Neutral Citation Number: [2024] EWHC 1096 (Comm)

Case No: CL-2022-000139

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Monday, 29 April 2024

BEFORE:

DAME CLARE MOULDER DBE
HIGH COURT JUDGE (SITTING IN RETIREMENT)

BETWEEN:

SHAHRAAB AHMAD	**Claimant**
- and -	
(1) KARIM OUAJJOU	
(2) YASMIN AL SAHOUD PEREZ	**Defendants**

MR COGLEY, KC and **MR GOLDSTONE** appeared on behalf of the Claimant
MR PICKERING, KC appeared on behalf of the Defendants

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. DAME CLARE MOULDER DBE: This is the judgment of the court on the claimant's contempt applications against the first defendant, Karim Ouajjou, and the second defendant, Yasmin Al Sahoud Perez (referred to in this judgment as "D1" and "D2" respectively). D1 and D2 have admitted breaches of the worldwide freezing orders ("the WFO") which were first made on an ex parte basis on 18 March 2022 and continued by consent by order of 30 March 2022. There were two WFOs, one against each defendant, in identical terms. The defendants accept that as a result of the breaches, they are in contempt of court. The hearing on 25 April 2024 was therefore for the purposes of determining the sentence for the admitted contempt.

2. At the hearing, the claimant was represented by Mr Cogley, KC and the defendants were represented by Mr Pickering, KC. Following a full day of oral submissions, the hearing was adjourned to 29 April 2024 for the purpose of handing down this judgment. I have had the benefit therefore of full written and oral submissions from counsel on both sides. The defendants, however, did not attend the hearing. In correspondence dated 22 April 2024 from Colman Coyle Limited ("Colman Coyle"), solicitors acting for the defendants, Colman Coyle wrote that:

> "There is no order or direction requiring the defendants to attend in person at the hearing, and particularly given that they are both resident abroad, they do not intend to be there.
>
> We note that you suggested that the reason why your client wishes them to be present is so that they could be cross-examined as to their assets and in respect of their mitigation. We do not accept that it would be proper for any such cross-examination to take place."

3. The court does have witness statements from the defendants in relation to the contempts. From D1 there is a witness statement dated 27 March 2024, entitled Fifth Witness Statement, and from D2 there are three witness statements dated 29 November 2023, 28 March 2024 and 16 April 2024, entitled Fourth, Fifth and Eighth Witness Statements respectively. The weight to be given to those statements is considered below.

4. It is not necessary to consider the detail of the underlying proceedings in this matter. The relevant background to these contempt proceedings is that D1 and D2 are married, and at the time the WFO was made, they jointly owned a property in Madrid, which they had owned since 2015 ("the Madrid property"). As referred to above, the WFO was first made on 18 March 2022 and was served on the defendants on or about 22 March 2022. On 30 March 2022 an order was made by consent continuing the WFOs.

5. The WFOs contained a prohibition on disposing of or dealing with assets up to the value of some €45.8 million in the following terms:

> "Until the return date or further order of the court, the respondent must not (1) remove from England and Wales any of his assets which are in England and Wales up to the value of €45,891,758,47 and US$1,946,402; or (2) in any way dispose of, deal with or diminish the value of any of his assets, whether they are in or outside England and Wales, up to the same value."

6. The WFO made express reference to the fact that the prohibition extended to the Madrid

property.

7. The WFO also contained the usual exceptions for living expenses and legal fees. In this case, the order allowed each defendant to spend €2,000 a week towards ordinary living expenses, and also a reasonable sum on legal advice and representation in respect of the claim.

8. Three of the breaches which constitute the contempt now before the court relate to the Madrid property. Firstly, the breach committed by D1 and accepted by him was that he transferred his half-interest in the Madrid property to D2. The transfer is admitted to have been agreed in April 2022 and recorded in a notarial deed in June 2022.

9. In relation to D2, the first breach committed by her was accepting the transfer of the interest of D1 in the Madrid property, in other words, knowingly assisting D1's breach of the WFO. The second breach by D2 was the sale in October 2022 of the Madrid property to third parties. The third breach by D2 is exceeding the limit on living expenses. Between 27 October 2022 and 29 November 2023, D2 spent €125,733 on living expenses, which equates to
€2,612 per week.

10. On 20 November 2023 the defendants' solicitors informed the claimant's solicitors that D2 had sold the Madrid property. On 21 November 2023 the defendants' solicitors wrote to the court that effect. On 29 November 2023 D2 filed on a voluntary basis her Fourth Witness Statement and on 8 December 2023 filed and served an account of funds received and payments made. On 15th December 2023 the claimant issued contempt applications against D1 and D2, supported by the first affidavit of Ms Spencer, an associate at the law firm, RWK Goodman LLP, acting for the claimant. On 28 March 2024 D2 filed and served her Fifth Witness Statement and D1 filed and served his Fifth Witness Statement. On 18 April 2024 D2 served her Eighth Witness Statement, which exhibited an updated account of the sums expended to date from the proceeds of sale of the Madrid property.

11. Turning to the relevant law, CPR 81.9 sets out the powers of the court in contempt proceedings:

> "(1) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law.
>
> (2) Execution of an order of committal requires issue of a warrant of committal. An order of committal and a warrant of committal have immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant.
>
> (3) An order or warrant of committal must be personally served on the defendant unless the court directs otherwise.
>
> (4) To the extent that the substantive law permits, a court may attach a power of arrest to a committal order.
>
> (5) An order or warrant of committal may not be enforced more than two years

after the date it was made unless the court directs otherwise."

12. In the case the contempts are admitted, and the issue for this court is the appropriate sentence in the circumstances. I note that the maximum sentence that the court can impose for contempt of court on a single occasion is two years (section 14.1 of the Contempt of Court Act 1981). I was referred to various authorities where the approach to sentencing has been set out, including the recent cases of *Isbilen v Turk and others* [2024] EWHC 565 (Ch) at [7] to [15] and *Tonstate Group Ltd & Ors v Wojakovski* [2023] EWHC 3119 (Ch). From those authorities, I note the following passage taken from the Supreme Court decision in *Attorney General v Crosland* [2021] UKSC 15 at [44], which is cited by Sir Anthony Mann at [7] of his judgment in *Isbilen* and by Edwin Johnson J in *Tonstate* at [10]:

> "44. General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:
>
> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
>
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
>
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
>
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children or vulnerable adults in their care.
>
> 6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.
>
> 7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension."

13. I also note the summary of principles taken from the judgment in *Solicitors Regulation Authority* v *Khan* [2022] EWHC 45 (Ch), cited (in part) at [13] of the judgment in *Isbilen*

and at [10] in *Tonstate*:

> "(1) There are no formal sentencing guidelines for sentence/sanction in committal proceedings.
>
> (2) Sentences/sanctions are fact specific.
>
> (3) The Court should bear in mind the desirability of keeping offenders and, in particular, first-time offenders, out of prison: *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35 and *Otkritie International Investment Management Ltd v Gersamia* [2015] EWHC 821 (Comm).
>
> (4) Imprisonment is only appropriate where there is "serious, contumacious flouting of orders of the court": see *Gulf Azov Shipping Company Ltd v Idisi* [2001] EWCA Civ 21 at [72] (Lord Phillips MR).
>
> (5) The key questions for the Court are the extent of the Defendant's culpability, and the harm caused by the contempt: see *Otkritie International Investment Management Ltd v Gersamia* (above).
>
> (6) Committal to prison may serve two distinct purposes: (a) punishment of past contempt and (b) securing compliance: see *Lightfoot v Lightfoot* [1989] 1 FLR 414 at 414–417 (Lord Donaldson MR).
>
> (7) It is good practice, for the Court's sentence to include elements of both purposes (punishment and compliance) to make clear what period of committal is regarded as appropriate for punishment alone, i.e. what period would be regarded as just if the contemnor were promptly to comply with the order in question: see *JSC Bank v Soldochenko (No 2)* [2012] 1 WLR 350.
>
> (8) Committal may be suspended: see CPR Part 81.9(2). Suspension may be appropriate: (a) as a first step with a view to securing compliance with the Court's orders: see *Hale v Tanner* [2000] 1 WLR 2377 at 2381; and (b) in view of cogent personal mitigation: see *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35.
>
> (9) The Court may impose a fine. If a fine is appropriate punishment it is wrong to impose a custodial sentence because the contemnor could not pay the fine: see *Re M (Contact Order)* [2005] EWCA Civ 615.
>
> (10) Sequestration is also available as a remedy for contempt: see CPR Part 81.9(2)."

14. Before turning to consider the individual breaches which constitute the contempt and the appropriate sentence for each breach and each defendant, I have to consider the weight, if any, to be given to the evidence of the defendants in their witness statements. The defendants, as referred to above, did not attend the hearing and remain outside the jurisdiction in Portugal. It was submitted on their behalf that there was no direction for the defendants to attend the hearing and no disrespect was intended because they live overseas and have young children. It was submitted for the defendants that the court should nevertheless admit the witness statements and give weight to the evidence.

15. Counsel for the claimant submitted that the claimant's primary position was that unless the contemnor offers himself for cross-examination, no weight can be given to any written evidence in mitigation (*Isbilen v Turk*). However, counsel for the claimant submitted that for the purposes of the proceedings before this court, the court should proceed on the basis that the court can look at and consider the evidence in the witness statements but it was submitted that no weight should be given to those statements given the absence of the defendants and having regard to the contents of the documents viewed in context.

16. In my view, the weight to be given to the witness statements must be assessed both against the contemporaneous documentary evidence and in light of their inherent plausibility against the known facts. I bear in mind that any findings which I make have be to the criminal standard.

17. In addition, in assessing the weight to be given to the witness statements, I take into account the absence of the defendants from the hearing. It was submitted for the defendants that the defendants had not previously attended hearings in this matter, but it seems to me that the nature of this hearing, which may result in an order for their imprisonment, was of an entirely different nature to any other hearings in this matter, and no good reason has been advanced why the defendants could not have travelled from Portugal and attended the hearings or at the very least sought to attend by video link. Accordingly, the inference that I draw from their absence is that they have deliberately absented themselves in circumstances where their own counsel acknowledged that the court may well consider a custodial sentence appropriate. In my view, therefore, in circumstances when the defendants are not willing to come to court and face the consequences of their admitted breaches of the WFOs, the court cannot be satisfied that the witness statements tendered reflect the true position and approaches them with considerable caution. In particular, the genuineness of the apologies contained in the witness statements and which are relied on by counsel for the defendants as part of their mitigation, are in my view to be given little if any weight in circumstances where the defendants have deliberately absented themselves from this sentencing hearing.

18. I turn then to consider the issue of sentence of D1. As against D1, a single breach is asserted and admitted, namely that contrary to the terms of the WFO, he transferred his half interest in the Madrid property to D2. Applying the approach set out in the authorities and referred to above, the first step is to consider the seriousness of the breach. In this regard, whilst I note that each case is to be assessed on its own facts, the authorities are clear that breach of a court order is always serious because it undermines the administration of justice: Jackson LJ in *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241 at [51], cited with approval in *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524 and by Nugee LJ in *Kea Investments v Watson* [2020] EWHC 2796 (Ch) at [9] – [10]:

> "9. The first question, therefore, is the degree of culpability and the degree of harm, those being matters which go to the seriousness of the contempt. The Court of Appeal continue in *FCA v McKendrick* at [40]:
>
> > 'Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the *Solodchenko* case as to the inherent seriousness of a

> breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court.'

10. That is a reference to what Lord Justice Jackson had said in *Solodchenko*. At [51], having referred to there having been many cases involving breaches of freezing orders, he said:

> 'I shall not attempt to catalogue all those first instance decisions. What they show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year.'"

19. It seems to me that, therefore, the contempt is so serious that only custodial penalty will suffice. However, I bear in mind that the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt. It was accepted by counsel for D1 that D1's intention to breach the order was not a relevant element in order to establish a contempt, but it was submitted on his behalf that his intention was relevant to the issue of mitigation. It was submitted for D1 that the transfer of D1's interest in the property was first planned before the present litigation was contemplated as part of a legitimate tax planning exercise, as evidenced by the contemporaneous email correspondence with the defendants' Spanish lawyers in July 2021, and it was submitted that whilst these do not excuse the breaches, they give insight as to how they came about.

20. It was also submitted for D1 that there was no harm caused by the breach as, looked at in the round, it had only resulted in the transfer by D1 of his share of the property to D2. It was further submitted that there was a genuine apology in the witness statements, and counsel repeated that apology orally to the court. It was submitted that the defendants had admitted the breaches and had been frank as to what had occurred.

21. In his witness statement, D1 said:

> "The transfer between my wife and I was not in any way motivated by or connected with the claim brought by the claimant".

22. D1 stated that they consulted a tax lawyer and it was decided that he should move to Portugal and that they should enter into a formal separation of the marital assets. His evidence was that the decision was taken in 2021, before the current proceedings were started, and although the formal notarial deed was entered into in June 2022:

> "It simply did not occur to me at that time that by carrying out what I saw as little more than an administrative task, formally separating our marital assets for tax reasons, I was in breach of the freezing order".

23. D1 went on to say:

> "I accept that I am in breach of the freezing order, and I sincerely apologise for this. It was never my intention to disobey the order, nor did I realise that by

effecting the transfer, I was in fact doing so".

24. The particulars of the admitted contempt by D1 are that he agreed to transfer the interest in the Madrid property in April 2022, and it would appear that the notarial deed in this regard was entered into in June 2022. The court does have evidence of tax advice that was obtained in 2021, which proposed a division of the marital assets, apparently for tax purposes, with the assets of the couple being divided and D1 being allocated the assets outside Spain and D2 taking the assets in Spain. However, even if D1's motive was, as he said, to carry out the tax planning foreshadowed in the tax advice, the issue so far as mitigation is concerned is whether D1, when he transferred the property in 2022, was, as he said, unaware that he was breaching the WFO. In my view, his evidence is not credible given the following facts and circumstances:

(1) The timing of the transfer coming so soon after the grant of the WFO, the WFO originally being granted on 18 March 2022, sent to the defendants on or about 22 March 2022, and on 30 March 2022, ordered to be continued by consent.

(2) As referred to above, the WFO contained an express prohibition against disposing of or dealing with any assets, and paragraph 6 of the WFO referred in particular to the Madrid property.

(3) The defendants at that time were represented by English solicitors, at that time Keystone Law, and continued to be represented in the following months and years by English solicitors. The defendants filed an affidavit that they held an interest in the property on 29 March 2022. The evidence indicated that the defendants took legal advice in order to provide those affidavits.

(4) The act which D1 described as "carrying out what I saw was little more than an administrative task" was not a mere signature on a document but apparently required a deed to be sworn before a notary.

(5) In a separate witness statement dated 21 October 2022 in proceedings in support of his application for an extension of time to find his defence, D1 complained of the constraints imposed by the WFO:

> "The freezing orders have caused my wife and I considerable issues both in our business dealings and privately …
>
> We had had no contact from the claimant or their solicitors for about three months and suddenly we were hit with these orders and needed to get urgent legal help, both in Spain and in London. We found the very short timescales in which we had to provide our affidavit of means very difficult to deal with, but it was made very clear to us by our lawyers in London that it was essential that we met the deadline stated in the order. My wife and I did comply with that deadline and provided our affidavit of means. Throughout the next six months our solicitors have received numerous letters requesting further information regarding our assets, and we have worked closely with our lawyers to make sure that those requests have been answered to ensure that we complied with the terms of the order."

25. Given that it is clear that D1 had been advised by English lawyers at the time of the WFO

and thereafter and his evidence describing how the defendants "worked closely with our lawyers for the next six months", I find D1's evidence on this issue is not credible. I do not accept, therefore, the evidence that D1 was unaware of the breach when he transferred his interest in the Madrid property to his wife, and no mitigation can be derived from that evidence. No admission was made until after the claimant was aware from other sources that the Madrid property had been sold. (The claimant had received a copy of the Madrid Property Register on 13 November 2003 from the claimant's Spanish lawyers and over a year after the property had been sold).

26. To the extent that it was submitted for D1 that there was no harm caused by the transfer to D2 and that a variation would have been granted to permit the transfer of the interest, had it been sought, I do not accept this overly-narrow view of the breach. If the transfer was pursuant to the tax advice, it is clear from the tax advice disclosed that this was the first step in the transfer of the Madrid property, which was then to be sold. This contempt cannot be judged in isolation without regard to the surrounding circumstances. No variation was in fact sought to the terms of the order to permit the transfer, and, absent any application, it is far from clear that the court would have agreed to the order, particularly if it was presented as part of the tax planning advised in the tax advice of 2021, which contemplated the sale of the Madrid property.

27. It was submitted for D1 that he sincerely apologises, and counsel relied on this to support a submission for a suspended sentence. However, as set out above, any apology is in my view without real substance given the absence of D1 from these hearings for no good reason.

28. In my view, having regard to the authorities, the breach of the WFO by D1 in disposing of this asset is serious in that it flouts the order of the court. This is irrespective of the value of the asset to the overall claim. It was still a substantial asset which was specifically identified in the WFO. It therefore requires in my view a custodial sentence. I do not accept that the breach was inadvertent. If not deliberate, it was reckless, given that English lawyers were retained at that time and their advice should have been sought before any disposal of real property, even between D1 and D2, particularly when it was specifically identified in the WFO.

29. I bear in mind that the sentence must be the lowest which is commensurate with the offence. In mitigation, I note the apology but give that little credence given that D1 has chosen not to attend the hearings. I note that D1 has young children, but the evidence of D2 suggests that she is the principal if not the primary carer. I bear in mind that the maximum sentence is two years but that that is a relatively short range. In all the circumstances, the lowest sentence which I can pass is a custodial sentence of nine months.

30. I turn then to consider whether the sentence should be suspended. The breach cannot be remedied, so there is no question of suspension being used to encourage compliance to that effect. I proceed on the assumption that D1 has not been committed to prison before. However, given the seriousness of the breach, I do not regard that as sufficient to justify suspension. It was submitted by counsel for D1 that the court should have regard both to the overcrowding in prisons and the pending Sentencing Bill, a copy of which was before the court. If passed, the Sentencing Bill would impose a duty to pass a suspended sentence in place of short custodial sentences (defined as not more than twelve months),

subject to certain conditions and exceptions. Counsel also referred me to *Advantage Insurance Company Ltd v Harris* [2024] EWHC 626 (KB) and a reference in that judgment to *R v Arie Ali* [2023] EWCA Crim 232, where Edis LJ said at [22]:

> "Sentencing courts will now have an awareness of the impact of the current prison population levels from the material quoted in this judgment and can properly rely on that. It will be a matter for government to communicate to the courts when prison conditions have returned to a more normal state."

31. In my view, the Sentencing Bill is not currently the law, and the court does not apply the provisions in a bill which has yet to be passed by Parliament, even assuming that it would pass in its current form. As I indicated to counsel during the hearing, I am not aware of any general policy which is currently in force that in contempt proceedings, the court is required to impose a suspended sentence in place of short custodial sentence unless there are exceptional circumstances which justify not making the order.

32. The two authorities to which I was referred, *Manning* and *Ali*, related to specific periods of time, in the former during the pandemic and, in the latter, when Operation Safeguard was activated. In the paragraph in *Ali* relied on by counsel, the relevant paragraph commences with the words:

> "It will only apply to sentences passed during this time. We have identified above the starting point for the relevance of this consideration for sentencing, which we take to be the implementation of Operation Safeguard 14 days after 6 February 2023."

33. Absent any general requirement to suspend a short custodial sentence, I understand the position to be that even if the high prison population is a factor to be taken into account, it does not require all short prison sentences to be suspended, absent exceptional circumstances.

34. In my view, suspension is not appropriate in this case given the serious nature of the breach. The maximum sentence that can be imposed for contempt is two years, and it is therefore inherent that sentences for contempt will be in the range of what could be termed "short custodial sentences". Further, given that the breach that has occurred is not capable of remedy, a suspended sentence in this case would not be for the purpose of encouraging compliance with the order going forward, and there is no cogent personal mitigation which would suggest a suspended sentence is more appropriate. I therefore reject the submission that the sentence for D1 should be suspended and impose an immediate custodial sentence of nine months.

35. Turning to D2, there are three admitted and separate breaches of the WFOs for which D2 falls to be sentenced. As referred to above, the first relates to the transfer of D1's interest in the Madrid property to D2, the second relates to the sale of the Madrid property by D2 to a third party and the third relates to the breach of the limit on the living expenses. D2 falls to be sentenced separately in respect to each breach, but the court must also consider the principle of totality to ensure firstly that the overall sentence imposed reflects all of the offending behaviour with reference to overall harm and culpability together with the aggravating and mitigating factors, and secondly that it is just and proportionate.

36. I deal first with the sale of the Madrid property to third parties, which took place in October 2022, as this is in my view the most serious of the three breaches. According to the evidence of D2 in her Fourth Witness Statement, she said that she placed the property on the market in 2021 due to financial pressure and on the basis that if they did not sell voluntarily, it was likely there would be a forced sale at a loss. She acknowledged that she received notice of the freezing order in March 2022. She said:

> "In early 2022, Inigo Cotoner, who held a charge against the property, had demanded repayment and was seeking to enforce his rights by having the property sold, and by late summer this had progressed quite far".

37. She said:

> "I was very concerned not to allow the public auction to occur, as there was a real risk that a sale at this price would not leave anything after payment to Sr. Cotoner and repayment of the bank mortgage and other liabilities attached to the property".

38. She said her first contact with the purchasers was on 4 April 2022. Thereafter, negotiation continued sporadically. She agreed an offer in September 2022, and the sale took place in October 2022.

39. Dealing specifically with the WFOs, D2's evidence was:

> "I was aware of the freezing order, and I checked the position with Spanish lawyers, who advised me that the order had not been registered in Spain through what I understand are known as Exequatur proceedings.
>
> I was advised that in these circumstances there was nothing in Spanish law to prevent me from selling the property.
>
> Although the freezing order prohibited dealings with the property, I believed that this did not mean I was unable to pay bona fide liabilities in respect of the Property and did not believe that I was doing anything wrong in preserving my assets as best I could and paying the liabilities which were attached to the Property.
>
> If and to the extent that this was a breach of the freezing order, I never intended to act in any way that was in contempt of court, and if I have then I offer my sincere apologies to the court for this. I was simply seeking to act in what I thought was a proper manner in paying the debt which was owed. If I had not done so, there was no defence to Sr Cotoner's claims, and the Property would in any event have been sold but at a very considerable discount..."

40. I turn first to assess culpability and harm. For the reasons set out above in relation to D1 and the authorities referred to, the deliberate breach of the restraint provisions in a freezing order in disposing of a substantial and identified asset is so serious that the custody threshold is passed in case.

41. In mitigation, it was submitted by counsel for D2 that D2 had admitted the breaches, the defendants' solicitors alerted the claimant to the breaches as soon as they became aware of them, D2 has apologised and the breaches have not caused prejudice. If a variation

had been sought, there was a reasonable chance that it would have been granted, and by selling the property and avoiding a forced sale, D2 has obtained a better price than if it had been left to a forced sale by creditors. It was further submitted for D2 that the sentence should be suspended as D2 is the primary carer for three boys aged nine, eight and four, and by reason of the overcrowding in prisons
and the Sentencing Bill referred to earlier.

42. For the claimant it was submitted that the admissions were "mealy-mouthed and equivocal". In relation to the financial pressure, it was submitted for the claimant that if the defendant had been acting with propriety, she would have applied for a variation. In relation to the apology, it was submitted for the claimant that the damage was done and the regret was only that she had been caught. In relation to the advice, the claimant questioned whether or not D2 actually took or believed the advice, and in relation to the issue of the children, it was submitted for the claimant that they had been given no opportunity to examine whether friends and family could act in *loco parentis*.

43. Dealing with the factors advanced in mitigation, I accept that D2 has admitted the breaches but I think little mitigation can be derived from this. The sale was a matter of public record and, as noted above, was apparently discovered in any event by the claimant's lawyers prior to the admission. It would be difficult to see how in the circumstances D2 could have done anything other than admit the breach. As to the notification by the defendants' lawyers of the sale, they appeared to have notified the claimant's solicitors and the court as soon as they became aware of it, but this was only in November 2023, whereas the sale had taken place over a year earlier in October 2022. There was therefore no early admission by D2 for which she should receive credit. The so-called voluntary provision of the Fourth Witness Statement was in reality forced on her to explain what had happened.

44. It was also submitted on her behalf that D2 took Spanish legal advice and that she was advised "that in these circumstances there was nothing in Spanish law to prevent me from selling the property". This evidence does not amount to mitigation. It does not say that D2 did not understand it to be a breach of the WFO but merely that she was advised that as a matter of Spanish law she could sell the property. As for the position under English law, her evidence in her Fourth Witness Statement was:

> "Although the freezing order prohibited dealings with the Property, I believed that this did not mean that I was unable to pay bona fide liabilities in respect of the Property and did not believe that I was doing anything wrong in preserving my assets as best I could and paying the liabilities which were attached to the Property."

45. In her Fifth Witness Statement she said:

> "Whilst I was aware of the freezing order at the time of sale, having taken advice from a Spanish lawyer, my understanding was that this did not prevent me from selling the property as the order had not been registered in Spain. At that time I was not aware that nevertheless the English court could make an order preventing me from doing so personally, even though I am not an English citizen, do not live there and the property is in Spain."

46. I note that as referred to above in his witness statement in support of his application for an extension of time, D1 described how the defendants were taking advice in relation to the WFOs and their impact. D1 also described in that same witness statement how his wife was actively involved in the management of the legal proceedings:

> "As a result of the freezing order, there was a huge amount of firefighting that my wife and I were having to do at the time, as well as seeking to comply with the affidavit of means required by the order and the question of whether or not we would be fighting this case in Spain or England…. My wife, who qualified as a lawyer, was of the strong view that this should be fought in Spain, and we spent a long time trying to work out the appropriate country to fight in. It seems that the position in Spain is very different for such claims, and to this day my wife still thinks that the claim would be better fought in Spain, but in the end, so that we did not waste time and money fighting this point, we agreed to fight it here in London, which I think benefits the claimant."

47. I do not accept, given her background and the evidence of her involvement in the proceedings, that D2 honestly held the view that she was not in breach of the WFO and was free to sell the Madrid property. If her view had been as stated in her witness statement, it seems difficult to understand why she took Spanish advice but did not check the position with her English lawyers before forming that view in relation to one of her major assets and one which was specifically identified in the WFO as subject to the prohibition on sale.

48. It was submitted in effect that the sale was to the claimant's benefit, because otherwise the Madrid property would have been sold at a discount, and that D2 could have obtained a variation of the WFO to allow this. However, I cannot see any mitigation in the fact that she could have sought to regularise the sale in circumstances where she did not do so. As to whether the Madrid property would otherwise have been sold at a discount, I do not accept that this is mitigation of breach of the WFO. The WFO is intended to identify the defendants' assets and present dissipation of assets pending determination of the claim. By disposing of the property, the claimant lost the benefit of the controls of the WFO and, had the matter not come to light, would have been in the dark about what had happened to the proceeds of sale, not least because it appears that they were paid in part into a bank account which was not in existence at the time the WFO was granted and thus not within the scope of the disclosure by the defendants in their disclosure affidavit.

49. There is an apology in her Fourth Witness Statement, but the import appears to be that she does not appear to regret her actions, stating in effect that it was justified by avoiding a public auction and the property being sold at a discount. In her Fifth Witness Statement, D2 said:

> "I do apologise sincerely for the breaches which have occurred. I am genuinely sorry for this. I did not intend any disrespect to the court or to wilfully disobey the order. I do however rely on my explanations in relation to any punishment the court may be minded to impose. Whilst I was aware of the Freezing Order at the time of sale, having taken advice from a Spanish lawyer, my understanding was that this did not prevent me from selling the property as the order had not been registered in Spain. I did not realise that in taking what I thought was a necessary step, both to

maximise the sale price of the property and to provide funds to pay our liabilities, fund our substantial legal expenses and have money to live, this would be considered to be a contempt of the court. As I said, I certainly meant no disrespect to the English court."

50. Taking this evidence at face value, it appears that D2 took the view that she could do what she thought fit to address their financial situation. However, in my view, given her background and her involvement in the management of the proceedings, as referred to above in the evidence, D2 knew that by selling the Madrid property she was in breach of the WFO by the sale, and I so find. Court orders must be complied with, and it is not open to parties form their own view of whether a provision is reasonable and fair. Had she wished to vary the WFO, it was open to her to make an application to do so, which was not done until after the contempts came to light. In her favour, I accept that D2 has now provided a statement which appears to show where the proceeds of sale have gone. I also accept that she is the primary carer for three young children, and the impact of a custodial sentence on the children is a factor which I take into account.

51. In my view, having regard to the authorities, the breach of the WFO by D2, in deliberately breaching the WFO and disposing of the Madrid property, is a serious, contumacious, flouting of the order of the court. It was a substantial asset and expressly identified in the WFO. It therefore requires in my view a custodial sentence. I bear in mind that the sentence must be the lowest which is commensurate with the offence. In mitigation, I note the apology but give that little credence given its terms and that D2 has chosen not to attend the hearings. I do take into account in her favour her recent cooperation and the impact of a custodial sentence on the young children. Whilst children are not a bar to imposing an immediate custodial sentence, to limit the impact on them I propose to reduce the sentence which I would otherwise have imposed. I bear in mind that the maximum sentence is two years but that this is a relatively short range. In all the circumstances, the lowest sentence which I can pass for this breach on D2 is a custodial sentence of nine months.

52. I then have to consider whether I should suspend the sentence. I have referred above to the principles which apply in relation to suspension of a sentence. The breach of the order by D2 in relation to the sale does not warrant a suspended sentence in order to encourage compliance, as the Madrid property has been sold and the breach cannot be remedied. I have carefully considered whether I should suspend the sentence by reason of the children and D2's role as a mother. However, I have been given no evidence to suggest any particular difficulties in this case which would result from a custodial sentence over and above the distress and disruption which a custodial sentence would have on any young family. I have reduced the overall sentence that I would otherwise have imposed to take account of the interests of the children, and the impact on the children of a custodial sentence is not in my view sufficient to justify a suspended sentence in this case.

53. Turning then to the sentence for the breach of the transfer of D1's interest to D2, in her Fifth Witness Statement D2 said that the breach was inadvertent and she did not intend to breach the order:

"In his witness statement Karim has explained the circumstances in which the 10 June 2002 deed was entered into as part of our legitimate tax planning, the

process for which started long before the bringing of the present proceedings. Like Karim, it simply did not occur to me at the time that this was a breach of the Freezing Order. I sincerely apologise for this and confirm that any breach in this regard was entirely inadvertent. I had no intention of breaching the Order or assisting Karim to do so, nor to disrespect it in any way, and I sincerely apologise for this."

54. Even if I accept that the transfer was part of the tax planning referred to in the tax advice disclosed, I do not accept the evidence of D2 that it did not occur to her that this would be a breach of the WFO. As already discussed above, she is a lawyer by background and she was heavily involved in the discussions with the lawyers on the WFOs and its implications. I find it not credible that she could hold such a view.

55. As was the position with D1, I do not accept that this breach is mitigated by the absence of loss. The transfer was the first step on the evidence of the tax advice to move the assets and then to sell the Madrid property. There was no early admission by D2 for which D2 could receive credit. The apology has to be read both in light of the explanation that it was inadvertent, which I do not accept, and the failure to attend the hearing. It therefore affords little or no mitigation.

56. In all the circumstances, in my view, the offence of a deliberate breach of the disposal provisions is serious and as such the custody threshold is passed. I take into account the mitigation to the extent discussed above. Having regard to the principle of totality and the fact that this breach can be viewed as part of the overall strategy to sell the Madrid property, the lowest sentence I can impose is one of six months' imprisonment to run concurrently. For the reasons set out above, I do not consider a suspended sentence to be appropriate.

57. Turning to the third breach, the failure to abide by the expenditure limits. This is addressed in D2's Eighth Witness Statement. It was submitted on her behalf that the overspend expenditure was "relatively modest" and that, going forward, she will be careful to keep within the limits. The breach is accepted by D2 in her Eighth Witness Statement, but the apology proffered in that witness statement is in my view perfunctory and somewhat negated by the assertion by D2 that it is the fault of the way the order is framed:

> "I accept that the order made by HHJ Jacobs, (as was drafted by the Claimant), provides a separate limit for each of us, but I would respectfully suggest that it may have been better and more easy to apply in practice if there had been a joint figure for the two of us."

58. I bear in mind that the defendants were advised throughout by lawyers and consented to the ongoing terms of the WFOs. If D2 had been of the view that the limit was unworkable as framed, it was open to the defendants to seek a variation. However, the defendants did not do so. I accept that the overspend was, given the amount allowed, relatively speaking, not a huge amount. But the limit was arguably a generous amount, €2,000 per week, €4,000 per month together, and yet D2 does not appear to have paid regard to the limit. She stated that she tried hard to comply with the order, and yet this assertion must be doubted given that she said that she has only just now realised how the limits operate:

> "I repeat that I apologise if I am in breach of the Order, but I hope at least that this explains the position, and I confirm that it was never my intention to breach the order. I was surprised by this, as both Karim and I tried hard to ensure that we complied with the requirements of the order. I now realise that although the order permits each of us to spend up to €2,000 per week, in practice we do not live or operate that way."

59. In my view, the custody threshold has been passed by this breach. Had it been the sole breach before the court, I would have been minded to suspend any custodial sentence to encourage compliance going forward. In the circumstances, however, where D2 has already received an immediate custodial sentence for the other breaches, and bearing in mind the principle of totality, for this breach I impose an immediate custodial sentence of three months to run concurrently.

60. The final issue is whether D1 should be debarred from pursuing a counterclaim in these proceedings. It was submitted for the claimant that I should exercise the discretion of the court, flowing from the dicta of Lord Denning in *Hadkinson v Hadkinson* [1952] P 285, to debar D1 from pursuing his counterclaim. It was submitted that the court has a discretion to refuse to hear the defendant if the actions of the defendant impede the course of justice. It was submitted that the defendants should be entitled to pursue their defence but should not be given the assistance of the court in positively pursuing a counterclaim.

61. I am not persuaded that the rule on which the claimant relied is engaged in relation to the pursuit of a counterclaim as a result of the contempt by D1 in this case, and if it is engaged, I am not persuaded that the nature of the contempt is sufficient to persuade me that such a discretion should be exercised in this case, with the result that D1 is unable to pursue his counterclaim. Such a sanction would in my view be disproportionate and unjust. Accordingly I decline to make any such order debarring D1 from pursuing his counterclaim.

62. In conclusion, I will make orders of committal in the terms indicated for each defendant and issue warrants of committal, to which I propose to attach a power of arrest. I remind the defendants that they have a right to appeal this decision without permission being sought to the Court of Appeal within 21 days.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge