relied on is that by email of 12 November 2021 Sterling Stamp said:

> "it is also without prejudice to any action that our client is bringing in the Moroccan court for compensation for all the losses sustained as a result of the Arbitration Award that was cancelled by the Casablanca Court of Appeal. The losses are currently being assessed by experts and our client estimate that they are in excess of the amount awarded under the cancelled Arbitration Award.".

143. It is rightly accepted that the challenge to enforcement is not a breach of the clause; the issue is whether this is a separate threat to bring proceedings which challenge that clause.

144. ADM has some evidence from local lawyers who say that such a separate action is possible. It points to the absence of response from Mr Oumary and the refusal to give an undertaking as reinforcing the concern raised by this letter.

145. Here I am troubled by three things. The first and main issue is the absence of breach. There are no foreign proceedings. While an anti-suit may well be granted in anticipation of foreign proceedings where such proceedings are likely (see *The Ivan Zagubanski* [2002] 1 Lloyd's Rep. 106, 124-5) I am not persuaded that this hurdle is met now, in circumstances where the threat relied on is 14 months ago and nothing has happened.

146. Further it seems to me that the caution suggested by that factor is increased by:

    i) The fact that an injunction would only be permissible at this stage (with the arbitration over) if it fell outside the scope of permissible challenges to enforcement. That any hypothetical proceedings would be of this sort is not clear or even established as a probability;

ii) The order sought is, as Mr Hilton pointed out, cast in broad terms which appear to pose a danger of impacting on foreign proceedings beyond the extent permissible.

It may be that an anti-suit injunction of some sort becomes appropriate in due course. I am not however satisfied that it would be right to grant one at this stage and on the material before me.