Neutral Citation Number: [2024] EWHC 220 (KB)

Case No: KB-2022-003489

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2024

Before :

MR JUSTICE SWEETING

- -

Between :

	(1) IGNITE INTERNATIONAL BRANDS (UK) LIMITED	
	(2) IGNITE INTERNATIONAL BRANDS (LUXEMBOURG) S.A	
		Claimants
	- and -	
	(1) INPERO LIMITED	
	(2) MARK COOPER	
		Defendants

- -
- -

Joshua Hitchens (instructed by **Ignite Legal Department**) for the **Claimant**
Michael Uberoi (instructed by **Janes Solicitors**) for the **2nd Defendant**

Hearing dates: 17 July 2023 - 19 July 2023

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Approved Judgment

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Introduction

1. This is the Claimants' application to commit the Second Defendant ("Mr Cooper"), for failing to comply with court orders. Mr Cooper does not accept that he is in breach, other than in a technical sense which would not amount to a contempt. The First Claimant ("Ignite") is incorporated in England and operates internationally. Its business is the production, promotion and sale of high-quality nicotine, alcohol, CBD, energy drinks and apparel products under the brand name "Ignite". The Second Claimant ("Ignite Lux") is a company within the Ignite group of companies. There are two applications, the first issued on 30 March 2023 and the second on 02 June 2023.

2. The First Defendant ("Inpero") provides warehousing sales and marketing functions in the United Kingdom. Its sole director and shareholder is Mr Cooper. Mr Cooper has substantial business experience. He has been to Business School and had worked as a CFO before establishing his own businesses.

3. In *Absolute Living Developments Ltd v DS7 Limited* [2018] EWHC 1717 (Ch), Marcus Smith J considered what had to be established in a committal application. He held: (a) The order must bear a penal notice and (subject to dispensation) have been personally served on the respondent. (b) The order must be capable of being complied with (in the sense that the time for compliance is in the future), and it must be clear and unambiguous. (c) The breach of the order must have been deliberate, which includes acting in a manner calculated to frustrate the purpose of the order. It is not necessary, however, that the respondent intended to breach the order in the sense that he or she knew the terms of the order and knew that his or her relevant conduct was in breach of the order. It is sufficient that the respondent knew of the order and that his or her conduct was intentional as opposed to inadvertent. (d) The standard of proof in relation to each allegation that an order has been breached is the criminal standard. The burden of proof is on the applicant to establish an allegation of breach to the criminal standard.

Background

4. On the 23rd of October 2020 Ignite Lux entered into a manufacturing and fulfilment agreement ("the manufacturing agreement") with Wellacy Labs Ltd, a company which the Claimants say, and the Defendants dispute, is controlled by Mr Cooper and is now in liquidation (as of 24th May 2022).

5. On the 14th of December 2021 Ignite entered into a services agreement ("the services agreement"), otherwise described as a "sales and fulfilment" agreement, with

6. Inpero, which was appointed as the sales and distribution agent for Ignite products within the United Kingdom. The agreement required Inpero to hold stock on Ignite's behalf in a warehouse. Title to the products remained with Ignite until their onward sale to third party purchasers. Following a sale, Inpero was required to forward the proceeds of sale to Ignite and in turn received a commission, in addition to a standing monthly payment.

7. Ignite kept track of stock levels at Inpero using SAGE accountancy software. The working practice was that Mr. Cooper would confirm that Ignite products had been

delivered to a warehouse. An entry reflecting the delivery was then made in SAGE. The Claimants' case is that the only way in which items could be entered onto Inpero's warehouse inventory tally on SAGE was when Mr. Cooper expressly informed Ignite that the products had been received by Inpero. Inpero was then required to report any sales to Ignite and send the associated payment. Ignite would record the sale and update the Inpero inventory record on SAGE.

8. On 04 January 2022, Ignite's auditors, Armstrong Watson Limited, conducted a physical count of Ignite stock held by Inpero to check what was held as at 31 December 2021, Ignite's accounting year end, The Claimants contend that there were significant discrepancies between the physical stock held in the Inpero warehouse and the related inventory reports held on the SAGE accounting system.

9. Mr. Cooper delivered an updated inventory report on the 2nd of February 2022. Ignite were again concerned by, what it regarded as, discrepancies in the information provided. On the 4th of February 2022 Mr. Cooper confirmed that a physical count of the Ignite stock had been completed under his supervision. The results of that exercise were sent to Ignite on the 9th of February 2022. Ignite then performed an accounting adjustment to "roll back" the inventory to determine the stock levels as of the 31st of December 2021. The resulting figures were sent to Mr. Cooper who confirmed, by e-mail of the 24th of March 2022, that they were correct.

10. The services agreement and the manufacturing agreement were terminated following e-mail exchanges concluding on the 1st of June 2022. Inpero contends that it brought the relationship to an end as a result of contractual breaches by the Claimants. The Claimants' case is that Inpero was in breach of its own obligations. At the date of termination, stock belonging to Ignite was still in the possession of Inpero. Some of Ignite's products, V600 vape devices on 10 pallets, were recovered on 23 June 2022. The Claimants say that they were unsuccessful in obtaining the return of other stock and resorted to issuing proceedings in the High Court.

Court Proceedings

11. In the underlying claim the Claimants allege that Mr Cooper has used his companies to perpetrate a substantial fraud which has resulted in a financial loss to the Claimants of over £2,000,000. It is alleged that Mr Cooper invented listing fees with the Booker Group in order to defraud the claimants of £312,000 and fabricated customer orders to generate manufacturing orders for Wellacy Labs Ltd. The Claimants contend that Mr. Cooper also caused over 240,000 units of the Claimants' products to be sold after the agreements had been terminated and that he or Inpero have retained the entire proceeds of sale. It is alleged that these sales were at heavily discounted prices (causing both direct loss and significant damage to the Ignite brand) and that some of the Ignite products have been unlawfully retained and/or moved to other storage facilities. They are perishable and their loss will cause further financial damage to the Claimants unless they can be recovered. The Claimants' case, based upon its records, is that the Defendants have retained stock with a cost value of over £1.7 million.

12. On 25 October 2022, Mr Healy-Pratt KC, sitting as a Deputy High Court Judge ordered the Defendants, that is both Mr Cooper and Inpero, to:

> (a) Deliver-up to the Claimants the entirety of the Ignite product inventory that the Defendants then had on hand; and
>
> (b) Provide the Claimants with information as to the dispositions and/or sales of any Ignite Product inventory (to the extent that the Ignite products delivered-up pursuant to the Order fell short of the closing inventory account provided to the Court by Ignite as part of the Application).

13. The order also provided at paragraph 2:

> "2. Where any of the Claimant's Products are no longer within the Defendants' possession at the date of this Order, the Defendants shall, by no later than 4pm on Friday, 28 October 2022, provide in writing the following information: (a) if the product has been transferred to a third party, full details of the transfer, including the date, the recipient and the terms on which the transfer was made (including, if applicable, any price paid or due for the product); (b) if the product has been otherwise disposed of for any reason, full details of the disposal and the reasons for it; (c) the current location of the product, if known; (d) the Defendants' proposals (if any) for the return of the product. Such information shall be accompanied by such documentary records as are available (in original or true copy)."

14. In short, the Defendants either had to hand back the Claimants' stock or explain what had become of it.

15. The Defendants were ordered to pay £25,000 on account of the Claimants' costs. No such payment has been made to date because, according to Mr. Cooper, there are no funds available from which to do so.

16. Attached to the Order of Mr Healy-Pratt was a Schedule, referred to as "Schedule 3", setting out the stock which, as at 10 July 2022, ought, according to the SAGE records, to have been in the Inpero warehouse and which was to be returned forthwith or accounted for. This schedule was produced as an exhibit to the first affidavit of Mr Dhadwar who is a Chartered Accountant and works for Ignite International, the Claimants' parent company, as its Corporate Controller.

17. Although Mr Dhadwar was able to speak to the overall operation of the Claimant's stock control and invoicing he did not have direct involvement with all of the events which led up to and followed the termination of the relationship. He was, for example, unaware of the collection of pallets in June 2022 although he maintained that this would have resulted in an accounting adjustment.

18. Following the order of 25th October 2022 Future Pro Logistics ("FPL") carried out collections on behalf of the Claimants from the Defendants' warehouse in late October and November 2022. It is said that, contrary to the usual practice, FPL was not provided, by Inpero, with "packing slips" during these collections. These slips are used to record an inventory of items which have been collected. Mr Cooper's explanation, that he could not provide them because he was unaware of the destination of the goods, struck me as contrived given his acceptance that he was unable to confirm whether there was a record of everything that was on hand to be collected.

19. FPL carried out a supervised inventory count of the products returned and reported to Ignite by way of a four-page document tabulating the products collected by item ("the FPL report"). One of the columns was headed "quantity expected". The label implies that this was intended to reflect the amount of each item which should have been present.

20. According to the evidence of Mr Dhadwar, and on the basis of the Claimants' records, Inpero ought to have been in possession of products with a combined manufacturing cost of £1,752,415. The manufacturing cost value of the stock in fact recovered was just £647,263, amounting to a shortfall of £1,105,152. The market value of this missing stock (its retail sales value in this context) is £2,870,742. The breakdown of the missing products, as set out in Mr Dhadar's witness statement, was as follows:

    i) Vape Product - V600 devices = 336,719 units with cost value of £651,813

    ii) Vape Product – Other = 14,185 units with cost value of £132,210.

    iii) CBD Products = 41,998 units with cost value of £229,374.

    iv) Beverage Products = 34,290 units with cost value of £26,332.

    v) Spirits Products - Vodka = 641 units with cost value of £12,309.

    vi) Promotional Goods = 1,243 units with cost value of £53,114.

21. The largest item by some margin was accordingly the V600 vape products. Mr Hughes, Ignite International's General Counsel, exhibited to one of his affidavits a reconciliation of the FPL report with Schedule 3, giving a slightly different figure for the manufacturing cost of the items which were not returned but with the same retail sales value.

22. By email of 28th October Mr Cooper purported to provide information pursuant to the order of the 25th of October 2022. His email indicated that some 244,493 units of Ignite's V600 vapes had been sold to a third-party purchaser at a reduced or discounted price. He attached an invoice which he asserted related to that sale. The invoice is dated the 1st of August 2022, after the date of termination of the agreements.

23. The Claimants say that his response in relation to the V600 vapes fails to provide the information required under the order of 25th October 2022 in that it does not set out:

    (a) The date on which the V600s were transferred to the purported purchaser, because, notwithstanding the date on the invoice, it remains unclear whether this was the date the V600s were physically transferred;

    (b) Whether Mr Cooper was aware of the current location of the V600s and if so, what that location is;

    (c) Proposals for the return of the V600s; or

    (d) Details of the terms of sale of the V600s.

24. Aside from the information given in relation to the sale of some V600 vapes Mr Cooper's email of 28th October 2022, in so far as it explained what had happened to other stock, can only be described as sparse. It suggested that items had been disposed of by agreement because they were not fit for consumption or had been damaged. It said:

> "Disposed
>
> a. All ZRO – NFFC
>
> i. This was discussed and agreed with the client.
>
> b. Energy Shot – NFFC
>
> i. This was discussed and agreed with the client
>
> c. Gummies - All
>
> i. Water damage to storage container"

25. The Claimants dispute that they agreed to write off stock in this way but say that in any event these items cannot account for the shortfall. Further they say that Mr. Cooper has failed to comply with paragraph 2 of the order in relation to these items because the information provided does not address what, according to the email of 28th October, was "discussed and agreed with client" in respect of the ZRO, Gummies or Energy Shot energy drinks, or set out any of the detail required. They contend that to the extent that any of the missing stock has not been sold by the Defendants, it must remain in the possession of the Defendants in breach of the Order of 25th October 2022.

26. On 30 March 2023, the Claimants made an application to have Mr Cooper committed to prison for non-compliance with the delivery up order. This was referred to in the hearing as "Contempt 1" and gives rise to the following issues:

    i) Did Mr Cooper fail to deliver up the products listed in Schedule 3 to the Order of Mr Healy-Pratt KC made on 25 October 2022?

    ii) If so, in respect of the products which were not delivered up, did Mr Cooper fail to furnish the Claimant with the information required by paragraph 2 of Mr Healy-Pratt KC's order?

27. As the Order was made against Mr Cooper in his personal capacity no point arises as to whether any non-compliance by the First Defendant could properly be attributed to him. There was, in any event no issue that he was the directing mind of the company and, as the sole director, the only person in a position to ensure compliance.

28. On 26 April 2023, the Claimants applied for and were granted a freezing order by Mrs Justice O'Farrell. Paragraphs 9 and 10 of the order provided:

> "9.... the Respondent must by 4.30pm on 03 May 2023 and to the best of his ability inform the Applicant of all his assets within in the jurisdiction exceeding £1,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. (2) If the provision of any of this

> information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.
>
> 10. By 16:30 on 05 May 2023, the Respondent must swear and serve on the Applicant an affidavit setting out the above information."

29. Mr Cooper did not provide the affidavit required under the terms of the order on the dates specified. On 12th of May he attended court at a hearing before Mr Dexter Dias KC sitting as a Deputy High Court Judge and handed up a draft affidavit. This asserted that he had provided a list of assets by way of an email sent to the Claimants on the 3rd of May 2023. The alleged recipient, Mr Hughes, denies that he had received any such e-mail. The Claimants point to the fact that Mr Cooper's e-mail address on the copy exhibited to the draft affidavit is incorrect and incomplete so that the email could never have been sent. They contend that it is plainly a fabrication intended to give the impression that there had been an attempt at compliance. In any event the assets were not set out in the body of the draft affidavit and, in the Claimant's view, the list is not a credible account of Mr Cooper's personal assets or the assets of Inpero.

30. Mr Cooper accepted at the hearing before Mr Dias that he had not complied with the order of Mrs Justice O'Farrell. Mr Dias made a further order and explained to Mr Cooper the importance of a sworn affidavit being produced giving an account of his and the company's assets in the body of the affidavit. Mr Cooper's attention was drawn to the fact that the order was endorsed with a penal notice. The order which was then made on 12th May by Mr Dias provided that:

> (3) By 16:30 on 19 May 2023, the second defendant is to file and serve a sworn affidavit setting out to the best of his ability:
>
> (a) All of his assets within in the jurisdiction exceeding £1,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.
>
> (b) All of Inpero Ltd's assets within in the jurisdiction exceeding £1,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

31. It is not in dispute that no such affidavit has been served. On the 2nd of June 2023 the Claimants brought a further contempt application arising out of the failure to comply with the 12th of May order. This was referred to in the hearing as "Contempt 2" and gives rise to the following issue:

> Did the Defendant fail to file and serve a sworn affidavit setting out to the best of his ability the Defendants' assets within the jurisdiction worth over £1,000 and all of Inpero Ltd's assets in the jurisdiction exceeding £1,000 and the associated details including value and location required by the order?

32. The Claimants argue that the two contempts are obvious on their face, cannot sensibly be defended and are ongoing; amounting to a deliberate and flagrant breach of court orders.

Contempt 1 – Delivery Up/Provision of Information

33. Mr Uberoi, pointed out, on behalf of Mr Cooper that it is not a contempt to fail to comply with a court order where compliance is impossible. He argued that Schedule 3 to the order is demonstrably inaccurate and could not be relied upon as establishing any shortfall in relation to the items which were collected by FPL. Where there was some evidence to suggest that the order could not be complied with, the mental element required for contempt was in issue and the Claimants had to prove that compliance was possible. In *Sectorguard PLC v Dienne PLC* [2009] EWHC 2693 (Ch) at para 32-33 Briggs J. as he then was, said [32-33]:

> "By contrast, I accept the thrust of Mr Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see *Adam Phones v. Goldschmidt* [1999] 4 All ER 486 at 492j to 494j.
>
> 33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court."

34. It was for the Claimants to establish that there had been a contempt to the criminal standard. As Chamberlain J. observed in *Perkier Foods Limited v Halo Foods Limited* [2019] EWHC 3462 (QB) [14]: "In a case where the respondent says that compliance was impossible, and there is some evidence to that effect, mens rea is in issue and it should be for the applicant to prove to the criminal standard that compliance was possible, in the sense that the respondent had a choice about what to do. The result is consistent with the general rule in criminal law."

35. Against that background it was submitted that Mr Cooper and Inpero had in fact complied with the order by delivering up all of the stock which was in Inpero's possession, save where an explanation as to its earlier disposal had been given, and there was neither a breach of the order nor a contempt. The premise on which the contempt argument was based, that Schedule 3 was accurate, was, it was argued, so flawed that the Claimants could not meet the high standard of proof required. There was, in those circumstances, no reason for the court to reject the explanation given by Mr. Cooper. Compliance with an order articulated by reference to Schedule 3 was in that sense impossible.

36. In the course of cross examination and in his submissions, Mr Uberoi sought to make good this argument by identifying discrepancies between Schedule 3 and other documents. There were some categories of item which do appear on schedule 3 but which were not present in the FPL report at all, indicating, it was submitted, that they cannot have been items which FPL was directed to expect. Other items had quantities attributed to them in schedule 3 but had a one or zero marked against them in the

"quantity expected" column in the FPL report. Further, "vodka" appeared as an item both in the FPL report and in the reconciliation produced by Mr. Hughes, but did not appear on schedule 3 at all (although the reconciliation exhibited to Mr Hughes' affidavit referred to a quantity said to be derived from Schedule 3). Notwithstanding these discrepancies vodka was nevertheless identified as a missing product that had not been returned.

37. Mr Cooper's evidence was that there had been substantial problems integrating the Claimants' SAGE inventory system with other e-commerce software platforms which had led to errors; a point which he said he was referring to in his e-mail of the 28th of October 2022 when he said "the relationship your client's system was often unclear due to connections with several accounts." (sic)

38. Mr Dhadwar rejected the proposition that there were any significant problems with the Claimant's computerised systems or that Schedule 3 was inaccurate as a result. There were no issues with over 20 other trading partners. There was, he noted, no chain of correspondence from Mr Cooper identifying problems with SAGE or its integration; an issue which, had it been a significant problem, he could hardly have failed to be concerned about given the issues raised by the Claimants in relation to his stock records.

39. Mr Dhadwar's evidence was that he would have been personally involved if there had been any agreement to destroy or dispose of stock other than by sale. He noted that there were no charges raised by Inpero in relation to any such disposal, as would normally be the case, and no adjustment was made to the Claimants' SAGE records to reflect the shortfall which would have resulted. Despite an extensive search there were no email records held by the Claimants relating to any agreement to dispose of stock and no report of any damaged stock by Ignite.

40. As far as the discrepancies in Schedule 3 were concerned the use of "1" or "0" in the "quantity expected" column of the FPL report appears to be associated with an update of the records carried out on 18th November rather than the earlier update on 14th of that month where quantities are given. According to Mr Dhadwar the quantity expected column did not play a part in the reconciliation.

41. As to Vodka; I note that the figure given in Mr Hughes' summary as the Schedule 3 figure is 965. Mr Cooper's own internal stock count sent to Ignite on 30th June 2022 (see further below), after the contracts had been terminated, gives a figure of 930.

42. Mr Dhadwar was, in my view, a straightforward and careful witness. He was not seeking to gloss over problems or place undue reliance on the Claimants' accounting systems. He readily accepted the limits of his personal involvement which, as he suggested, were more indicative of the absence of SAGE problems than their persistent presentation. He was involved when there were concerns about the accuracy of Mr Cooper's inventory accounting in the early part of 2022 and took part in conference calls with Mr Cooper. As he observed, from February onwards, the information reflected stock levels which Mr. Cooper had acknowledged and verified.

43. Mr Cooper suggested that some shortfalls might have arisen because Ignite personnel had taken samples or asked for them to be sent to customers without deductions from stock being recorded on the SAGE system. There were e-mail exchanges in February, April and May 2022 which, he said, evidenced this practise. The emails referred to do,

certainly, contain requests that samples should be sent out to customers but the type of product requested is limited and the quantities involved are tiny in relation to the shortfalls with which this claim is concerned. There is nothing to suggest that sample requests which came from the Claimants were not the subject of adjustments in SAGE as Mr Dhadwar said they would be. Although Mr Cooper asserted that customer samples had been further discussed in calls and WhatsApp messages there has been no disclosure by him of any document that supports that assertion. His draft affidavit of May 2023 simply refers to "a number of occasions" on which samples were asked for. He accepted in cross-examination that Inpero had invoiced for postage costs when sending samples out, supporting Mr Dhadwar's evidence that sample requests were reflected in the records.

44. Mr Cooper's positive case, set out in his witness statement, and repeated in his oral evidence was that neither he or Inpero had any of Ignite's products in their possession and that the email and invoice sent on 28th October 2022 accounted for all other disposals (save for products taken or sent as samples).

45. It is a striking feature of the case that despite Inpero's business involving, at its core, the storage and movement of material in warehouses, using, as might be expected, its own computerised stock control system ("Shiftstation") Mr Cooper has disclosed none of Inpero's records. He agreed in cross examination that it would have been "helpful" to have produced them. He was able to supply detailed stock sheets, including commentary, to Ignite in February 2022 during the trading relationship. I regarded his answer when asked about this in cross-examination, that he did not think his own records were "relevant" as, at best, disingenuous. The evidence in his witness statement as to what had or had not occurred by the time of a WhatsApp call on 12th July 2022 was also, as he acknowledged, inconsistent with the account given in the email correspondence of October 2022. For a man of his experience and background the discrepancies could not, in my view, credibly be accounted for by his paternity leave or health issues, as he suggested.

46. He has not made good on his promise in correspondence in October of 2022 to send a spreadsheet detailing the goods disposed of by Inpero nor has he disclosed the documents, including photographs, that he said would have existed had stock been disposed of because it was damaged.

47. The Claimants submitted that whatever discrepancies could be identified between Schedule 3 and other documents the overall position is that there was plainly a substantial unexplained shortfall between the items which ought to have been in the Defendants' possession and those which were delivered up; Mr Cooper could, if his evidence was truthful, have substantiated his contentions as to what was in the possession of Inpero and what had been disposed of but had deliberately chosen not to do so.

48. It is instructive to examine the parties' respective positions by considering the largest single category of products; the V600 vapes. The purchase order for these items, in various flavours, is dated the 5th of January 2022 and shows that the overall quantity purchased was 500,000. The Claimants' case is that Ignite commissioned the manufacture of these items because of Mr Cooper's representation that he had secured a large order for them from a chain of retail outlets. The delivery of the entire consignment to Inpero was completed by the 8th of March 2022. Some 10 pallets were

returned to Ignite around the 24th of June 2002, as evidenced in emails passing between Mr. Cooper and Mona Puri of Ignite around that date. On the 30th of June Mr. Cooper sent Mona Puri, what he termed, an "internal count" of Ignite stock. This showed that there were 366,407 V 600 vapes remaining. This is very close to the total figure for V600 vapes on Schedule 3 which is 360,833. The commercial relationship had terminated on the 1st of June so that the stock level should have remained frozen; there was no more e-commerce or sampling.

49. Mr. Cooper's evidence was that he arranged for the sale of 244,493 of the V600 vapes as evidenced in the invoice of the 1st of October 2022, which he subsequently produced as an attachment to his email of 28th October. Although the invoice does not show the quantities of each flavour which made up this total it follows from the information supplied by Mr Cooper that the balance of the vapes remaining at the warehouse was 121,914. The total number of V600 vapes collected by FPL was 24,140. The shortfall is accordingly 97,774, nearly 20% of the original order with a purchase price approaching £225,000. The existence of this deficit can thus be demonstrated on the evidence without any reference to, or reliance on, Schedule 3 (although it is broadly consistent with Schedule 3) and is in fact based upon Mr Cooper's own stock check of the Ignite products at the end of June 2022 and his account of what had been sold on.

50. As Mr Hitchens submitted on behalf of the Claimants, a discrepancy of nearly 100,000 V600 vapes would be a huge error for FPL to have made in taking an inventory, whilst stock in this quantity could hardly be missed in the warehouse. The monthly reconciliation process would, equally, have to have failed dramatically, month on month, for an error of this magnitude to have been present in the records.

51. Mr Cooper's case was that his e-mail of the 28th of October 2022 complied with paragraph two of the order. In relation to the V600 his explanation and the invoice were sufficient to give the details required. He was only required to give information about the location of products if that was known to him, which it was not following the sale. He explained that there had been disputes in relation to payment by Ignite and other breaches of contract as evidenced by his e-mail of the 26th of April 2002 in which he threatened termination if breaches were not remedied, and payment made in full, against outstanding invoices.

52. This was the context in which, by letter of the 12th of July 2022, he notified the Claimants that he required to recover warehouse space and that if the Ignite account was not brought up to date he would move stock on "for clearance" to free up space and recoup losses. The fact that he had sold the V600 vapes was accordingly not something that would have come as a surprise to the Claimants and, given the timing, the sale was not a breach of the court order (which had yet to be made).

53. As far as the Gummies and the Energy Shots were concerned, although these appeared on Schedule 3 they were not on the FPL report and, it could be inferred, were not expected, supporting the statement made in the e-mail that this had been discussed and agreed. In relation to the "ZRO" products there was an e-mail exchange with Ignite in late April 2022 in which Liza Kabatsky of Ignite commented, "I thought all of the ZRO energy drinks were expired and not shipped" and then asked if they would "be removed off the files sent?" Mr Uberoi submitted that any doubt should be resolved in the Defendants' favour and even if there were, on a strict construction, breaches of the order, Mr. Cooper would only have failed to give the Claimants information of which

they were already well aware. Mr Cooper's witness statement of 6th July 2023 gives an additional gloss on this explanation suggesting that he was told to re-label and sell on the expired products to another country; he adds "I have so far been unable to find an email regarding this and the disposal".

54. As Mr Dhadwar observed in his evidence:

> "In any event, even when taken cumulatively, the Missing Product inventory purportedly explained in the notes of Mr. Cooper's email of 28 October 2022 only relate to a small minority of the Missing Products. In relation to the vast majority of the Missing Products (other than the Improperly Sold V600s), no accounting or information of any kind has been provided, and in respect of the Improperly Sold V600s, entirely insufficient information was provided."

55. Mr Cooper conceded, in effect, in the course of his cross examination that he had failed to provide the information required. On his own evidence he could have provided further details of the alleged disposals and sale referred to in the email of 28th October 2022. The email does not in any event cover all of the stock which the Claimants contend was missing. He did not provide "full details" as he was required to do and, with the exception of the V600 sales invoice he has not disclosed documentary records.

56. Neither Mr Dhadwar or Mr Hughes had seen the letter of 12th July 2022 and I share their scepticism as to whether it was ever sent. Mr Cooper's evidence was that there was no reply. Given the context, it seems highly improbable that the letter of 12th July would not have resulted in a response. Despite his insistence that contact with the Claimants was mainly by telephone or WhatsApp message he does not suggest that he followed up on the letter by either method after 12th July. His reference in correspondence (11 October 2022) to a WhatsApp call with Michalis on 12th July is explained in his witness statement as relating to the disposal of expired goods rather than any notice of his intention to sell. He relied on the letter as a justification for the sale of some V600s (15%-20% of the uncollected stock) at a clearance price without further recourse to the Claimants.

57. This is not a case about marginal errors in the Schedule attached to the order of 25th October 2022. The proportions in which stock held by the Defendants on Ignite's behalf had either been retained, sold or otherwise disposed of could, in the circumstances, only have been known to the Defendants. The purpose of the order was to identify what remained in their possession and fell to be returned and to provide details (including documentary material where available) of what had become of the balance of the stock. It was always open to Mr Cooper to produce his own inventory. The email of 28th October fell well short of what was contemplated and required under the court order as Mr Cooper was, on my assessment of his own evidence, well aware. His response to the order of 25th October 2022 was at best partial and, in my view, deliberately evasive; an approach to compliance with court orders which, despite the concessions he was forced to make, he brought with him into the witness box. I am satisfied to the criminal standard that he is in breach of the order and that the first contempt application is made out.

Contempt 2

58. It is not in dispute that Mr Cooper failed to comply with paragraph three of the order of the 12th May 2023. That failure came hard on the heels of his failure to comply with the order of O'Farrell J. Mr Uberoi submitted that there was no prejudice from the admitted non-compliance since the information required by paragraph 9 of the order of O'Farrell J had been provided by email on 4th May and then in hard copy on 12 May. The affidavit was defective as to form rather than substance.

59. Mr Cooper gave the explanation that he was under the impression that he had complied with the original order and that nothing further was required of him. The breach, it was argued, was therefore a technical one to which the court ought to apply the principle derived from *Jameel v Dow Jones and Co* [2005] EWCA Civ 75; [2005] Q.B. 946; [2005] 2 W.L.R. 1614 that proceedings may amount to an abuse of process where "the game is not worth the candle" and the costs of the litigation will be out of all proportion to the benefit to be achieved. *Jameel* was a defamation case, but has been applied more widely. In *Sectorguard* Briggs J. commented [45-46]:

> "The concept that the disproportionate pursuit of pointless litigation is an abuse takes on added force in connection with committal applications. Such proceedings are a typical form of satellite litigation, and not infrequently give rise to a risk of the application of the parties' and the court's time and resources otherwise than for the purpose of the fair, expeditious and economic determination of the underlying dispute, and therefore contrary to the overriding objective as set out in CPR 1.1...
>
> It has long been recognised that the pursuit of committal proceedings which leads merely to the establishment of a purely technical contempt, rather than something of sufficient gravity to justify the imposition of a serious penalty, may lead to the applicant having to pay the respondent's costs:"

60. This was not however a technical breach. The court was in a position on 12th May to consider whether the earlier order had been effectively complied with or whether an affidavit was required. Mr Cooper was told in terms that he should swear an affidavit and an order was made to that effect. It contained a recital that it was made "Upon the Defendants having failed to comply with paragraph 10 of the Court's order of 26 April 2023". It required an affidavit by 19th May. Mr Cooper ignored that order just as he had ignored the earlier order. His assertion that he mistakenly thought he had complied in relation to both orders is unconvincing. The email dated 4th May 2023, addressed to Mr Hughes, contains an obvious error in a field that ought to have been generated automatically if the email was genuine. The list of assets which the email contains is short on detail, not replicated in the body of the affidavit and, the Claimants suggest, may be understated or incomplete. There is no reference at all to any bank account operated by Inpero. The first step however was for Mr Cooper to swear and serve an affidavit in compliance with the order.

61. The factors which may make a contempt more or less serious were considered in *Crystal Mews Limited v Metterick* [2006] EWHC 3087 (Ch); they include whether the breach of the order was deliberate or unintentional whether its seriousness was appreciated and whether any reasonable excuse was put forward.

62. Having heard Mr Cooper give evidence I am satisfied that this was a deliberate breach by a man who was well aware of what was required and who has taken the view that difficult questions are best evaded. Given the fact that he has already failed to meet the costs order made against him there is obvious prejudice to the Claimants if he has given an account of his and Inpero's assets which may be partial or less than candid. There was good reason for requiring him to swear an affidavit. It follows that the second contempt application is made out and is not a mere technical breach.

Conclusion

63. Mr Cooper is in breach of both orders and in contempt of court. The matter will be listed for the imposition of a sanction. The breaches are ongoing. It would be wise for Mr Cooper to take steps to purge his contempt even at this late stage.