Neutral Citation Number: [2024] EWCA Civ 531

Case Nos: CA-2023-000868
CA-2024-000237

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Leech
[2023] EWHC 302 (Ch), [2023] EWHC 525 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2024

Before :

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

SOLICITORS REGULATION AUTHORITY LTD	**Claimant/ Respondent**
- and -	
(1) SOOPHIA KHAN	**Defendant/ Appellant in CA-2023-000868**
(2) SOPHIE KHAN & CO LTD **(3) JUST FOR PUBLIC LTD**	**Defendants/ Appellants in CA-2024-000237**

Case No: CA-2023-000829

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Leech
[2022] EWHC 45 (Ch)

Between :

SOLICITORS REGULATION AUTHORITY LTD	**Claimant/ Respondent**
- and -	
(1) SOOPHIA KHAN	**Defendant/ Appellant**
(2) SOPHIE KHAN & CO LTD **(3) JUST FOR PUBLIC LTD**	**Defendants**

- -
- -

James Bogle (instructed by **Janes Solicitors**) for **Ms Khan** in CA-2023-000868

James Bogle (instructed by **Just for Public Ltd**) for **Sophie Khan & Co Ltd** and **Just for Public Ltd** in CA-2024-000237 and for **Ms Khan** in CA-2023-000829-G

Philip Ahlquist (instructed by **Capsticks Solicitors LLP**) for **Solicitors Regulation Authority Ltd**

Hearing dates: 27, 28 and 29 February 2024
- -

Judgment Approved by the Court for handing down

Lord Justice Nugee:

Introduction

1. There are a number of matters formally before the Court but the essential question raised by this appeal is whether Leech J erred in finding that Ms Soophia Khan had capacity to defend proceedings for contempt of court.

Background

2. There is a long history to this matter. It is recorded in detail in a number of judgments mentioned below and to which reference can be made for a full account, but for the purposes of this appeal a briefer summary will suffice.

3. Ms Khan is a former solicitor. She was admitted on 1 November 2006. Prior to 19 August 2021 she practised through Sophie Khan & Co Ltd (**"SK & Co"**), of which she was the sole principal and director.

4. The Respondent Solicitors Regulation Authority Ltd (**"the SRA"**) exercises the regulatory functions and powers of the Law Society, including the power to intervene in a solicitor's practice. On 19 August 2021 an adjudication panel of the SRA decided to intervene in Ms Khan's practice. The SRA wrote to Ms Khan requiring her to provide all documents in her possession to their approved intervention agent.

5. Ms Khan did not comply with that requirement. On 27 August 2021 the SRA issued proceedings in the High Court against both Ms Khan and SK & Co to compel compliance. On 7 September 2021 Adam Johnson J made an Order requiring them to deliver the relevant documents to the intervention agent within 3 working days of service of the Order. There was an elaborate definition of the documents and items covered by the Order (the "Listed Items") but the detail is not important for present purposes: it included client files and other paper and electronic documents relating to the practice.

6. Ms Khan and SK & Co did not comply. On 16 September 2021 the SRA issued a second set of proceedings, this time adding as 3rd Defendant another company, Just for Public Ltd (**"JFP"**), Ms Khan having indicated in the hearing before Adam Johnson J on 7 September 2021 that she had established JFP and transferred client matters to it. I will refer to SK & Co and JFP together as **"the companies"**. On 21 September 2021 Miles J made an Order in substantially the same terms as that made by Adam Johnson J but addressed to Ms Khan and both of the companies.

7. Again there was no compliance with the Order. On 1 October 2021 the SRA applied to commit Ms Khan for contempt of court, issuing two applications, one in respect of the failure by Ms Khan (both personally and as director of SK & Co) to comply with the order for delivery up in the Order of Adam Johnson J of 7 September 2021; and the other in respect of her failure (both personally and as director of each of the companies) to comply with the order for delivery up in the Order of Miles J of 21 September 2021.

8. The contempt applications were heard together by Leech J on 17 December 2021. He handed down a reserved judgment on 12 January 2022 at [2022] EWHC 45 (Ch). He concluded that Ms Khan was liable for contempt for breach of each of the Orders, and

by Order dated 12 January 2022 he committed her to prison for a term of 6 months for each contempt (to run concurrently), of which 3 months was punishment for past breaches and 3 months was to be discharged on Ms Khan complying with the Orders. I will refer to this as **"the first committal"**, and to Leech J's judgment of 12 January 2022 as **"the First Committal Judgment"**.

9. Ms Khan appealed the first committal to this Court, but only in respect of the sentence imposed by Leech J, not in respect of the findings of contempt. The appeal was heard by Arnold LJ and myself on 17 February 2022. We dismissed the appeal for the reasons given in our judgments of that date at [2022] EWCA Civ 287.

10. Ms Khan did not comply with the Orders and so the full sentence of 6 months took effect. After statutory remission she was released after 3 months.

11. On 6 April 2022 the SRA applied for a further order against Ms Khan and the companies. On 27 April 2022 Miles J made such an order. This (**"the Miles Order"**) ordered the Defendants to produce or deliver up the Listed Items (similarly defined as before) in their possession or control to the SRA's intervention agent by 4 pm on 5 May 2022 (para 1), and Ms Khan to provide all necessary usernames and passwords (para 2). If Ms Khan knew or believed that any of the Listed Items was in the possession or under the control of anyone other than the Defendants, she was ordered to give details to the agent (para 3). If the Defendants were unable to comply with paragraphs 1 to 3, Ms Khan was ordered to sign and serve a witness statement explaining the steps she had taken to comply, why she had been unable to do so and when she would be able to do so, again by 4 pm on 5 May 2022 (para 5).

12. It was common ground that Ms Khan did not deliver up any Listed Items to the intervention agent as required by paragraph 1. It was also common ground that she did not provide a witness statement by 5 May 2022 as required by paragraph 5, although Ms Khan maintained that she had complied late when she served her first affidavit in November 2022.

13. On 4 October 2022 the SRA issued a second application for committal. I will have to consider the details of the application below but in essence it alleged that the Defendants had had Listed Items in their possession or control but had failed to produce or deliver them up as required by paragraph 1 of the Miles Order, and had failed to serve a signed witness statement in breach of paragraph 5 of the Miles Order.

14. The committal application was heard by Leech J on 1 and 2 February 2023. On 14 February 2023 he handed down judgment on liability at [2023] EWHC 302 (Ch). His conclusions in this judgment (**"the Liability Judgment"**) were as follows (references are to paragraphs of the judgment):

    (1) Ms Khan and the companies had been properly served with the Miles Order [37].

    (2) Ms Khan knew and understood the terms of the Miles Order and what it required her to do [42].

    (3) Ms Khan's failure to deliver up certain specific items (referred to as the Ledger and Bank Statements, the Beynon file and the Humpston files) amounted to

breaches of paragraph 1 of the Miles Order [100]. Leech J said that he was unable to be satisfied to the criminal standard that she had committed breaches in relation to other specific items relied on by the SRA, although that was because she had not made an honest and reasonable attempt to comply with paragraph 5 [101].

(4) Ms Khan's failure to provide any of the information required by paragraph 5 until (at the earliest) her first affidavit on 30 November 2022 was a serious and deliberate breach of the Miles Order [112].

(5) Ms Khan fully appreciated that her failure to deliver up any of the Listed Items and to make and serve a witness statement amounted to a breach of the Miles Order [119].

(6) Ms Khan took a conscious decision not to comply with the Miles Order herself or to ensure that the companies complied with it, knowing that this would put them in breach of the Order or not caring whether it did or not [122].

(7) In summary Leech J found (i) Ms Khan and SK & Co liable for contempt in failing to produce or deliver up the Ledger, the Bank Statements and certain documents from the Humpston files in breach of paragraph 1 of the Miles Order [124]; (ii) Ms Khan and the companies liable for contempt for failing to produce or deliver up the Beynon files and certain Humpston files in breach of paragraph 1 of the Miles Order [125]; and (iii) Ms Khan liable for contempt in failing to serve a signed witness statement in breach of paragraph 5 of the Miles Order [126]-[127].

15. Leech J adjourned the question of sanction to a further hearing. That took place on 8 March 2023. Ms Khan was represented (as she had been on the liability hearing) by counsel, Mr James Bogle. Shortly before the hearing Mr Bogle filed submissions inviting the Court not to deal with sanction because medical evidence served on her behalf cast doubt on what was called her "status", that is her fitness or capacity to defend herself. Mr Bogle suggested that the Court should adopt one of three courses: (i) set aside the Liability Judgment and re-hear or dismiss the committal application; (ii) adjourn the question of sanction pending appointment of a litigation friend; or (iii) adjourn the question of sanction and direct the service of expert evidence and a hearing at which experts could be cross-examined.

16. Leech J handed down his judgment on sanction on 10 March 2023 at [2023] EWHC 525 (Ch). In the course of this judgment (**"the Sanction Judgment"**) he considered the alternative courses which Mr Bogle had submitted should be adopted. In summary (references here are to paragraphs of the Sanction Judgment):

(1) He was not satisfied that Ms Khan (or those representing her) had a real prospect of persuading the Court that she was a protected party, his detailed reasons being given in a confidential schedule. In those circumstances he dismissed the application to re-open and set aside the Liability Judgment [29].

(2) He refused the application for an adjournment, again for the reasons given in the schedule [34].

(3) So far as sanction was concerned he sentenced Ms Khan to prison for 12 months [52].

17. By his Order dated 10 March 2023 he therefore committed Ms Khan to prison for 12 months, subject to a stay of execution to enable an appeal to be brought. I will call this **"the second committal"**. He also ordered the Respondents (that is, Ms Khan and the companies) to pay the SRA's costs on the indemnity basis.

The appeals and applications

18. There are three sets of proceedings before the Court.

19. First, on 10 May 2023 Ms Khan appealed to this Court against the second committal. This is appeal no CA-2023-000868. I will refer to it as **"the main appeal"**. Ms Khan did not need permission to appeal (as by CPR r 52.3(1)(a)(i) an appellant does not require permission to appeal against a committal order), but she applied for a continuation of the stay of execution, which was granted by Newey LJ on 17 July 2023 until after determination of the appeal.

20. In the main appeal the SRA has filed a Respondent's notice seeking to uphold Leech J's order on additional grounds. It has also applied for permission to rely on fresh evidence which the SRA seeks to rely on to show that Ms Khan has continued to take an active role in proceedings.

21. Second, on 6 February 2024 the companies filed their own Appellant's notice against the Order of Leech J of 10 March 2023. This is appeal no CA-2024-000237. I will refer to it as **"the companies' appeal"**. It is not disputed that the companies do need permission to appeal, as the exception in CPR r 52.3(1)(a)(i) to the general requirement to obtain permission to appeal only applies to an appeal against "a committal order", and this means an order (immediate or suspended) committing a person to prison. It does not therefore extend to an order made against a company, which cannot be sent to prison: *Masri v Consolidated Contractors Ltd International Co SAL* [2011] EWCA Civ 898, [2012] 1 WLR 223. In addition to requiring permission to appeal, the companies also require a significant extension of time for appealing as the order appealed against was made on 10 March 2023 and time expired 21 days later on 31 March 2023, over 10 months before the Appellant's notice was filed.

22. By Order dated 13 February 2024 Newey LJ directed among other things that the applications in the companies' appeal for an extension of time and permission to appeal be heard together with the main appeal, with the appeal to follow immediately if the extension and permission were granted.

23. Third, by Appellant's notice initially filed on 2 May 2023 Ms Khan sought to appeal the first committal, and specifically the findings of liability that led to the committal. This is appeal no CA-2023-000829. I will refer to it as **"the first committal appeal"**. She did not need permission to appeal the findings of contempt (see *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ at [39] per Males LJ), but she did again need a significant extension of time. The order which she sought to appeal was made on 12 January 2022 (see paragraph 8 above) and the Appellant's notice was therefore some 15 months out of time.

24. By Order dated 17 July 2023 Newey LJ refused the extension of time with the result that the appeal stood dismissed (and various ancillary applications fell away).

25. Ms Khan applied for his order to be reconsidered. By Order dated 14 November 2023 Newey LJ confirmed his decision to refuse an extension of time.

26. By application notice dated 22 November 2023 Ms Khan applied to set aside and vary his order of 14 November.

27. Newey LJ directed that there be an oral hearing of that application, and it was subsequently listed to be heard together with the hearing of the main appeal.

28. We therefore have before us: (i) the main appeal by Ms Khan; (ii) the companies' applications for extension of time and permission to appeal (with appeal to follow if granted) in the companies' appeal; and (iii) Ms Khan's application for reconsideration of the refusal of an extension of time in the first committal appeal.

The main appeal

29. Four grounds of appeal are advanced on behalf of Ms Khan in support of the main appeal. In summary they are as follows:

    (1) The judge erred in his approach to the question whether Ms Khan was fit to plead.

    (2) The judge erred in attaching weight to the finality principle.

    (3) Ms Khan did not receive a fair trial as required by Article 6 of the European Convention on Human Rights (**"ECHR"**).

    (4) The judge did not warn Ms Khan that he would draw adverse consequences from exercising her right to silence.

30. The substantive issue in the appeal is that raised by Ground 1. Ground 3 does not really raise any separate issue, and Ground 2 was not pressed by Mr Bogle in oral argument. Ground 4 does raise a short separate point but it is very much a subsidiary one.

The medical evidence

31. In order to explain Ground 1, I should give a more detailed account of the course of the committal applications noting in particular certain medical evidence.

32. So far as the first committal is concerned, the position is recorded in the First Committal Judgment of Leech J at [33]-[37]. Ms Khan had initially represented herself but after obtaining legal aid was represented by solicitors and counsel. The application was listed for hearing on 17 December 2021. On 9 December 2021 Ms Khan's solicitors, Janes Solicitors, wrote to the SRA's solicitors, Capsticks Solicitors LLP, indicating that Ms Khan accepted that there had been non-compliance with the orders and that she did not intend to offer any evidence in her defence, but saying that Janes and her counsel, Mr Grey, had concerns about her mental health. On 16 December 2021, Ms Khan's doctor, Dr Khalid Choudry, wrote a letter confirming that Ms Khan was suffering from stress and anxiety due to the ongoing litigation with the SRA, which was having a

profound effect on her mental and psychological well-being, and saying that she was unlikely to be in a mental state to fully evaluate and comprehend the issues before the Court. On 17 December 2021 Mr Grey applied for an adjournment of the hearing. Leech J held that Dr Choudry's letter did not justify an adjournment, although he said he would give full weight to Ms Khan's mental health and Dr Choudry's concerns in determining sanction (assuming he found liability). When, having dealt with liability, he came to consider sanction, he repeated that he gave full weight to Dr Choudry's assessment of her mental condition; this could not, he said, excuse her conduct but went some way to explaining why she adopted such a wrong-headed attitude to the intervention and the subsequent court orders (First Committal Judgment at [64]); he also said that he made allowance for the fact that a period of imprisonment would be extremely hard for her given her psychological condition (at [65]).

33. The liability hearing for the second committal was heard by Leech J on 1 and 2 February 2023. There was evidence before him in the form of an expert's report dated 6 January 2023 from Dr Arvind Gupta, a consultant psychiatrist (**"Gupta 1"**). Dr Gupta's conclusion was that Ms Khan was presenting with signs and symptoms that were suggestive of Adjustment Disorder: mixed anxiety and depressive reaction. There was also a possibility that she might be suffering from Autism Spectrum Disorder. In answer to a specific question as to the extent to which Ms Khan "understands and can process the current proceedings and the orders she is accused of breaching", Dr Gupta said:

> "Ms Khan is cognitively alert to understand the court proceedings and can put her views, opinions and wishes in her defence. However, she does not believe that the accusations are morally right. She expressed willingness to accept the outcome, particularly after spending 3 months in prison. She came across as a person, who has over-valued and odd ideas about morality and values."

He added that in his opinion a further assessment was necessary.

34. Leech J accepted Dr Gupta's evidence (Liability Judgment at [116]). It was relied on before him to suggest that Ms Khan did not have the necessary mental element to prove contempt. He accepted that the Court had to be satisfied that an alleged contemnor understood what they were required to do or not to do, and that if they did not do what they were required to do they might well be punished (Liability Judgment at [117]). But he was not satisfied that Dr Gupta's report provided any evidence to support the conclusion that Ms Khan did not understand either of these things; if anything it supported his conclusions that Ms Khan understood the terms and effect of the Miles Order and appreciated that she had not delivered up any Listed Items or served a witness statement explaining her actions until after issue of the committal application (Liability Judgment at [118]).

35. Leech J handed down the Liability Judgment on 14 February 2023 and gave directions for the sanctions hearing which he listed for 8 March 2023. These permitted Ms Khan to file further expert evidence by 3 March 2023, later extended to 6 March 2023. On 6 March 2023 she served a second report by Dr Gupta dated that day (**"Gupta 2"**). Dr Gupta repeated his diagnosis that she was presenting with adjustment disorder (mixed anxiety and depressive reaction), and added a diagnosis of Asperger's syndrome. He was again asked the extent to which Ms Khan "understands and can process the current

proceedings and the orders she is accused of breaching". The answer he gave this time was as follows:

> "Ms Khan came across as a person who has a superficial understanding of the matter and seriousness of the proceedings. Ms Khan strongly believes that she acted upon good faith and followed on the path of standing up for her clients."

36. He followed this with an assessment whether Ms Khan was fit to plead and stand trial based on the criteria used in criminal cases, as follows:

> "100. The criteria are on the balance of priorities to be capable of:
>
> To understand the charges
>
> 101. Ms Khan does not have a clear and thorough understanding of the charges levelled against her. Ms Khan does not fully understand the nature and the severity of the charges.
>
> Deciding whether to plead guilty or not guilty
>
> 102. Ms Khan does understand what pleading guilty and not guilty means. Ms Khan does understand implications of being found guilty of the offence and that she might go to prison.
>
> To give evidence in Ms Khan's own defence:
>
> 103. Ms Khan does understand the need for evidence but could not provide with any relevant opinion or views in her defence.
>
> To instruct her solicitor and counsel:
>
> 104. In my opinion, Ms Khan cannot instruct her solicitors.
>
> To be able to challenge a juror:
>
> 105. Since Ms Khan does not have a reasonable understanding of the charges and her actions, she cannot challenge the jurors meaningfully and effectively.
>
> To follow the course of proceedings
>
> 106. Ms Khan can follow the court proceedings as her attention and concentration is good. However, she may not accurately comprehend the discussion.
>
> 107. In my opinion, Ms Khan is not fit to plead and stand trial."

He concluded that Ms Khan needed further assessment by the specialist Autism team who could assess and offer treatment and support in terms of medication and other cognitive psychological and social needs.

37. It was on the basis of that evidence that Mr Bogle applied on 8 March 2023 for the question of liability to be reopened, or for the sanction hearing to be adjourned for the appointment of a litigation friend, or for a hearing at which experts could be cross-examined on the question whether Ms Khan was a protected party (see paragraph 15 above). As already referred to, this application was rejected by Leech J on the basis that he did not consider that there was a real prospect of persuading the Court that she was a protected party, and he proceeded to impose a sentence on Ms Khan (see paragraph 16 above). I will have to look at his reasons for this conclusion in more detail below.

38. It is convenient to mention here that subsequent to the decision under appeal further expert reports have been prepared for Ms Khan by Dr Pawan Rajpal, a consultant psychiatrist. His first report (**"Rajpal 1"**) dated 14 April 2023 was prepared on the instructions of JFP in connection with Ms Khan's appeal against a decision of the Solicitors Disciplinary Tribunal to strike her off the roll of solicitors. He agreed with Dr Gupta that Ms Khan would fulfil the criteria for Autistic Spectrum Disorder (ASD). His opinion was that such a diagnosis would not impair her ability to form *mens rea* for her actions. Her ASD deficits might have impacted on her ability to decide the appropriate action in August to October 2021, but it was not possible to quantify this.

39. On 8 June 2023 Dr Rajpal issued an addendum to his report (**"Rajpal 1A"**). In this he was asked to comment on why it was not possible to quantify the impact of her ASD diagnosis on her decision making process in relation to court orders made on 7 and 21 September 2021. He explained that the diagnosis of ASD is based on qualitative deficits in social interaction, social communication and social imagination, along with preference of sameness (rigidity of thoughts with reduced ability to manage change). There were no scales that could quantify these deficits; and it was not possible to say with assurance whether her rigidity of thought affected her decision making as she was not assessed at the time and the deficit as seen in people with ASD can vary, over time, in the same person, depending on the situation they find themselves in.

40. On 30 September 2023, Dr Rajpal issued a supplementary report (**"Rajpal 2"**). He was asked to comment on the effect of "autistic burnout" on Ms Khan's fitness to plead and stand trial on 17 December 2021. He explained that autistic burnout is a rather new concept, described as intense physical, mental and emotional exhaustion. It was important to appreciate that the concept was rather new and there was still ongoing research required to confirm its validity and reliability. On the specific question he was asked he said:

> "It is documented that she was reporting stress in November and Dec 2011.
>
> It is very much possible that Ms Khan had some signs, as being described, as a part of 'Autistic Burnout'.
>
> However, as mentioned, it is a rather new concept, still being described and researched and it is not possible to comment on the severity of such, on her ability to being fit to plead, engage and instruct her team for the trial on 17 Dec 202[1].
>
> Autism itself, is not enough for defendants to become unfit to plead,

engage or instruct."

Is the test of fitness to plead in criminal cases applicable to a committal application?

41. Mr Bogle's first submission under Ground 1 was that Leech J was wrong to find that the fitness to stand trial and plead test did not apply to contempt proceedings such as the present. His submission was that in such proceedings the Court should assess whether the defendant was fit to plead in the same, or nearly the same, way as in criminal proceedings. For reasons given below, I do not think the answer to this question actually makes a difference in the present appeal, but it was fully argued and in deference to counsel's careful arguments I propose to consider it.

42. There are of course many different types of conduct that may constitute contempt of court. Some are classified as civil contempts and some as criminal. The distinction does not turn on the court concerned, but on the conduct in question: see *Director of Serious Fraud Office v O'Brien* [2013] UKSC 23, [2014] AC 1246 at [37]-[39] per Lord Toulson JSC. Failure to comply with an order of (or an undertaking given to) a court is a civil contempt, whether the court concerned is a civil or criminal court; a criminal contempt is one which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice, and can be committed in civil or criminal proceedings. "To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings": *ibid* at [42].

43. In the present case we are not concerned with criminal contempts, nor with the procedure applicable to civil contempts in the criminal courts, and we have heard no argument on them. We have only heard argument on the question as it applies to civil contempt proceedings brought in the civil courts. Where therefore I refer below to "contempt proceedings" or "committal proceedings" or the like, this is to be understood as only referring to proceedings such as the present, namely an application in a civil court to commit a person for civil contempt such as failing to comply with an order of the court.

44. The procedure for determining questions of fitness to plead in criminal proceedings is provided for by the Criminal Procedure (Insanity) Act 1964 (**"the 1964 Act"**). By s. 4(5) of the 1964 Act the question of fitness to be tried was originally to be determined by a jury but this provision was amended with effect from 2005 (by the Domestic Violence, Crime and Victims Act 2004) to provide that the question is now to be determined by the Court without a jury. By s. 4(6) it is provided that the Court (formerly the jury) shall not make such a determination "except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved".

45. The test of fitness to plead applied in criminal proceedings is not however found in the 1964 Act but is a common law one. The direction of Baron Alderson to the jury in *R v Pritchard* (1836) 7 C & P 303 at 304-5 remains the foundation of the common law, and the test is often referred to as "the *Pritchard* test" (or "the *Pritchard* criteria"). It has been refined in later cases, notably in *R v M (John)* [2003] EWCA Crim 3452, where the Criminal Division of this Court endorsed the directions given to the jury by

the trial judge, HHJ Roberts QC, as "admirable" (see at [31] per Keene LJ). HHJ Roberts had identified 6 things which the defendant needed to be capable of in order to be fit to stand trial. Those 6 things were:

> "(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence."

(see at [21]). In his directions HHJ Roberts expanded on each of these, explaining what they meant in practical terms. In *R v Marcantonio* [2016] EWCA Crim 14, [2016] 2 Cr App R 9, the Court referred to *R v M (John)* and observed that although the *Pritchard* criteria had been subjected to much criticism, as matters stood they were firmly established as the law which had to be applied by this Court (see at [6] per Lloyd Jones LJ).

46. Mr Bogle submitted to Leech J that the *Pritchard* criteria should apply to committal proceedings. Leech J dealt with this point at [13]-[14] of the schedule to the Sanction Judgment. He preferred Mr Ahlquist's submission that the *Pritchard* test did not apply, the relevant test being that for mental capacity under the Mental Capacity Act 2005 (**"the 2005 Act"**). But he continued (schedule [14]):

> "Although the test for mental capacity under the 2005 Act is different from the *Pritchard* test, I accept that at a high level of generality they are directed to the same concern and that if I accepted Dr Gupta's evidence without qualification and found that Ms Khan was unfit to plead for the purposes of criminal proceedings, then this would be a powerful factor in deciding whether she lacked capacity for the purposes of the 2005 Act. I also accept that this would be a strong reason for refusing to permit the Committal Application to proceed."

47. I consider that Leech J was right that the test of fitness to plead in criminal cases, and the *Pritchard* criteria, do not as such apply to committal proceedings. Mr Bogle accepted that the 1964 Act does not apply *directly* to civil contempt proceedings as they are not criminal, and this must be right: there would for example have been no question before 2005 of a jury being asked to determine the question of capacity in such proceedings, nor (as Mr Bogle accepted) is it a requirement in civil contempt proceedings that there be evidence from two or more medical practitioners. What he in effect argued for was not that the procedure should be the same, but that the Court should apply similar criteria (subject to the obvious adjustment that in contempt proceedings there would be no question of challenging jurors). It was, he said, a matter of simple sense and logic that contempt proceedings should be subject to the same criteria as criminal proceedings, given the similarity between them. He relied on the fact that contempt proceedings are in some respects regarded as criminal or quasi-criminal. They are criminal proceedings for the purposes of Art 6 of the ECHR, and have often been referred to as "quasi-criminal" in domestic law: see for example *Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656 (***"Navigator Equities"***) at [79] per Carr LJ (as she then was).

48. I do not think the classification of contempt proceedings as criminal for the purposes of Art 6 ECHR is of much assistance to the present question. The effect of such a

classification is that contempt proceedings attract the protections of Art 6(2) and Art 6(3) (which only apply to criminal proceedings), as well as those of Art 6(1) (which applies to the determination of a person's civil rights and obligations as well as to the determination of criminal charges against him). But neither Art 6(2) (presumption of innocence) nor Art 6(3) (specific safeguards for those charged with criminal offences) is directly in point, as Mr Bogle accepted. His submission rather was that the ECHR classification of contempt proceedings as criminal, and the domestic classification of them as quasi-criminal, indicated that the nature of the proceedings was such that the fitness to plead rules should apply by analogy. But that must I think ultimately depend on domestic law considerations not on the ECHR.

49. So far as the domestic law is concerned, the position is clearly established that although contempt proceedings are often described as "quasi-criminal", they remain civil proceedings. What this means in practice is that while contempt proceedings are not in fact criminal proceedings, they have an obvious resemblance to them, and in some respects similar principles apply to them as they do to criminal proceedings. The examples given by Carr LJ in *Navigator Equities* are that the charges raised have to be clear; the criminal standard of proof applies; the respondent has a right to silence; and there must be a high standard of procedural fairness. Another example is provided by *Jelson (Estates) Ltd v Harvey* [1983] 1 WLR 1401 where this Court, following its earlier unreported decision in *Danchevsky v Danchevsky (No 2)* (10 November 1977), held that the criminal rules governing double jeopardy (*autrefois convict* and *autrefois acquit*) applied to proceedings for contempt; and see *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 at [97]-[98] per Popplewell LJ (a point of law which goes to whether an alleged contempt is one known to the law can be taken on appeal even if not taken below, by analogy with the practice in criminal appeals). I accept, as these examples illustrate, that committal proceedings have much in common with criminal proceedings. But none of this means that contempt proceedings are in fact criminal proceedings. They are undoubtedly civil proceedings: see *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm) (***"Masri"***) at [157] per Christopher Clarke J (referring to the fact that hearsay may be admissible), and *Navigator Equities* at [80ff] per Carr LJ (holding that the role of the applicant is not to be equated with that of a dispassionate prosecutor acting as guardian of the public interest).

50. It follows that the extent to which the principles applicable in criminal proceedings apply to committal proceedings depends on the particular point in question. In the present context the relevant principles are those dealing with the capacity of the defendant to a committal application to conduct the proceedings. That cannot be answered simply by an appeal to the quasi-criminal nature of the proceedings and the degree of similarity between a person facing a committal application and a person facing criminal charges, but only by examining the particular rules applicable.

51. On this I found entirely persuasive the analysis put forward by Mr Ahlquist. This was as follows. Committal proceedings in the civil courts are civil litigation, governed by CPR Part 81. As such they are subject to the other provisions of the CPR, including Part 21, which contains "special provisions which apply in proceedings involving children and protected parties" (see r 21.1(1)(a)). It may be noted that r 21.1(c) provides that Part 21 does not apply to certain very limited types of proceedings where one of the parties is a child (Part 75 and related provisions, all concerned with traffic

enforcement penalties); but there is nothing excluding Part 81 proceedings, or indeed any proceedings where a party is a protected party. For these purposes "protected party" means a party who lacks capacity, within the meaning of the 2005 Act, to conduct the proceedings (see definitions in r 21.1(2)(a), (c) and (d)).

52. CPR Part 21 does not spell out what it is to lack capacity to conduct proceedings. For this one has to go to the 2005 Act, s. 2(1) and (4) of which provide as follows:

> "**2 People who lack capacity**
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> …
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities."

53. Being "unable to make a decision" is explained in s. 3. This provides, so far as relevant, as follows:

> "**3 Inability to make decisions**
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> …
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–
>
> (a) deciding one way or another, or
>
> (b) failing to make the decision."

54. These provisions should also be read with s. 1, which, so far as relevant, provides as follows:

> "**1 The principles**
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> …
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

55. In other words the relevant statutory test for whether a party to civil litigation, including a defendant to contempt proceedings, has capacity to conduct proceedings is that found in these provisions of the 2005 Act. Mr Bogle accepted that Part 21, and hence the 2005 Act, applied to contempt proceedings, but said that that did not exclude the application of a fitness to plead test as well. But I think Mr Ahlquist is right that what he called the "architecture" of the CPR and the 2005 Act means that there is no need – nor indeed any room – for there to be a second test as to whether a defendant to committal proceedings is fit to plead to them. The only test is that laid down by the 2005 Act.

56. What he accepted however (again, in my view correctly) is that although the 2005 Act tells you in general terms what it is to lack capacity – namely to be unable through mental impairment or disturbance to make a decision for oneself – and also tells you in general terms what making a decision for yourself requires you to be able to do – understanding, retaining and weighing information, including reasonably foreseeable consequences, and communicating decisions – it unsurprisingly does not tell you what kind of decisions you need to make in order to conduct proceedings, and specifically in order to conduct proceedings as a defendant to committal proceedings. Here the experience of the criminal courts as to what sort of decisions a defendant might need to make, and what that means in practical terms, might indeed be valuable as an analogy. In this way the *Pritchard* criteria, although not directly applicable to contempt proceedings, might nevertheless assist in assessing whether a defendant to contempt proceedings lacked capacity within the meaning of the 2005 Act. Thus if one takes the 6 things identified by HHJ Roberts, and endorsed by this Court, in *R v M (John)*, they are as follows:

> "(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence."

(see paragraph 45 above). With the exception of (3), the others are all just as applicable to a defendant facing committal proceedings for contempt as to a defendant facing criminal charges.

57. In summary, the position seems to me to be this. The criminal test of fitness to plead, and the *Pritchard* criteria, are not directly applicable to contempt proceedings, where the test for capacity to conduct proceedings is that in the 2005 Act. But the *Pritchard* criteria may nevertheless assist the Court in assessing whether a defendant to contempt

proceedings lacks capacity under the 2005 Act as illustrations of the sort of decisions that such a defendant is likely to have to take in order to be able to defend the proceedings.

58. I do not see that this differs in substance from what Leech J said. As set out at paragraph 46 above, although he accepted that the test was that in the 2005 Act not the fitness to plead test, he said that if he had found that Ms Khan was unfit to plead that would have been a "powerful factor" in deciding whether she lacked capacity and a "strong reason" for refusing to permit the committal application to proceed. The reason he did not accede to Mr Bogle's application was not therefore because he preferred one test to another but because he did not accept the conclusion in Gupta 2 that Ms Khan was unfit to plead.

59. That was why I said that resolution of the question whether the test of fitness to plead in criminal cases applied to a committal application was not likely to make any difference to the outcome of the appeal. But for the reasons I have given I would not accept Mr Bogle's submissions on this aspect of his Ground 1.

Should Leech J have adjourned for further evidence?

60. Mr Bogle's second, and main, submission under Ground 1 is that given Gupta 2 and its conclusions on Ms Khan's fitness to plead, if Leech J was not going to accept this as sufficient evidence of her lack of capacity, he should have adjourned the proceedings for further evidence to be obtained. He described the thrust of his appeal as a very simple one. He candidly accepted that Ms Khan's lawyers had thought that Gupta 2 was sufficient to establish that she was not fit to plead; but if this was not so, it did at any rate raise sufficient doubt about her mental state to require Leech J to direct the obtaining of further evidence. He was therefore really obliged to halt the proceedings for that purpose.

61. Mr Bogle advanced this case with skill and tenacity, but I do not accept it.

62. I will start with the relevant legal principles. We were referred to a number of authorities dealing with the position when an adjournment is sought for medical reasons. This is not quite the same question as arises in capacity cases but I accept that these authorities contain helpful guidance. In *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 21 this Court reviewed many of the authorities and concluded that the guiding principle in an application to adjourn of this type was whether if the trial went ahead it would be fair in all the circumstances, and that, depending on the circumstances, the illness of an important witness might engage the principles in the same way as the illness of a party: see at [30]. But in that case there was no doubt about the relevant medical evidence. It was "detailed, recent and entirely compelling", and "rightly accepted" by the judge "without qualification": see at [44]. The Court therefore did not say anything much about what a court or tribunal should do if presented with some evidence that a litigant is unfit to attend but has doubts whether it is genuine or sufficient, beyond noting that such a situation arises not infrequently and often requires careful handling: see at [39] (and also at [67] per Peter Jackson LJ).

63. That situation had however been considered in *Teinaz v Wandsworth London Borough Council* [2002] EWCA Civ 1040 (***"Teinaz"***). At [22] Peter Gibson LJ said this:

> "If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

64. As this passage makes clear, *Teinaz* is not authority that directions for further evidence are always a necessity. It is authority for the proposition that a court may seek further evidence if it has doubts, but that the decision whether to do so is a matter of discretion, and everything depends on the circumstances: see *Maitland-Hudson v SRA* [2019] EWHC 67 (Admin) (***"Maitland-Hudson"***) at [99]-[100] per Carr J (as she then was). A similar point was made by this Court in *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 (***"Solanki"***) at [35] per Gloster LJ:

> "…where medical evidence is produced which is deficient in some respect, it *may* be appropriate to give consideration to a short adjournment in order to enable a litigant to make good such deficiency."

(emphasis in original).

65. Another well-established principle is that a Court is not obliged to accept medical evidence uncritically. In *Levy v Carr-Ellis* [2012] EWHC 63 (Ch) at [36] Norris J said:

> "No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

This passage was expressly approved by this Court in *Forrester Ketley v Brent* [2012] EWCA Civ 324 at [26] per Lewison LJ; see also *General Medical Council v Hayat* [2018] EWCA Civ 2796 at [38]-[39] per Coulson LJ. In *Maitland-Hudson* at [84] Carr J expressed it thus:

> "A court or tribunal is entitled to weigh up the medical evidence against all of the other material available to it."

66. There was some debate before us as to whether this is affected by the recent decision of the Supreme Court in *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 (***"TUI"***), which considered the principles as to when a party was required to cross-examine a witness for the other party. The Court's conclusions are summarised at [70] in the judgment of Lord Hodge DPSC in a number of propositions, the first being that

the general rule in civil cases is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the Court should not be accepted. That rule extends to both witnesses of fact and expert witnesses.

67. That was said in the context of a case where there had been a trial with oral evidence and the defendant had not required an expert witness for the claimant to be called and cross-examined. Lord Hodge's judgment is firmly set in the context of the requirements of a fair trial: see at [2] where he introduces the appeal as raising "a question of the fairness of the trial". This question of the fairness of a trial runs throughout the judgment: see for example [34] ("unfairness in the way in which the trial judge conducted the trial"), [35] ("the rule is based on the fairness of the trial"), [36] ("At the heart of this appeal lies the question of the requirements of a fair trial"), and [42] ("It is the task of a judge in conducting a trial in an adversarial system to make sure that the trial is fair.") Hence the second of Lord Hodge's propositions summarising his conclusions is that "In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair."

68. In those circumstances considerable caution is needed before seeking to transpose what Lord Hodge said to the rather different context of ancillary applications made in the course of proceedings. There is nothing to suggest that Lord Hodge intended to bring about any change in practice in relation to such applications, and no reason from his judgment to think that such a question was even addressed in argument. It is trite law that judgments are to be read by reference to the issues before the Court. Indeed Mr Bogle accepted that he was not suggesting that *TUI* applied generally to applications brought under Part 23. His submission was rather that in the present case Gupta 2 raised sufficient doubt, on a question of great seriousness, to require further evidence. On analysis I do not think that submission really turns on anything in *TUI*, and I am not persuaded that Mr Bogle either needs, or gets, any assistance from *TUI*, which was not I think intended to say anything about the practice of the Court in relation to interlocutory applications. The real question in the present case is whether Leech J was entitled to proceed on the basis of the evidence he had.

69. That requires considering the precise findings that Leech J made about Gupta 2. He said (Sanction Judgment schedule [9]) that he accepted Dr Gupta's evaluation of Ms Khan's medical condition at paragraphs 90 to 94 of Gupta 2. In these paragraphs, Dr Gupta discusses his diagnosis that Ms Khan suffers from Asperger's syndrome, and how that impacted on her. Leech J commented that there was nothing in those passages which was inconsistent with Gupta 1 or the findings that he had made in the Liability Judgment.

70. He then set out Dr Gupta's consideration of whether Ms Khan was fit to plead (see paragraph 36 above). He then conducted a detailed analysis of various matters under 8 heads (schedule [15] to [27]), and then considered what weight he could give in the light of them to Dr Gupta's views on the question of fitness to plead. I think it is worth quoting his carefully expressed conclusions on this point in full, as follows (schedule [30]):

> "The real issue for me to decide is whether I attribute sufficient weight to those views to direct further evidence or cross-examination on the question whether Ms Khan lacks mental capacity. I have reached the

conclusion that the evidence which Dr Gupta has given in Gupta 2, ¶101 to ¶106 does not bear sufficient weight to take that course for the following reasons:

(1) Section 1(2) of the 2005 Act provides that a person must be assumed to have capacity unless it is established that she lacks capacity. This is expressed as a principle not a legal or evidential presumption. As a matter of principle, therefore, I must assume that Ms Khan has capacity until or unless Ms Khan or those appearing on her behalf persuade me otherwise.

(2) The question whether Ms Khan lacks capacity must be decided on the balance of probabilities. I am not satisfied that it is more probable than not on the basis of Dr Gupta's evidence that Ms Khan is either unfit to plead or lacks capacity. Far from it, the overwhelming evidence before the Court is that Ms Khan has capacity to conduct legal proceedings on her own account or to instruct solicitors and counsel to do so. Mr Bogle has not, therefore, discharged the burden of proving on a balance of probabilities that Ms Khan lacks capacity.

(3) But in any event, I am not satisfied that Mr Bogle has any real prospect of persuading me to accept the conclusions in Gupta 2, ¶101 to ¶106 even after further expert evidence and cross-examination and, in particular, to revise the conclusion which I reached in the Liability Judgment at [119]. The history of the Committal Application and the associated proceedings and Ms Khan's personal participation in them throughout satisfies me that I should attribute very little weight to those conclusions. I am fully prepared to accept that Ms Khan had serious medical and emotional problems after the Liability Judgment and I would not wish to downplay them. But they did not prevent her making Khan 1 to 4, Khan WS1 or continuing to participate in costs proceedings (above).

(4) In reaching this conclusion, I also take into account her conduct at the Committal Application. I give one example. Ms Khan attended both days of the hearing. When Mr Ahlquist had fully opened the application, I gave Mr Bogle an opportunity to take instructions from Ms Khan on whether to give evidence and submit to cross-examination. After about 20 minutes, I returned to Court and Mr Bogle informed me that Ms Khan had elected not to give evidence but to rely on Khan 1 to Khan 4. I have no doubt that Ms Khan made a fully informed decision not to give evidence and was able to discuss and communicate that decision to her solicitors and counsel. In my judgment, she has no real prospect of persuading the Court that she lacked capacity when she made that decision."

71. I consider that Leech J asked himself the right question when he asked whether the evidence from Dr Gupta was sufficient to cause him to direct further evidence or cross-examination. At (2) he concludes that Gupta 2 did not persuade him on the balance of

probabilities that Ms Khan lacked capacity. He was of course right that the 2005 Act required both that she was to be assumed to have capacity unless the contrary was established, and that this had to be decided on the balance of probabilities: see s. 1(2) and s. 2(4) of the 2005 Act (paragraphs 54 and 52 above respectively). Mr Bogle has not sought to argue that his conclusion that her lack of capacity had not been established was one that was not open to him on the evidence before him.

72. But it is important to note that he did not simply stop there and conclude that because he was unpersuaded by the evidence currently before him that was the end of the question. I do not propose to decide if that would have been open to him, as that is not what he did. I think there is some force in Mr Bogle's submission that if the evidence that a party may lack capacity to conduct proceedings is insufficient to persuade a judge on the balance of probabilities, but nevertheless does leave him in real doubt whether a party has capacity or not, it may be appropriate for the application to be adjourned for further and better evidence to be obtained, in line with what was said in *Teinaz* and *Solanki*. To proceed on the basis that a person has capacity when there is a real doubt about it may not only be unfair to the party concerned but cause problems for the proceedings as a whole, because if a party does in fact lack capacity, then no party may take any further step without the Court's permission until the party without capacity has a litigation friend, and any step taken before then has no effect unless the Court orders otherwise: see CPR r 21.3(3) and (4).

73. But in the present case what Leech J did at (3) was to go on to consider whether there was any real prospect of his being persuaded to accept the conclusions in Gupta 2 at paragraphs 101 to 106 even with the benefit of further evidence and cross-examination. He concluded that there was not. That is the critical conclusion for the current question. If he was entitled to reach *that* conclusion, then I do not see that he erred in refusing to adjourn for such further evidence or cross-examination. There was no advantage to anyone in putting off the proceedings further if there was no real prospect of further evidence persuading him to accept the conclusions in Gupta 2.

74. So the critical question for this part of the appeal is whether Leech J's conclusion that there was no real prospect of further evidence changing things was one that was open to him.

75. Here the appellant faces well-known difficulties in disturbing what is essentially an evaluative decision by a judge who is immersed in the detail of a case in a way in which an appellate court cannot be. Mr Bogle addressed us on each of the 8 points relied on by Leech J in coming to his conclusions, and I propose to consider each of them briefly in turn, but I will say straightaway that I do not think Leech J's evaluation, based as it was on all the material before him, was flawed.

The 8 points

76. Point (1) was that Dr Gupta's instructions, which were before the Court, did not ask him to consider the fitness to plead test and the *Pritchard* criteria, and he did not explain why he did so. Mr Bogle accepted that this was so; but said that Dr Gupta was obviously familiar with the test, and his instructions did ask him to consider the extent to which she understood and could process the proceedings. I do not think this point by itself takes one very far, but I agree with Leech J that one might have expected an explanation of why Dr Gupta thought it appropriate to consider the fitness to plead test

at all.

77. Point (2) was that Dr Gupta had not been provided with Ms Khan's third or fourth affidavits (**"Khan 3"** and **"Khan 4"**). Since he said that the diagnosis by itself did not necessarily result in cognitive impairment, and did not suggest that there had been any recent adverse change in her mental state, it would have been very relevant to consider whether her affidavits (she swore four in all between 30 November 2022 and 1 February 2023) really demonstrated the kind of cognitive impairment which would prevent her for example from giving instructions. But Dr Gupta does not conduct any such analysis and says nothing about whether the affidavits he did have (Khan 1 and Khan 2) provided relevant evidence as to her fitness to plead. Mr Bogle said that Dr Gupta could not be criticised for not having Khan 3 or 4 (which I accept) and did have the advantage of a face-to-face interview with Ms Khan. If Leech J thought more explanation was required, he could and should have given directions for further evidence.

78. I can take this with point (3) which is that Dr Gupta did not explain why he had changed his mind from Gupta 1 as to Ms Khan's fitness to plead. Mr Bogle said again that he had had the benefit of a lengthy face-to-face interview. As Mr Ahlquist accepted, that *might* be an explanation, but if so Dr Gupta didn't say so. He undoubtedly did take a radically different view in Gupta 2 from that he had taken on the same question in Gupta 1, but without any explanation at all for his change of view, or even explicit recognition that his conclusion in Gupta 2 that Ms Khan "is not fit to plead and stand trial" was diametrically opposed to the view he had expressed in Gupta 1 that she "is cognitively alert to understand the court proceedings and can put her views, opinions and wishes in her defence": see paragraphs 33 and 36 above.

79. I think Leech J was entitled to take both these points into account. No doubt they would not have been enough in themselves to cause him to reject the conclusions on fitness to plead in Gupta 2, but it does mean that those conclusions are fairly baldly stated without much reasoning, which undermines their cogency.

80. Point (4) is that Dr Gupta had set out a Case Summary in Gupta 2 which included reference in paragraph 8 to Ms Khan having suffered mental and emotional health issues and having begun to make erratic and unwise decisions, and in paragraph 9 to her having appeared to have adopted the delusive position that she needed to protect the confidentiality of her clients from the SRA, which was described as an irrational position that no solicitor acting rationally could ever adopt. Paragraphs in identical terms had been included in Gupta 1. Mr Ahlquist pointed out that for the purposes of the 2005 Act a person is not to be treated as unable to make a decision merely because he makes an unwise decision (s. 1(4), set out at paragraph 54 above), and Leech J accepted that this cast doubt on whether Dr Gupta had applied the correct test. It was pointed out to Leech J that these paragraphs were taken from Dr Gupta's instructions, to which his reaction was that the fact that Dr Gupta accepted them without forming an independent opinion about Ms Khan's decision making might cast even greater doubt on his conclusions.

81. Mr Bogle did not put forward any substantive challenge to this assessment. Indeed it seems to me that there was another point which could have been made. Since paragraphs 8 and 9 were in the same terms in Gupta 1 and Gupta 2, it is apparent that nothing in this respect had changed. But in Gupta 1 Dr Gupta had said that Ms Khan was cognitively alert to understand the proceedings, and had said in terms that "There

was no expression or evidence of delusional thinking." So the matters recited in paragraphs 8 and 9 of Gupta 2 could not explain the conclusions he expressed on fitness to plead, or the apparent change in his views since Gupta 1.

82. Point (5) indeed was a summary of the inconsistencies between Gupta 1 and Gupta 2 which were unexplained. Mr Bogle again submitted that these were all explicable on the basis of a more thorough examination. But the fact is that the inconsistencies were striking, and were not explained. One example given by Leech J is sufficient to illustrate the point. In Gupta 1, Dr Gupta said that Ms Khan "can put her views, opinions and wishes in her defence"; in Gupta 2 he said that she understood the need for evidence but "could not provide with any relevant opinion or views in her defence". This is not a slight or nuanced change in position based on a more detailed investigation but a stark and complete reversal.

83. Point (6) was the contrast between Dr Gupta's views in Gupta 2 and the conclusion Leech J had himself come to in the Liability Judgment, namely that Khan 1 to 4 betrayed a thorough understanding of the terms of the Miles Order and of what compliance with it required. Leech J said it was very difficult to see how Ms Khan could have prepared her four affidavits without a clear and through understanding of the allegations of contempt and their severity, or if she could not instruct her solicitors, or provide them with her views and opinions about the way to address those allegations, or provide them with any relevant evidence in her defence.

84. Mr Bogle said that his solicitors were faced with the difficulty of trying to make as much as possible from what they had, but that if Ms Khan were in fact unfit to plead her instructions and affidavits were useless. Leech J was therefore assuming that which had to be proved.

85. I do not think this does justice to the point Leech J was making. Mr Bogle naturally accepted that the *facts* deposed to by Ms Khan came from her, it not being suggested that the solicitors had devised facts themselves. So where an explanation is given, it is an indication that Ms Khan was able to give instructions on relevant facts to her solicitors. I consider Leech J was plainly entitled to take account of what she said in her affidavits as casting very significant light on her understanding of the proceedings. Indeed I think this (and the related point in point (7)) is the key consideration which led him to conclude not only that Dr Gupta's conclusions were inadequately explained and insufficient to persuade him, but also that there was no real prospect of his being so persuaded even with further evidence or cross-examination.

86. Point (7) is to much the same effect. It is that there was evidence subsequent to Ms Khan's meeting with Dr Gupta (which took place on 25 February 2023) that she continued to take an active part in proceedings in a way that showed that she understood and was able to participate in them. Thus she had made a detailed witness statement explaining why she had been unable to meet the Court's deadlines; she was working on an affidavit which she proposed to give to show that she had purged her contempt; and she had made a without prejudice offer (signed by herself) and served points of dispute and supplemental points of dispute in costs proceedings (which could be shown by the metadata to have been amended by her personally). She had also been involved in litigation with the SRA for a number of years, often representing herself; and Leech J was taken to transcripts of two hearings in which she addressed the Court. His conclusion from this material was that there was no suggestion that she had any

difficulty understanding the proceedings or defending herself; and that:

> "If she was suffering from the long-standing issues which Dr Gupta has identified at the time, they did not impair her ability to comprehend and participate fully in legal proceedings even to the extent to appearing before the tribunal herself."

87. Mr Bogle submitted that these were matters that could and should have been explored in cross-examination. But I consider that Leech J was plainly entitled to take them into account. We were taken by Mr Ahlquist through some particular points that had been deployed by Ms Khan in her affidavits as answers to the charges; it is not necessary to set out the detail, but I accept his submission that they demonstrate a sophisticated awareness of the detail of the proceedings that is entirely at odds with the conclusions on fitness to plead expressed in Gupta 2.

88. Point (8) was that Dr Gupta concluded that Ms Khan "cannot instruct her solicitors", but that this is another bald conclusion that is quite unexplained. Mr Bogle pointed to a part of Gupta 2 which refers to there being a high possibility that her difficulties could have had an impact on her information processing and decision making related to the issues mentioned in the charges levelled against her. But that does not seem to me a sufficient answer to Leech J's point that there is no real explanation in Gupta 2 as to why he concluded that she could not instruct her solicitors when the other material indicated that she not only could but had done.

89. Having been through each of the 8 points, I return to the overall question which is whether Leech J was entitled to reach the evaluative assessment, on the basis of all the material before him, that there was no real prospect of his being persuaded to accept the conclusions on fitness to plead in Gupta 2 even with further evidence and cross-examination. I think he was entitled to reach that view, and as I have already said if he was, then he was also entitled to proceed without any further adjournment.

90. I would therefore dismiss Ground 1 of the appeal.

Respondent's notice and further evidence

91. It is not necessary in those circumstances to consider the alternative grounds raised in the SRA's Respondent's notice. Four grounds are pleaded but the first three are really responses to the grounds of appeal. The fourth however is a separate point. It is that since the Sanction Judgment Ms Khan has continued to be involved in various proceedings, pursuing an appeal against the decision of the Solicitors Disciplinary Tribunal, issuing the main appeal and the first committal appeal, and making a number of interlocutory applications. In none of these has there been any suggestion that she could not act without a litigation friend and none has been appointed.

92. In support of this ground the SRA applied for permission to adduce further evidence detailing the various applications Ms Khan has made. We looked at it on a provisional basis. Had the point been a live one, I would have given the SRA permission to adduce this further evidence, all of which post-dates the hearing, is documented and not likely to be disputed, and apparently persuasive and material. But it is not necessary to go into the details.

93. There is one point however that may be worth drawing attention to. Among the other documents for which the SRA sought permission were the reports by Dr Rajpal (Rajpal 1, 1A and 2), which Ms Khan had sought leave to adduce in the first committal appeal. The SRA sought permission for Rajpal 1 and 1A in its formal application, and in oral submissions Mr Ahlquist extended that to Rajpal 2, which post-dated that application. Neither Rajpal 1 nor Rajpal 1A gives any particular support for the conclusion that Ms Khan did not have sufficient understanding of the litigation to have capacity (or be fit to plead) (see paragraphs 38 and 39 above); and Rajpal 2 goes further in stating that autism itself is not enough for defendants to become unfit to plead, engage or instruct, and that it is not possible to comment on the impact of the rather new concept of autistic burnout on her ability of being fit to plead, engage and instruct her team (see paragraph 40 above). This was admittedly specifically directed at the position on 17 December 2021, being the date of the hearing of the first committal, but the tenor of Dr Rapjal's reports is consistent with the conclusions reached by Leech J. That does tend to suggest that he was right to take the view he did, and that an adjournment for further evidence would not in fact have been likely to change anything.

Ground 2

94. Ground 2 of the main appeal was that Leech J was wrong in his application of the finality principle. But in oral submissions Mr Bogle did not press the point. I think he was well advised not to. Leech J referred to *AIC Ltd v Federal Airports of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223 where Lord Briggs and Lord Sales JJSC considered the importance and weight of the finality principle (Sanction Judgment at [16]-[18]), and concluded that the evidence in Gupta 2 was not sufficiently strong to outweigh or displace the finality principle, and hence that he would not re-open or set aside the Liability Judgment (Sanction Judgment at [29]). But this was because he was not satisfied that Ms Khan, or those representing her, had a real prospect of persuading the Court that she was a protected party (ibid). Had he been satisfied that there was such a prospect he would have been prepared to find that the finality principle was outweighed or displaced by two factors, namely the real risk of injustice in imposing a sentence of imprisonment in those circumstances, and the fact that in any event the Court could not have proceeded to sanction her until the question whether she was a protected party had been determined and if she had been finally determined to be a protected party that would have cast significant doubt on the Liability Judgment (Sanction Judgment at [30]-[31]).

95. In those circumstances I do not see any flaw in his approach, and in any event this point cannot assist Ms Khan without success on Ground 1, in which case it would not have added anything.

Ground 3

96. Ground 3 of the main appeal is that Ms Khan did not receive a fair hearing as required by Art 6 ECHR. This too raises no separate point to Ground 1, as the basis for the contention that she did not receive a fair hearing was that the submissions made in respect of fitness to plead under Ground 1 were well-founded. No other reason for impugning the fairness of the hearing was advanced, and Ground 3 therefore stands or falls with Ground 1.

Ground 4

97. Ground 4 of the main appeal is that Leech J failed to warn Ms Khan that if she did not give evidence in her own defence an adverse inference might be drawn.

98. It is clear from the transcript of Day 1 of the hearing on liability (1 February 2023) that Mr Ahlquist and Leech J had a discussion in the course of his opening about the extent to which it is possible to draw an adverse inference against a defendant to a committal application who exercises their right not to give oral evidence. The upshot of that discussion was that Mr Ahlquist and Leech J were agreed that it is not possible to draw any adverse inference from the mere fact that a defendant has elected not to go into the witness box; but that if there are matters from the documents which call for an explanation, and none is forthcoming, the Court is entitled to take into account the fact that no explanation has been given and draw the inference that that is because there is no explanation that can be given, a distinction that Leech J described as a fine line. We did not hear any extended argument on the point, but as at present advised that seems to me to be right. A defendant to a committal application is not obliged to give evidence in their own defence but if they do not do so, it inevitably means that the Court has no explanation from them to set against the inferences from the applicant's evidence, and the Court may infer that that is because they have no explanation to give, or none that would stand up to cross-examination: see *Masri* at [147], *Business Mortgage Finance 4 plc v Hussain* [2022] EWCA Civ 1264, [2023] 1 WLR 396 at [112].

99. The significance of this exchange for present purposes is that Mr Ahlquist said that he wanted to make the point so that it was clear what he was going to say before Ms Khan had the chance to make her election. This was that if there were inconsistencies and elements of her evidence that were implausible and contradicted by the documents and not explained, or not adequately explained, and if she chose not to take the opportunity to answer those criticisms then it was open to the Court to draw the inference that there was no further evidence to give. This was said in open court in the presence of Ms Khan and her solicitors and counsel.

100. It is not disputed that Leech J did not himself give Ms Khan any warning to that effect before she elected not to give oral evidence. Mr Bogle suggested that that was a procedural irregularity, relying on *Moutreuil v Andreewitch* [2020] EWCA Civ 382, [2020] 4 WLR 54 (***"Andreewitch"***). In that case Ms Moutreuil applied to commit Mr Andreewitch for breach of a freezing order. Mr Andreewitch represented himself at the hearing. He had submitted a document entitled "Notes" which contained his answers to the application; this ended with a statement that "I confirm that the contents of my statement are true" but was unsigned. Counsel for Ms Montreuil proposed that Mr Andreewitch be sworn to confirm his note, and said that that "would give me the peg on which to hang oral evidence in cross-examination". The judge agreed with this course and suggested that Mr Andreewitch go into the witness box "because then everything you say in your note I can take as evidence"; he did as she suggested, and was then cross-examined at length.

101. It is perhaps unsurprising in those circumstances that this Court held that there had been a procedural defect. Peter Jackson LJ said at [16]:

> "The starting point when striking the balance in this case is the duty upon a court hearing committal proceedings to ensure that the accused person

> is made aware that they are not obliged to give evidence and also warned that adverse consequences or inferences may arise from exercising the right to silence. Those messages may indeed contain a tension, but what matters is that the choice of how to proceed belongs to the litigant and not to the other party or to the court. This is of particular importance when the litigant is unrepresented, and it does not apply any the less to the seasoned litigant in person, or to the litigant who appears eager to enter the witness box. The last mentioned individual may be the one who most needs to be reminded of his or her rights."

He went on to say that the decision could only stand if there had been no injustice, but that the Court could not be satisfied of that. The judge's conclusions owed much to her assessment of Mr Andreewitch's oral evidence, and if he had been told that he was not obliged to give evidence it was not possible to be sure that he would have done, and had he not done so the judge's findings might not have been the same (at [18]-[20]).

102. I do not doubt that it is the duty of the Court "to ensure that the accused person is made aware of [the right to remain silent] and also of the risk that adverse inferences may be drawn from his silence": *Inplayer Ltd v Thorogood* [2014] EWCA Civ 1511 at [40] per Jackson LJ. Mr Ahlquist submitted that it is not however necessary for a judge himself to give a warning if, as here, it has been specifically and sufficiently given by counsel for the applicant. I am not sure about that: warnings from the bench are likely to carry more weight than what counsel says, however clear, and whether or not it is always strictly required, I think the better practice is for the judge to address the point himself. But in the circumstances of the present case I accept that if there was a procedural defect it was at most a minor one, not a serious one. This Court will only allow an appeal if the decision of the lower Court was wrong, or "unjust because of a serious procedural or other irregularity" (CPR r 52.21(3)). Where Mr Ahlquist had made entirely clear in his oral opening that he would be inviting the Court to draw adverse inferences, in the presence of not only Ms Khan but her own solicitors and counsel, I do not think the fact that Leech J did not himself repeat the warning can be characterised as a *serious* procedural irregularity.

103. Quite apart from this, Leech J did not in fact rely on adverse inferences from Ms Khan's silence in reaching his conclusions on liability. He specifically addressed this in the Liability Judgment at [123] under the heading "The Right to Silence", where he said in terms:

> "In making the findings in this Section III of my judgment, I have not found it necessary to rely on any inference drawn from the fact that Ms Khan elected not to give evidence."

(The findings here referred to were all the factual findings which led to his conclusions on liability). It is true that he went on to say that almost all the issues which he had considered called for explanations, and continued:

> "Like Miles J in *Hussain* I can only assume that Ms Khan chose not to give evidence because she recognised that she was unable to give evidence which exonerated her and that cross-examination would have further damaged her case. This therefore supports and strengthens the conclusions which I have already reached."

But that does not detract from the statement that he had not found it necessary to rely on such inferences to reach his conclusions.

104. Mr Bogle submitted that it was difficult to credit what he said, and that he does appear to have drawn inferences. But I do not accept this. This Court will usually proceed on the basis that a judge has done what they say they have done unless it is demonstrated that what they say cannot be correct. The fact that Leech J did draw inferences from the documents and other facts in evidence does not mean that he relied in reaching his conclusions on adverse inferences specifically drawn from Ms Khan's decision not to give oral evidence. I consider that we have no basis to doubt his statement that he did not find it necessary to do so.

105. That means, as Mr Ahlquist submitted, that even if this had been a serious irregularity it did not in fact cause any injustice. That this is a separate requirement is indicated by the wording of CPR r 52.21(3)(b) which requires that the decision of the lower Court be "unjust because of" the irregularity, and illustrated by the decision in *Andreewitch* where Peter Jackson LJ considered not only whether there was a procedural defect but also whether it had caused any injustice.

106. In those circumstances Ground 4 is not in my judgement made out.

Supplemental point – Coates v Turner

107. In a supplemental skeleton Mr Bogle sought to take a further point (for which he accepted that he needed permission to amend his grounds of appeal). This was that although the Court has power to direct a defendant to a committal application to serve any affidavits or statements on which he or she might wish to rely, the defendant retains the right until the last moment to choose whether to rely on them or not, and the applicant can make no use of them until the defendant has "deployed" them, either by reading them or relying on them: see *Coates v Turner* [2023] EWCA Civ 1487 at [14]-[16] per Peter Jackson LJ (referring to *In re B (Contempt of Court: Affidavit Evidence)* [1996] 1 WLR 627 at 638A-D per Wall J), *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm) at [53] per Cockerill J.

108. The point was going to be that Leech J was therefore wrong to place any reliance on Ms Khan's affidavits (as he undoubtedly did). But in the course of oral submissions Mr Bogle accepted that in the present case Ms Khan's affidavits had been deployed for the purposes of this principle and said that he was not pursuing the point. It is not therefore necessary to say any more about it.

109. Nor is it necessary to deal with another point which was touched on in argument which is whether it is open to a defendant to a committal application to put in evidence affidavits in answer to the application, but still decline to give oral evidence and expose themselves to cross-examination. There is a certain amount of authority on the point but the position is not as clear as it might be: compare for example *Discovery Land Co, LLC v Jirehouse* [2019] EWHC 1633 (Ch) at [23]-[30] per Henry Carr J with the recent decision of Sir Anthony Mann in *Işbilen v Turk* [2024] EWHC 505 (Ch) at [50]-[56]. We did not receive full argument on the point, and the latter decision was indeed not available at the time of the hearing. The point cannot assist Ms Khan in the present case as she was in fact able to rely on her affidavits without being cross-examined, which, even if technically wrong, cannot have been to her disadvantage, and in those

circumstances I prefer to leave its resolution for a case where it matters and where the point can be fully argued.

Conclusion on the main appeal

110. For the reasons I have given, I would dismiss Ms Khan's appeal in the main appeal.

The companies' appeal

111. As already explained (see paragraphs 21 and 22 above), the companies need both permission to appeal and an extension of time.

112. Three grounds of appeal were initially advanced in support of the companies' appeal. These were effectively the same as the grounds advanced by Ms Khan in the main appeal, namely that Leech J was wrong to find that Ms Khan had capacity; that he should have applied the criminal fitness to plead test; and that he failed to warn Ms Khan that adverse inferences could be drawn from her exercising her right not to give evidence. In the light of my conclusions on the main appeal, none of these would succeed even if permission and an extension were given.

113. But in the course of the hearing Mr Bogle applied to amend his grounds of appeal by adding a fourth ground, namely that Leech J was wrong to include the companies as respondents to the committal order when the SRA had expressly told him in open court that they were not. This had not been foreshadowed in the skeleton arguments, or in any other material on behalf of the appellants, and we were told by Mr Ahlquist that he was first notified of it at the end of the second day of the appeal. He objected to the proposed amendment on the grounds that it was too late.

Facts

114. I should first set out the facts. The Miles Order of 27 April 2022 was addressed to the companies as well as Ms Khan. All three were named as defendants in the title, and the penal notice was addressed to each of them by name ("If you, Soophia Khan or Sophie Khan & Co Limited or Just for Public Limited disobey this Order…"). In particular paragraph 1 of the Order required "the Defendants" to produce or deliver up the Listed Items in their possession or control to the SRA's intervention agent, whereas paragraph 5 required "the First Defendant" (ie Ms Khan) to provide a signed witness statement.

115. The SRA's contempt application was issued on 4 October 2022. In the box for the terms of the order allegedly breached it set out paragraphs 1 and 5 of the Miles Order. In the box for the summary of facts alleged to constitute the contempt, there were three separate contempts charged. The first was that "the Defendants" had Listed Items in their possession or control but had nonetheless failed to produce or deliver them to the agent, and that "the Defendants have therefore breached paragraph 1 of the Order". This is clearly a charge brought against all three defendants. The second was that "the Defendants" had failed to serve a witness statement on the agent and "the Defendants have therefore breached paragraph 5 of the Order". This is also clearly a charge brought against all three defendants, although I think it should not have been because, as already noted, paragraph 5 of the Miles Order only ordered Ms Khan to provide a witness statement. The third contempt charged was:

> "Further or alternatively, in her capacity as a director of the Second Defendant and/or the Third Defendant, the First Defendant has wilfully failed to take reasonable steps to ensure that the Second Defendant and/or the Third Defendant complied with paragraph 1 and/or paragraph 5 of the Order."

An allegation in this form, it seems to me, is a charge of contempt brought against Ms Khan alone (albeit that it depends on her having procured the companies to breach the order). I do not think it is a charge against the companies themselves (and it would be duplicative if it were as the companies had already been included in the first two counts).

116. Nevertheless there is no doubt that overall the application as brought was brought against all three defendants as respondents, as Mr Bogle accepted.

117. Thereafter however there seems to have been some confusion. We have not got the full picture, but we have various matters recorded in a judgment given by Leech J on 10 July 2023 at [2023] EWHC 2487 (Ch) on an application made under the slip rule, as explained below (**"the Slip Rule Judgment"**). He says that he made four procedural orders before his substantive order committing Ms Khan of 10 March 2023, and in each of them the title showed Ms Khan as "Defendant/respondent" but the companies as "Defendants". In addition he records that Mr Ahlquist referred to the parties in that way in each of his skeleton arguments throughout the period up until the final hearing on 10 March 2023.

118. That would suggest that only Ms Khan was then regarded as a respondent. More plainly still, at a hearing on 6 December 2022, which Leech J treated as a directions hearing, Mr Ahlquist expressly said that the companies were not respondents to the committal application. The relevant passage is as follows:

> "Mr Ahlquist: …may I just pick up one point in your judgment, My Lord, which I think also is a point raised in my learned friend's skeleton about the role of the second and third defendants. They are not respondents to this application.
>
> Mr Justice Leech: No, they are not, but [Ms] Khan is being – the committal application is made against her in her capacity as a director of the second and third defendants.
>
> Mr Ahlquist: Exactly so, my Lord, in addition to her personal capacity.
>
> Mr Justice Leech: in addition to her personal capacity.
>
> Mr Ahlquist: I just thought I should make it clear that the second and third defendants are not respondents, my Lord.
>
> Mr Justice Leech: You are quite right to pick me up on that. I understand the position to be that she faces committal on the grounds that she has committed breaches of the order in her capacity as a director of both defendants, both of the two companies.
>
> Mr Ahlquist: Yes, my Lord. I suppose I should say committed a breach

> of the order personally and wilfully procured a breach.
>
> Mr Justice Leech: They are named as defendants in the application notice.
>
> Mr Ahlquist: They are defendants to the proceedings so they are in [the] heading, but not as respondents, my Lord."

As can be seen Mr Ahlquist and Leech J were in agreement that although Ms Khan was charged both with having committed a breach of the order personally and with having wilfully procured the companies to commit a breach, the companies were not themselves respondents. (It appears also that Mr Bogle had taken some point in his skeleton but we have not seen it and do not know what it was.)

119. The hearing on liability proceeded on 1 and 2 February 2023, and the Liability Judgment was handed down on 14 February 2023 (see paragraph 14 above). Leech J began the Liability Judgment with a statement that the SRA by application notice dated 4 October 2022 "applied to commit the Defendants for contempt of court" [1]. At [37] he dealt with service of the Miles Order; he said that it was clear that the alternative service provisions in that order were intended to apply not just to service on Ms Khan personally but also to service on the companies, and "I find, therefore, that the SRA properly served the Miles Order on all three Defendants." Having considered the facts and concluded that Ms Khan had deliberately failed to comply with the Miles Order, he then turned to the position of the companies under the heading "JFP and the Firm" (where "the Firm" means SK & Co) as follows:

> "121. To find both the Firm and JFP liable for contempt of court, it is also necessary for the SRA to satisfy me that Ms Khan wilfully failed to ensure that the Firm and JFP took reasonable steps to comply with the Order. Ms Khan is the sole director of the Firm. She is one of two directors of JFP the other being her brother Yusuf. There is no evidence that she was relying on him (or anybody else) to comply with paragraphs 1 and 5 of the Miles Order on behalf of either entity or that he (or anybody else) took any steps to do so. Ms Khan does not make such a suggestion in any of her four affidavits and he has not given evidence himself. I am satisfied, therefore, that Ms Khan did not believe that some other director, officer or employee of either the Firm or JFP was taking reasonable steps to comply with the Miles Order on their behalf.
>
> 122. I have found that Ms Khan committed a number of breaches of paragraphs 1 and 5 to the criminal standard. I have also found that she deliberately failed to comply with the Order in her personal capacity and attempted to mislead the Court into accepting that she had. In the light of those findings, I also find beyond reasonable doubt that she took a conscious decision not to comply with the Miles Order herself or to ensure that the Firm and JFP complied with it knowing that this would place them in breach of the Order or not caring whether it did or not."

120. Then under the heading "Disposal" he summarised his conclusions as follows:

> "124. I find that Ms Khan and the Firm are liable for contempt of court, namely, that in breach of paragraph 1 of the Miles Order they failed by 4 pm on 5 May 2022 to produce or deliver up to Mr Owen the Ledger, the Bank Statements and the documents from the Humpston files which Janes disclosed to Capsticks on 30 January 2023.
>
> 125. I also find that all three Respondents are liable for contempt of court, namely, that in breach of paragraph 1 of the Miles Order they failed by 4 pm on 5 May 2022 to produce or deliver up to Mr Owen both the Beynon files and Humpston Files 051 and 051-2 and that they remain in breach of paragraph 1 of the Order by failing to do so.
>
> 126. I also find that Ms Khan is liable for contempt of court, namely, that in breach of paragraph 5 of the Miles Order she failed to serve on Mr Owen a signed witness statement with a statement of truth by 4 pm explaining the steps which she had taken to comply with paragraph 1, why she had been unable to do so and when she would be able to do so and that in breach of paragraph 5 she failed to give any of the required explanations until 30 November 2022.
>
> 127. Finally, I also find that Ms Khan is liable for contempt of court, namely, that in breach of paragraph 5 of the Miles Order she has still failed to serve such a witness statement on Mr Owen explaining what steps she has taken to produce or deliver up electronic documents and files created, stored or held by the Firm and also the client files of the following clients (whether hard copy or soft copy): Mrs Blackwell, Mr Baxter, Mr Shillito, Mr Mahoney, Mr and Mrs Coulthard, Mr Martin, Mr Corbridge and Mr Naylor."

121. No order giving effect to these findings was drawn up at that stage, but a single Order dated 10 March 2023 dealing with both liability and sanction was drawn up after the Sanction Judgment. Unlike the previous procedural orders this named all three defendants in the heading as "Defendants/Respondents". It contained a recital as follows:

> "**AND UPON** the Court being satisfied for the reasons set out in the reserved judgment dated 14 February 2023 (the **"Liability Judgment"**) that the Respondents have committed the following breaches of the Order in contempt of court (together the **"Contempts"**), namely, that:…"

followed by four paragraphs which replicated the findings in [124]-[127] of the Liability Judgment, numbering them Contempts 1 to 4, so that for example Contempt 1 was in the form:

> "In breach of Paragraph 1 of the Order the First and Second Respondents

> failed by 4pm on 5 May 2022 to produce or deliver up to the Agent all Listed Items..."

122. That was followed by a declaration in the following terms:

> "**IT IS DECLARED THAT** the First Respondent has committed the Contempts, that she committed Contempt 1 both personally and in her capacity as a director of the Second Respondent and that she committed Contempt 2 both personally and in her capacity as a director of the Second and Third Respondents".

123. After further recitals referring to the sanction hearing, the substantive part of the Order contained a number of provisions including an order that Ms Khan be committed to prison, and an order that all three Respondents pay the SRA's costs on an indemnity basis with an interim payment on account of £100,000 by 24 March 2023. No other sanction was imposed on the companies. It appears from a note of the hand-down hearing of the Sanction Judgment on 10 March 2023 that Mr Ahlquist specifically made the point that he was asking for costs against all three respondents, and that Leech J specifically agreed that that was appropriate.

124. In the Slip Rule Judgment, Leech J records that he himself drew up and circulated a draft of the Order of 10 March 2023, and that although Ms Khan's solicitors did suggest amendments to the draft they did not then take any issue with the companies being referred to as "Respondents".

125. However by application notice dated 24 May 2023, Ms Khan applied to amend the Order of 10 March 2023 under the slip rule (CPR r 40.12) by referring to her alone as the Respondent and to the companies as Defendants. That application was refused by Leech J on paper in an Order dated 20 June 2023, and again after an oral hearing on 10 July 2023 (at which Ms Khan appeared in person) for the reasons given by him in the Slip Rule Judgment. In essence he held that the Order did what he had intended it to do and there was therefore no mistake.

126. One of the reasons given by Ms Khan for making the slip rule application was that it would take away the companies' liability for costs, her submission as recorded in the Slip Rule Judgment (at [13]) being as follows:

> "The second reason which Ms Khan gave for making this application was that the Appellant's Notice has only been submitted on her behalf and not on behalf of the Second and Third Defendants. She submits therefore that even if her appeal is completely successful and she succeeds in overturning both the liability and the sanction judgments the Committal Order will stand in relation to both the costs orders and the recital in relation to the Second and Third Defendants JFP and the Firm."

127. To complete the chronology, the companies submitted their Appellant's notice on 6 February 2024 (see paragraph 21 above). But it did not then include the proposed fourth ground of appeal, and Mr Ahlquist was first notified of it after court on the second day of the appeal hearing (28 February 2024) (see paragraph 113 above).

Should permission be given?

128. In those circumstances the question is whether permission should now be given for this ground of appeal. Technically the companies need three permissions in order to do so: an extension of time for appealing, permission to amend their grounds of appeal, and permission to appeal. But I think there is only one substantive question which is whether it is too late to raise this ground. In my judgement it is.

129. It is not disputed that the companies need an extension of time to appeal. Nor is it disputed that an application for such an extension, although not technically an application for relief from sanctions, is to be decided by reference to the familiar three-stage analysis expounded in *Denton v T H White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. As to the first stage, Mr Bogle accepted that the delay in filing the companies' appeal was serious and substantial, which it plainly was.

130. As to the second stage, namely whether there was a good reason for the delay, Mr Bogle accepted that Ms Khan made an error in not appealing on behalf of the companies as well as herself, and said that when she appreciated the error, she made the slip rule application. When that failed, she made another error in not pursuing the matter on behalf of the companies. That, he said, was attributable to her mental state. Some details of this are given by Ms Khan in the Appellant's notice: she started treatment in the form of post-diagnostic support therapy in April 2023, which lasted until September 2023. As part of her therapy she discovered the adaptations she needed to manage her vulnerability, especially to prevent autistic burnout, and as part of these she had to slow down, and take time off which she did in July-August 2023. She also fasted for the first 10-11 days of the Islamic New Year, which began on 19 July 2023. There was then a delay in obtaining transcripts, which were not received until mid-October 2023, and in November and December she had to take a break again as she was becoming tired and exhausted.

131. It was accepted in the skeleton argument for the companies that this was not a "good reason" for the delay but Mr Bogle submitted that it did make the delay understandable. But even making every allowance for Ms Khan's need to slow down and take time off to prevent autistic burnout, and for her religious observance, I do not accept that this explains the companies' failure to bring an appeal. So far as JFP is concerned, she was not the only director, the other being her brother, and I have considerable doubts whether it is an answer to say, as Mr Bogle told us, that he did not know very much about the proceedings and was dependent on Ms Khan for information about them.

132. But leaving that aside (and the same does not apply to SK & Co, where Ms Khan was the only director), I do not accept that the evidence shows that it was reasonable or understandable for her not to pursue an appeal on the costs point on behalf of the companies once the slip rule application had failed. As the Slip Rule Judgment shows, she knew then all that she needed to know to bring forward this ground of appeal. She knew in particular that Mr Ahlquist had told Leech J on 6 December 2022 that the companies were not respondents; she knew that they had nevertheless been included as respondents in the Order of 10 March 2023; and she knew that they had been ordered to pay costs, including a substantial interim payment which was already overdue. In his Slip Rule Judgment Leech J confirmed that that was what he had intended to do, and was not a mistake. He said in terms (at [26]):

> "Indeed, Ms Khan posed the following question as the essential question which I had to answer this morning: "Was the intention to make a costs order against the second or third defendant, or was it a mistake?" The answer to the question which she posed is, very simply, that I did intend to make a costs order against the Second and Third Defendants and I made a ruling to that effect. I am satisfied, therefore, that if I made a procedural error on 10 March 2023 by treating the Firm and JFP as Respondents and by making costs orders against them, then this error will have to be the subject of an appeal to the Court of Appeal and that I cannot correct it under the slip rule."

That makes it entirely clear that an appeal would be needed to run the argument that the costs order should not have been made against the companies because of the history of the way the application had been treated as only being brought against Ms Khan. Ms Khan was in court, and cannot have been unaware that this is what Leech J had said. She did not need to have a transcript to appreciate that if the matter was to be taken forward at all, the companies would have to appeal, nor did she need one to articulate this ground of appeal.

133. As to the impact on her of having to slow down, Mr Ahlquist pointed out that she was able to, and did, bring a number of applications to this Court (in connection with the first committal appeal) between July 2023 when the Slip Rule Judgment was given and November 2023. These included a request dated 26 July 2023 for reconsideration of the Order of Newey LJ of 17 July 2023, an application dated 23 August 2023 for, among other things, permission to amend her grounds of appeal, an application dated 3 October 2023 for permission to rely on a further report of Dr Rajpal, and an application dated 22 November 2023 for reconsideration of the Order of Newey LJ dated 14 November 2023. Some of these were signed by an employee of JFP, but instructions must have been given by Ms Khan, and there is other evidence of her personal involvement in writing letters and preparing documents.

134. In those circumstances I am not persuaded that the difficulties that Ms Khan was experiencing are a sufficient explanation for the companies' appeal not having been brought until February 2024, far less an explanation as to why the proposed fourth ground of appeal was not then included in the appeal.

135. As to the third *Denton* stage, namely a consideration of all the circumstances, reliance was placed in the companies' skeleton on the overlap between the issues in their appeal with those in the main appeal, and the injustice that would be caused them if the main appeal succeeded but they remained liable for costs. That was true of the three grounds originally pleaded. I accept that if those had been the only grounds the companies' appeal would add little to the consideration of the main appeal. But it is of course not true of the proposed fourth ground which raises an entirely separate issue. Mr Ahlquist protested that it was unfair to raise it at such a late stage. Although we asked him to address the merits of the point and he did so, it became apparent that some of the material relevant to the point was not before the Court: for example he relied on the fact that Mr Bogle's skeletons before Leech J were avowedly filed on behalf of all three defendants.

136. I have come to the conclusion that it is indeed too late to raise the point. Not only is the delay substantial and not satisfactorily explained, but I accept that it is unfair for

Mr Ahlquist to have to argue the point with scarcely any warning and without all the relevant material. I think the most appropriate course is to refuse the application to amend the grounds of appeal. I do not propose in those circumstances to say anything about the substance of the argument.

137. So far as the other three grounds of appeal are concerned, I would formally grant the companies an extension of time and permission to appeal (on the basis that these grounds add very little to the main appeal, but would enable the companies to escape liability for costs if the main appeal succeeded), but for reasons already given on the main appeal would dismiss the appeal.

The first committal appeal

138. The procedural history for the first committal appeal is set out at paragraphs 23 to 27 above. To summarise, Ms Khan filed an Appellant's notice out of time on 2 May 2023 seeking to appeal the first committal; Newey LJ refused an extension of time on 17 July 2023; she applied for reconsideration; and Newey LJ confirmed his decision on 14 November 2023. Ms Khan then applied to set aside or vary that order, and that is the application that is now before us.

139. Mr Ahlquist took a preliminary point as to whether the Court had jurisdiction to entertain the application. The procedure for ancillary applications in the Court of Appeal is regulated by CPR r 52.24. This is headed "Who may exercise the powers of the Court of Appeal" and r 52.24(1) to (4) deal with the powers of court officers to make certain decisions, while r 52.24(5) provides for such decisions to be reviewed by a single judge. The rule then continues:

> "(6) A party may request a decision of a single judge made without a hearing (other than a decision made on a review under paragraph (5) and a decision determining an application for permission to appeal) to be reconsidered, and—
>
> (a) the reconsideration will be determined by the same or another judge on paper without an oral hearing; except that
>
> (b) the judge determining the reconsideration on paper may direct that the reconsideration be determined at an oral hearing, and must so direct if the judge is of the opinion that the reconsideration cannot be fairly determined on paper without an oral hearing."

Newey LJ's Order of 17 July 2003 was made on paper. It was therefore a "decision of a single judge made without a hearing" within the meaning of r 52.24(6). Ms Khan's application for reconsideration was made under that rule, and Newey LJ's Order of 14 November 2023 was the determination of that reconsideration on paper without an oral hearing as provided for by r 52.24(6)(a).

140. Mr Ahlquist submitted that r 52.24(6) does not provide for a second reconsideration of the decision, even if the first reconsideration is itself made, as it will usually be, without a hearing. I would accept that submission. If the Court could be asked to have a third look at the same question, then logically it could be asked to have a fourth look at it,

and so on without limit until there had been a decision at a hearing. That is not said expressly in r 52.24(6) and would be so impractical that I cannot believe it is what the framers of the rule intended. I think that r 52.24(6) distinguishes between a "decision" and a "reconsideration" of a decision, and that it only provides for the former to be reconsidered. It does not in my judgement provide for a reconsideration of a reconsideration.

141. That was not in fact Mr Bogle's argument. He relied instead on CPR r 23.8(c). This rule is of general application to applications under Part 23 and provides as follows:

> "**23.8 Applications which may be dealt with without a hearing**
>
> The court may deal with an application without a hearing if –
>
> (a) the parties agree as to the terms of the order sought;
>
> (b) the parties agree that the court should dispose of the application without a hearing, or
>
> (c) the court does not consider that a hearing would be appropriate."

142. This needs to be read with two other provisions. The first is in PD23A para 11.2 which is as follows:

> "**Other applications considered without a hearing**
>
> …
>
> 11.2 Where rule 23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative."

143. That in turn leads one to CPR r 3.3, as follows:

> **"3.3 Court's power to make order of its own initiative**
>
> (1) Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (Part 23 sets out the procedure for making an application.)
>
> (2) Where the court proposes to make an order of its own initiative—
>
> (a) it may give any person likely to be affected by the order an opportunity to make representations; and
>
> (b) where it does so it must specify the time by and the manner in which the representations must be made.
>
> (3) Where the court proposes—
>
> (a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to make the order,

it must give each party likely to be affected by the order at least 3 days' notice of the hearing.

(4) The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.

(5) Where the court has made an order under paragraph (4)—

(a) a party affected by the order may apply to have it set aside, varied or stayed; and

(b) the order must contain a statement of the right to make such an application.

…

(7) An application under paragraph (5)(a) shall be considered at an oral hearing unless the court decides and states in an order that the application is totally without merit.

…"

144. Mr Bogle's argument is as follows. When Newey LJ made his Order of 17 November 2023 on reconsideration that was a case of the Court dealing with an application without a hearing within CPR r 23.8(c). By PD3A para 11.2 it was therefore to be treated as a decision made of the Court's own initiative. That meant it was to be treated as if it were a decision made of the Court's own initiative without hearing the parties within CPR r 3.3(4). That meant that Ms Khan, as the party affected by the Order, had a right to apply to vary or set it aside by CPR r 3.3(5).

145. I do not accept this argument, for two reasons. The first assumes that Mr Bogle is right that the order made on reconsideration was within CPR r 23.8(c) and hence by PD23A para 11.2 is to be treated as a decision made of the Court's own initiative. Nevertheless CPR r 3.3(4) and (5) do not provide that a party affected by any decision made of the Court's own initiative without a hearing can apply to set it aside or vary it. CPR r 3.3(4) is limited to the case where the Court makes an order of its own initiative without hearing the parties or giving them the opportunity to make representations. That has to be read with the earlier parts of CPR r 3.3. CPR r 3.3(2) to (4), when read together, show that there are a number of options available to the Court when it is proposing to make an order of its own initiative. It may decide to hold a hearing (in which case it must give the parties at least 3 days' notice) (r 3.3(3)). It may decide not to hold a hearing but to deal with the matter on paper, but nevertheless give the parties an opportunity to make representations (in which case it must tell the parties when and how representations must be made) (r 3.3(2)). It may decide to do neither – that is to make a decision on paper without either having a hearing or giving the parties an opportunity to make representations (r 3.3(4)). To my mind it is entirely clear that it is only in the latter case that r 3.3(5) confers a right on a party affected to apply to vary or set aside.

146. Where therefore the Court decides to deal with an application without a hearing because

it does not consider that a hearing would be appropriate, it nevertheless has the option of either giving the parties an opportunity to make representations, or deciding the application without doing so. It is only in the latter case that CPR r 3.3(5) applies. In the present case Newey LJ did give both parties (and in particular Ms Khan) an opportunity to make representations in respect of the application for reconsideration. He initially directed Ms Khan's representations to be filed by 16 August 2023, and subsequently extended the time twice, to 21 August and then 23 August 2023, and finally made an unless order directing that unless they were filed by 16 October the original order would stand affirmed. They were then filed on 16 October. The Court then invited representations from the SRA. These were provided by letter from Capsticks dated 30 October 2023. So this was not a case that fell to be treated as if made under CPR r 3.3(4), and r 3.3(5) does not apply.

147. I note that there is a note in *Civil Procedure (The White Book) 2024 vol 1* at §23.8.1 which reads as follows:

> "Where r.23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative. The effect of para.11.2 here is to bring into play r.3.3 (Court's power to make order of its own initiative). The particular significance of this is that, where the court makes an order on an application, having dealt with it without a hearing on the basis of r.23.8(c), the right to apply to the court to have the order set aside, varied or stayed conferred by r.3.3(5) accrues to a party affected by the order."

I consider that this note is not entirely accurate, and, for the reasons I have given, should read "having dealt with it without a hearing *and without giving the parties an opportunity to make representations*…".

148. I also note that in Ms Khan's skeleton argument reference is made to *R (Compton) v Wiltshire Primary Care Trust (Practice Note)* [2008] EWCA Civ 749, [2009] 1 WLR 1436 at [41]-[42] per Waller LJ where he refers to an application (in that case for a protective costs order in judicial review proceedings) as having been dealt with under r 23.8(c) "and in the result either party has the right to make an application to the court to have it varied, set aside or discharged." We were not addressed orally on this. But there does not seem to have been any dispute in that case that if a protective costs order were granted (or indeed refused) on paper, the party affected could apply for it to be reconsidered at a hearing. The issue was over the test to be applied on any such reconsideration. My understanding is that although we are bound by prior decisions of this Court this does not apply to matters that were not in issue. I do not therefore think what Waller LJ said binds us to apply an interpretation of CPR r 3.3(4) which seems to me plainly wrong.

149. Quite apart from that I said that there was a second reason why I do not accept Mr Bogle's argument. That is that I do not in fact think Newey LJ's reconsideration fell within CPR r 23.8(c). This rule is drafted on the assumption that the default position for an application under Part 23 is that it will be determined at a hearing, the exceptions being (a) where the parties agree to the terms of the order, (b) where they agree to the matter being dealt with on paper, or (c) where the court does not consider that a hearing would be appropriate (see paragraph 141 above). That is very different from the position where the Court reconsiders an application under CPR r 52.24(6). This

provides (see paragraph 139 above) that the default position is that the reconsideration will be dealt with on paper, although the judge may direct an oral hearing. I consider that the different structure of these rules is significant, and that a single judge of the Court of Appeal determining a reconsideration under CPR r 52.24(6) on paper is not within CPR r 23.8(c) at all. They are not determining the application without a hearing because they consider that a hearing would not be appropriate; they are determining it on paper because that is what the rules provide as the normal method of determining an application for reconsideration.

150. It follows in my judgement that Ms Khan did not have a right to have Newey LJ's decision on reconsideration either itself reconsidered under CPR r 52.24(6), or varied or set aside under CPR r 3.3(5).

151. Mr Bogle also relied on CPR r 3.1(7). This does confer a general power on the Court to vary or revoke an order, but the circumstances in which it is appropriate to exercise the power have been heavily circumscribed by a series of decisions, culminating in the decision of this Court in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591. In effect what must ordinarily be shown is either that there has been a material change of circumstances or that the facts were misstated, or that the order did not achieve what the Court intended. Although Mr Bogle sought to suggest that there was something new here, I do not think there is. Nothing material has changed since Newey LJ's decision on 14 November 2023, and the application does not meet the criteria laid down in *Tibbles* for the application of CPR r 3.1(7).

152. As a final fall-back Mr Bogle relied on CPR r 3.1(2)(m) which enables the Court to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. I do not think this takes matters any further: the problem for Mr Bogle is not the lack of a formal power in the Court to revoke its previous order as this is conferred by CPR r 3.1(7). It is that the circumstances are not such as to justify exercising the power. If the Court cannot properly do it under CPR r 3.1(7), it cannot be right for the Court to do it under the guise of CPR r 3.1(2)(m).

153. I would therefore accept Mr Ahlquist's submission that there is no proper basis on which we could reopen the decision of Newey LJ on reconsideration to refuse Ms Khan an extension of time for the first committal appeal. That makes it unnecessary to say anything about the merits of the appeal.

Conclusion

154. For the reasons I would give above I would dispose of the appeals as follows:

(1) In the main appeal, I would dismiss the appeal.

(2) In the companies' appeal, I would refuse permission to amend the grounds of appeal to add the fourth ground. On the three unamended grounds, I would grant an extension of time for appealing, and permission to appeal, but dismiss the appeal.

(3) In the first committal appeal, I would dismiss the application to set aside Newey LJ's Order of 14 November 2023 confirming his refusal of an extension of time for appealing.

Arnold LJ:

155. I agree. I would only add one point. Ms Khan made four affidavits in opposition to the SRA's second committal application: the first on 30 November 2022, the second on 5 December 2022, the third on 9 January 2023 and the fourth on 1 February 2023. The first affidavit responded to the SRA's application as set out in its application notice and supporting evidence. The second affidavit responded to a supplemental skeleton argument filed by counsel for the SRA on 2 December 2022. The third affidavit responded to an affidavit made by a partner in the intervention agent on 1 December 2022. The fourth affidavit responded to an affidavit made by a partner in the SRA's solicitors on 20 January 2023 and to a further skeleton argument filed by counsel for the SRA on 16 January 2023. The affidavits run to a total of 266 paragraphs (not counting sub-paragraphs). Ms Khan chose to rely upon these affidavits in opposition to the application. Somewhat remarkably to my mind, she was permitted to do so without consenting to be cross-examined on them. She elected not to give oral evidence after being warned by counsel for the SRA that, in that event, he would invite the court to infer that she had no better answer to the charges against her than those she had given in her affidavits. Moreover, she made that election at a time when she was professionally represented by solicitors and counsel. In my view the proposition that Ms Khan was deprived of the right to remain silent can only be described as preposterous.

Newey LJ:

156. I agree with both judgments.