



Neutral Citation Number: [2021] EWCA Civ 1799

Case No: A4/2020/1522  
A4/2020/1523

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**  
**MR JUSTICE ANDREW BAKER**  
**[2020] EWHC 1798 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/11/2021

**Before :**

**LADY JUSTICE ASPLIN**  
**LADY JUSTICE CARR**  
and  
**LORD JUSTICE SNOWDEN**

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**Between :**

**(1) NAVIGATOR EQUITIES LIMITED**  
**(2) VLADIMIR ANATOLEVICH CHERNUKHIN**

**Claimants/**  
**Appellants**

**- and -**

**OLEG VLADIMIROVICH DERIPASKA**

**Defendant/**  
**Respondent**

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**Mr Jonathan Crow QC and Mr James Weale (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the Appellants**

**Mr Nathan Pillow QC, Mr Tim Akkouch and Ms Catherine Jung (instructed by Reynolds Porter Chamberlain LLP) for the Respondent**

Hearing dates: 19 and 20 October 2021  
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**Approved Judgment**

## **Lady Justice Carr :**

### **Introduction**

1. This appeal arises in the wake of a long-running, bitter and high profile dispute between Navigator Equities Limited (“Navigator”) and Mr Vladimir Chernukhin (“Mr Chernukhin”) (as claimants) (“the Appellants”) and Mr Oleg Deripaska (“Mr Deripaska”) (as defendant) concerning valuable real property in Central Moscow owned through a joint venture vehicle, Navio Holdings Limited (“Navio”). Following an unsuccessful jurisdictional challenge by Mr Deripaska, in July 2017 the Appellants obtained an arbitral award against him (and his company Filatona Trading Ltd (“Filatona”)) ordering Mr Deripaska and Filatona to buy out Mr Chernukhin’s interest in Navio in the sum of approximately US\$95million (“the Award”). Mr Deripaska’s subsequent High Court challenge to the Award under ss. 67 and 68 of the Arbitration Act 1996 (“the Arbitration Act proceedings”) failed in February 2019 (see the judgment of Teare J at [2019] EWHC 173 (Comm)<sup>1</sup>).
2. Following the imposition of (and in partial substitution for) a worldwide freezing order in the sum of £87.5million (“the WFO”), Mr Deripaska gave various personal undertakings to the court on 29 June 2018 (signed by him on 28 June 2018) (“the Deripaska Undertakings”). By application notice dated 14 November 2019 the Appellants applied to commit Mr Deripaska for contempt of court on the basis of alleged breaches of the Deripaska Undertakings (“the Contempt Application”); they also contended that the Deripaska Undertakings were of contractual effect such that breach could sound in damages, which they duly sought (“the Contractual Claim”).
3. On 10 June 2020, after two days of a four-day hearing, Andrew Baker J (“the Judge”) dismissed the Contempt Application as an abuse of process and allowed Mr Deripaska’s cross-application to strike out the Contempt Application on that basis (“the Abuse Application”). In a reserved written judgment dated 17 July 2020 (“the Judgment”) he gave full and detailed reasons for that decision and also dismissed the Contractual Claim on the basis that the Deripaska Undertakings were not of contractual effect and, in any event, there had been no breach.
4. The effect of the Judge’s decision was to dismiss what was an otherwise properly arguable application to commit Mr Deripaska for serious (as opposed to merely technical) contempt on the basis:
  - i) Of the Appellants’ subjective motive in bringing the application (which the Judge found to be a desire for revenge and personal animosity towards Mr Deripaska); and
  - ii) Of a failure on the part of the Appellants (and more particularly their lawyers) to comply with what he found to be the “quasi-prosecutorial” duties owed by them. In his judgment, in circumstances where any private interest in enforcement is spent, such an applicant pursues the matter “as much as quasi-prosecutor serving the public interest as it does as private litigant pursuing its

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<sup>1</sup> An appeal to the Court of Appeal by Mr Deripaska was unsuccessful (see [2020] EWCA Civ 109). Permission to appeal to the Supreme Court from that decision has been refused.

own interests in the underlying dispute”. It was incumbent on the Appellants, so he held, to “act generally dispassionately” “as guardians of the public interest”.

5. The Judgment has, perhaps unsurprisingly, attracted attention. It is noted in the White Book 2021 (at CPR3.4.17 and CPR81x.28.2) and *Gee on Commercial Injunctions* (7<sup>th</sup> edn) (at 19-007, 20-009, 20-013, 20-021, 20-026, 20-044, 20-049 and 3-014). It has also been referred to judicially in *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182 (“*TBD*”) (at [246]) and at first instance in *Cole v Carpenter* [2020] EWHC 3155 (Ch) (“*Cole*”) (at [32] and [85]).
6. The Appellants now have permission to appeal (granted by Males LJ on 10 November 2020) against the Judge’s striking out of the Contempt Application (though not to challenge his dismissal of the Contractual Claim).

### **The WFO**

7. In the course of the Arbitration Act proceedings and in response to US sanctions imposed on Mr Deripaska (and a number of entities associated with him<sup>2</sup>) on 8 April 2018 (“the US Sanctions”), the Appellants sought and obtained the WFO pursuant to s.44 of the Arbitration Act 1996.
8. At the forefront of the Appellants’ application was the fear of difficulties in enforcement against Mr Deripaska’s assets in Russia. Thus, by way of example, the Appellants’ solicitor, Ms Marie Berard (“Ms Berard”) of Clifford Chance LLP (“Clifford Chance”), stated in her supporting (first) affidavit (“Berard 1”) (at [9]) that:

“...the [Appellants] are concerned that the wider effect of the sanctions is to encourage Mr Deripaska to repatriate his assets to Russia, where for the reasons set out below I believe he retains substantial influence, and/or otherwise take unjustifiable steps to restructure his assets in a way which will make it more difficult for third parties to enforce against them.”

In the same vein, Ms Berard deposed (at [89]) to her belief that, in the light of the deterioration in Mr Deripaska’s international business interests and his ability to conduct business internationally, there was a real risk that he would take steps to repatriate assets to Russia. She identified (at [90]) the “substantial” legal and practical obstacles to enforcing a London arbitral award and/or an order of the English High Court in the Russian Federation, summarised as follows:

- i) Although English judgments may be recognised and enforced in Russia on the basis of reciprocity, the standards for establishing reciprocity vary;
- ii) There are a number of grounds to deny recognition and enforcement irrespective of reciprocity (including violation of Russian public policy, service issues, and jurisdictional issues);

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<sup>2</sup> The sanctions involved the addition of Mr Deripaska, B-Finance and EN+ Jersey (amongst others) to the Specially Designated Nationals and Blocked Persons List maintained and published by the US Treasury’s Office of Foreign Assets Control.

- iii) Proceedings for recognition and enforcement may take a long time, especially if non-Russian entities are involved in foreign proceedings, amongst other things because of requirements that they should be involved in and served with any Russian proceedings on recognition and enforcement; and
  - iv) Execution of a foreign judgment will, even if recognised, require execution proceedings to be initiated before a court; and different courts may be involved, depending on where assets are located. This may significantly add to the time and costs necessary for effective execution of the foreign judgment.
9. Consistent with these concerns, the WFO (at paragraph 7c) expressly discounted the value of any of Mr Deripaska’s “assets based in Russia regardless of whether such assets are held through shares in companies outside of Russia (save for [Mr Deripaska’s] interest in shares in companies quoted on the London or Hong Kong Stock exchange)”.
10. At the return date fixed for the WFO (on 19 June 2018), whilst not conceding in any way that the WFO had been properly granted<sup>3</sup> or that it should be continued, Mr Deripaska (through his lawyers) proposed a package of three sets of undertakings in exchange for withdrawal by the Appellants of their application to continue the WFO. This offer had been foreshadowed in earlier correspondence, including in a letter from Mr Deripaska’s then solicitors, Bryan Cave Leighton Paisner LLP (“BCLP”) dated 23 May 2018. Referring to the three sets of proposed undertakings, BCLP there stated:
- “The effect of these arrangements will be that Mr Deripaska will have made arrangements for assets with a value of well in excess of £125 million, of which he is the ultimate beneficial owner but not direct owner, to be made available in London to be held pursuant to [the WFO] and offered as security for the purposes of paragraph 9e.ii of [the WFO].”
- The reference to paragraph 9e.ii of the WFO was a reference to the provision under which the WFO would cease to have effect if Mr Deripaska made provision for security to be provided for the £87.5 million the target of the WFO.
11. The precise terms of this “suite of documents” (as Mr Deripaska’s (subsequent) solicitor, Mr Andrew McGregor (“Mr McGregor”) of Reynolds Porter Chamberlain LLP (“RPC”), later accurately described them<sup>4</sup>) were then the subject of detailed negotiation before being accepted by the Appellants in return for discharge of the WFO.

### **The Undertakings**

12. The subject matter of each undertaking was 45,500,000 certificated shares in a Jersey-registered company, EN+ Group plc (“EN+ Jersey”) (“the Jersey shares”) held through a British Virgin Islands nominee, B-Finance Ltd (“B-Finance”), of which Mr Deripaska was the ultimate beneficial owner. That figure represented only a proportion - just under a third - of Mr Deripaska’s total interest (of more than 150

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<sup>3</sup> Indeed, it was said that it had not been properly obtained.

<sup>4</sup> In his second witness statement dated 28 June 2019 (“McGregor 2”).

million shares) in EN+ Jersey. B-Finance was a subsidiary of a Panamanian company, Fidelitas International Investments Corporation (“Fidelitas”).

13. The precise wording of the three sets of linked undertakings can be found in Annex A to this judgment. Each of the undertakings was expressly governed “in all respects” by English law. In overview:

- i) RPC gave an undertaking to the court dated 29 June 2018 to hold the share certificates for the Jersey shares and not to dispose of or otherwise deal with the Jersey shares in any way pending the final outcome of the proceedings between the parties or further order of the court or written agreement. RPC further undertook that, in the event of Mr Deripaska failing to satisfy any subsequent final judgment in the Appellants’ favour (or any such settlement), it would, pursuant to irrevocable instructions from B-Finance, take appropriate steps to facilitate the sale of such number of the Jersey shares as were required to satisfy any order of the court. I refer to these as “the RPC Undertakings”;
- ii) The directors of B-Finance gave undertakings to the court dated 28 June 2018, including not “to dispose of or otherwise deal with” the Jersey shares and to give irrevocable instructions to RPC to hold the Jersey shares and not to deal with those shares. I refer to these as “the B-Finance Undertakings”. The B-Finance Undertakings were accompanied by a signed comfort letter from Fidelitas to B-Finance dated 25 June 2018 confirming that Fidelitas had read and considered the B-Finance Undertakings in draft and concluded that it was in the best interests of Fidelitas for B-Finance to provide them;
- iii) The Deripaska Undertakings (dated 28 June 2018) are reproduced here in terms for ease of reference:

"4) Once the undertakings have been provided by ... B-Finance, I understand that Fidelitas is unable to take any step to frustrate compliance with, and/or enforcement of, the undertakings. Nevertheless, and for the avoidance of doubt, I hereby further undertake to the court in connection with the above proceedings, as follows:

(a) I shall not take any steps or procure the taking of any steps, whether directly or indirectly, in my capacity as ultimate beneficial owner or in any other capacity, which has the effect of preventing, impeding or obstructing the fulfilment of the undertakings set out in the B-Finance Letter as they may fall due for performance.

(b) I shall take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcement."

I refer below to the undertaking in paragraph 4(a) as “the Negative Undertaking” and the undertaking in paragraph 4(b) as “the Positive Undertaking”.

14. The RPC, B-Finance and Deripaska Undertakings (together “the Undertakings”) were each set out in an order of Robin Knowles J on 29 June 2018. Under that order the Appellants also had permission to apply for further relief in so far as they considered (on reasonable grounds) that the value of the Jersey shares had fallen below £87.5 million.

### **Events subsequent to the Undertakings**

15. Following the imposition of the US Sanctions, the Russian State implemented a series of measures through a programme of what has been described as “de-offshorisation”. In particular, the Russian State established a mechanism for companies incorporated outside Russia to apply to become incorporated in “special administrative zones” within the exclusive jurisdiction of the Russian courts. This process of allowing foreign companies to become incorporated in those protective zones has been referred to as “redomiciliation” or “continuance”. The Appellants contend that the process was designed to protect the assets of those affected; that the “special administrative zones” are immune from outside interference; and that the effect of the process is that orders by non-Russian courts will not be enforced against the Russian companies in question (or their assets).
16. On 1 November 2018 the board of EN+ Jersey approved a redomiciliation process to Russia. EN+ Jersey made a public announcement of that decision through the Regulatory News Service of the London Stock Exchange (“RNS”) on the following day. A notification appeared on the EN+ Jersey website and Stock Exchange websites, and it also featured in an online publication of the Wall Street Journal on 9 November 2018. On 30 November 2018 EN+ Jersey gave public notice (again the through the RNS and websites) of a general meeting to be held on 20 December 2018 to put the redomiciliation proposal to a vote.
17. At an EGM of EN+ Jersey held on 20 December 2018, a majority of shareholders, including B-Finance (which held a 53% controlling interest in the shares in EN+ Jersey), voted in favour of redomiciliation. A special (two-thirds) majority was required in order for the proposal to proceed; thus B-Finance’s vote had to be in favour of the proposal if it were to do so.
18. On 27 January 2019 a new, independent board of EN+ Jersey was installed. On the same day the US sanctions imposed on EN+ Jersey were lifted (following the reduction of Mr Deripaska’s direct and indirect shareholding in the company, and the severance of his control). On 18 April 2019 the new board approved the redomiciliation. On 16 May 2019 the Jersey Financial Services Commission granted permission for EN+ Jersey to leave the jurisdiction.
19. No notification of these matters was given to the Appellants (or the court) by Mr Deripaska or anyone on his behalf until 29 May 2019<sup>5</sup> (although, as indicated, the fact that the redomiciliation was being proposed and voted on in general terms was in the public domain and, so the Judge found, known to Mr Chernukhin at the time).

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<sup>5</sup> By which time it is said to have been too late to raise a creditor’s objection under Jersey law.

20. On that day, RPC wrote (amongst other things) as follows:

“...5. The Continuance was proposed to En+’s shareholders by the En+ board of directors on 1 November 2018. En+’s shareholders, including B-Finance..., voted to approve the Continuance on 20 December 2018.

6. En+’s independent board of directors has now affirmatively approved the Continuance. We are instructed that the timeline for the Continuance is as follows:

- a) the Jersey Financial Services Commission confirmed in principle the migration to Russia (17 May 2019);
- b) the necessary documentation was sent to the management company of the Special Administrative Region (20 May 2019);
- c) the necessary documentation will be sent to the Russian Central Bank (expected 27 May 2019);
- d) the Central Bank approves the Continuance (expected 27 June 2019);
- e) En+ is registered in Russia as a Russian legal entity (expected 4 July 2019); and
- f) the Continuance to Russia is complete (expected 12 July 2019) (after step e) and before the completion of this step, En+ will be dual registered in both Jersey and Russia).

7. We are instructed that:

- a) once Continuance of En+ takes place, its shares will be held in dematerialized form, i.e. share certificates will not be issued to shareholders;
- b) the existing shares and share certificates in respect of Jersey-domiciled EN+ will be automatically cancelled (including the share certificates held by RPC pursuant to the undertakings previously given by Mr Deripaska, B-Finance and Rupert Boswall of RPC in respect of 45.5m certificated shares in En+ owned by B-Finance (the Undertakings));
- c) all shareholders in Jersey-domiciled EN+ will, at the point the Continuance is completed, automatically be granted new shares in Russia-domiciled En+ on a one-to-one basis; and
- d) En+’s listed Global Depositary Receipts will continue to be traded on the London Stock Exchange as before (as well as the Moscow Stock Exchange).

8. The current Undertakings refer to the certificated shares in EN+ and are based upon the Jersey share certificates in En+ being held by RPC. In light of the Continuance of En+, the Undertakings will, with the permission of the Court, need to be withdrawn...

13. In light of the above [namely, the US sanctions and the increased GDR price as against June 2018], your clients are adequately protected from an enforcement

perspective independently of the Undertakings. Our client therefore does not consider it necessary for there to be put in place any alternative form of security in place of the Undertakings...”

(“the May Letter”)

21. On 26 June 2019 RPC wrote again as follows:

“11. We can confirm the following in response to the specific queries...:

(a) The Russian Central Bank registered the issuance of shares in En+ as an International public joint-stock company on 24 June 2019. We are instructed that, whilst it is not possible to give a definitive date, the anticipated date on which En+ will be registered in Russia as a Russian legal entity remains, as set out in our letter of 29 May 2019, on or around 4 July 2019 and the continuance will be completed shortly thereafter (still anticipated as on or around 12 July 2019) ...It is upon the registration of the Russian legal entity that any shareholder would, if minded to sell all/part of its En+ shareholding, be required to sell its shares (and/or GDRs relating to those shares) in the new Russian entity and would no longer be able to sell its shares (and/or GDRs relating to those shares) in the Jersey entity...

12. Absent a change in position by your clients, it appears that our client will be left with no choice but to issue an application to see the Court’s permission to withdraw the undertakings in the light of the continuance of En+. In light of the proximity of the registration of En+ as a legal entity which, as noted above, we are instructed will be on or around 4 July 2019 at the latest, we will be issuing that application shortly...”

(“the June Letter”)

22. On the same day the Appellants applied for an order that Mr Deripaska make a payment into court of the full amount of the Award, together with costs and interest. That application was supported by a (fourth) affidavit from Ms Berard (“Berard 4”). Mr Deripaska issued a cross-application seeking permission to “lift/withdraw the Undertakings” on the basis that they would, on completion of the redomiciliation, “no longer be workable in the manner contemplated”.

23. On 28 June 2019 the Appellants also pursued a Representation before the Royal Court of Jersey seeking enforcement of the Award, based on the underlying risk of dissipation and lack of confidence in judicial process in Russia. It was emphasised that a “key attraction of the Undertakings was the ability to enforce against Jersey situs assets.” The outcome of the Representation was an order that the Jersey shares be transferred into the name of the Viscount of the Royal Court of Jersey.

24. Teare J granted the Appellants’ application for a payment into court at a hearing on 3 July 2019 (during the course of which Mr Deripaska abandoned his cross-application for release from the Undertakings) (“the payment in hearing”). In determining that such relief was appropriate Teare J relied on the fact that it appeared likely that the redomiciliation process would involve a breach of the Undertakings (see [2019] EWHC 1846 (Comm) at [27] and [28]):



“The third feature to bear in mind is this. Although it is not said that a breach of the undertaking is the source of jurisdiction, the court should in my judgment take into account that it seems likely that the mechanism by which the redomiciliation is permitted to take place in fact involves a breach...”

In circumstances where the shares in the Jersey company are to be extinguished, it is difficult to understand how there could not have been a breach of the undertakings...”

25. The redomiciliation took effect on 9 July 2019. At this stage EN+ was dissolved and a Russian-registered substitute, EN+ Group IPJSC (Международная компания публичное акционерное общество «ЭН+ ГРУП»), was created in one of the newly created special administrative zones. I refer below to this company as “EN+ Russia” (without thereby intending to signify that it was necessarily a different legal entity from EN+ Jersey). All shareholders in EN+ Jersey at the redomiciliation date were automatically granted shares in EN+ Russia, on a one-to-one basis.
26. At a hearing on 29 July 2019 Teare J ordered further injunctive relief against Mr Deripaska (including the forced sale of his worldwide assets) insofar as payment was not made by the extended deadline set by his order of 3 July 2019. Further extensions to the deadline were subsequently granted; on 5 September 2019 Bryan J made further orders (including a further freezing order) in respect of Mr Deripaska’s proposed scheme of payment.
27. On 30 September 2019 Mr Deripaska paid the sums due under the Award. The Undertakings were discharged by consent on 4 October 2019.
28. The Appellants contend that they have nevertheless been caused significant losses by reason of Mr Deripaska’s alleged breaches of the Deripaska Undertakings, namely the incurring of substantial legal costs (in the region of £1million) in multiple jurisdictions (including the BVI).
29. As set out above, the Appellants issued the Committal Application on 14 November 2019. They alleged that Mr Deripaska had breached the Deripaska Undertakings as follows:
  - i) At the EN+ Jersey shareholders’ meeting on 20 December 2018 Mr Deripaska, as the ultimate beneficial owner of B-Finance, procured B-Finance to vote in favour of a special resolution to approve the redomiciliation in circumstances where the affirmative vote of B-Finance was determinative of whether the redomiciliation would take place;
  - ii) The effect of the redomiciliation was a) that the Jersey shares secured pursuant to the Undertakings (as defined) would be “automatically cancelled” and all prior shareholders in EN+ Jersey granted new shares on a one-to-one basis in a new Russian-domiciled company and b) that the share certificates held by RPC pursuant to the Undertakings would be “automatically cancelled”;
  - iii) By procuring the vote, Mr Deripaska breached the Deripaska Undertakings in that he thereby:

- a) Took a step which had the effect of “preventing, impeding or obstructing the fulfilment of” the B-Finance Undertaking to “not dispose of the Shares or otherwise deal with them” pending the final outcome of the Arbitration Act proceedings. The cancellation of the shares caused by B-Finance’s vote amounted to a dealing and/or disposal of the Jersey shares within the meaning of the B-Finance Undertaking;
  - b) Took a step which had the effect of “preventing, impeding or obstructing the fulfilment of the B-Finance Undertaking that, after final judgment in the Arbitration Act proceedings and in the event of non-payment by Mr Deripaska of the judgment sum, B-Finance would “take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance”. The cancellation of the shares caused by B-Finance’s vote meant that the Jersey shares would no longer be available for sale and/or would not be capable of realising any value capable of meeting the outstanding balance of any judgment sum; and
  - c) Failed to “take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group plc) remain available for direct enforcement” by failing to procure B-Finance to vote against the proposal to move the domicile of EN+ to Russia at the meeting on 20 December 2018. The cancellation of the shares caused by B-Finance’s vote meant that the Jersey shares would no longer remain available for direct enforcement.
30. The Contempt Application was supported by the eighth affidavit of Ms Berard (“Berard 8”).
31. Mr Deripaska issued the Abuse Application on 18 February 2020 on the following grounds:
- i) The Appellants were not seeking to enforce compliance with any order;
  - ii) There was an improper purpose behind the application, namely the personal animus of Mr Chernukhin towards Mr Deripaska;
  - iii) The Contempt Application was a disproportionate response to technical breaches by Mr Deripaska, if there were breaches at all; and
  - iv) The Contempt Application had not been prosecuted even-handedly by the claimants as quasi-prosecutors, as part of which the Appellants had suppressed documents and given false evidence as to their knowledge of the redomiciliation.
32. By the time of the hearing before the Judge, Mr Deripaska had served (but not adduced) a fifth affidavit (“Deripaska 5”), but he had not elected whether or not to give evidence on the Contempt Application. Mr McGregor had also provided an affidavit (“McGregor 1”). It appears that both documents appeared on the Judge’s pre-reading list submitted by the Appellants, the contents of which Mr Deripaska’s legal team

expressly acknowledged without objection. In his affidavit, Mr Deripaska apologised for having failed to draw the redomiciliation proposal to the court's attention in advance of the shareholders' vote in December 2018; likewise, Mr McGregor apologised for having failed to apply his mind to whether the vote might involve a breach of the Undertakings. The Judge indicated that he did not in fact pre-read Deripaska 5 (because of the possibility of a submission of no case to answer).

33. In his skeleton argument Mr Deripaska further alleged that the Contempt Application was an abuse on the basis that the Appellants were seeking to relitigate matters already considered by the court.

### **The proceedings and the Judgment**

34. The four-day hearing in June 2020 had been listed to dispose of the Abuse Application, the Contempt Application (if it survived the Abuse Application), and the Contractual Claim. The Judge was presented with at least eight bundles of written evidence, alongside the parties' written and oral submissions, and the oral evidence of Ms Berard.
35. At the start of the hearing, the Judge indicated that he proposed to hear the Abuse Application first, together with any application of no case to answer. (Mr Deripaska had (in a short footnote in his written skeleton argument) reserved his right to make a submission of no case to answer.) Ms Berard was in the witness box by 10.40am, where she remained for the rest of the (first) court day. She was cross-examined extensively, including on matters relevant to breach of the Undertakings.
36. Following her evidence, Mr Deripaska's lawyers indicated to the Appellants overnight that Mr Deripaska would not be pursuing a submission of no case to answer, albeit, as Mr Pillow QC for Mr Deripaska made clear to the Judge at the time, that did not reflect "a view being taken on the merits on [their] side". The second day of the hearing was then occupied with oral submissions on the Abuse Application (but not breach of the Undertakings). The Judge indicated that he would reflect overnight and indicate his decision on the Abuse Application with "very broadbrush headline points" at 9.45 am the next day.
37. The Judge then dismissed the Contempt Application in a short oral ruling at the start of the third day of the hearing. He rejected the contention that the Contempt Application infringed the principle in *Henderson v Henderson* [1943] 3 Hare 100 ("*Henderson*"). However, in the particular circumstances of the case – in particular given the expiry of any private interest that the Appellants might have had in the fulfilment of the Deripaska Undertakings - the Judge held that it was "incumbent" on the Appellants to prosecute the Contempt Application "dispassionately as guardians of the public interest". He found that they had not done so in respects which rendered the process unfair to Mr Deripaska. For that and other reasons, the Contempt Application had been issued and pursued by the Appellants "out of and in pursuit of [Mr Chernukhin's] deep-rooted personal animosity towards [Mr Deripaska]". The argument on breach was, so far as the Abuse Application was concerned, to "vex and harass" Mr Deripaska, not in order to draw serious misconduct to the attention of the court.

38. The Judge went on to hear submissions on liability only on the Contractual Claim, and then reserved judgment. In his written judgment, he gave full written reasons for both the dismissal of the Contempt Application and the Contractual Claim.
39. I summarise below the sections that are key for present purposes; however, given the nature of the issues raised on appeal, it is necessary to set out some of the detail.

The Judge's findings on the redomiciliation and its effect

40. The Judge set out the details surrounding the redomiciliation at [53] to [64] of the Judgment. He found (at [61]) that the redomiciliation was a “necessary element of the way in which the lifting of US sanctions on En+ was achieved in the event, and so it was a key step taken to preserve the value of B-Finance’s shareholding in En+ for the benefit, indirectly, of the [Appellants], given that the WFO had been discharged in return for the Undertakings.”
41. The Judge set out his findings as to the legal effect of the redomiciliation in different sections of the Judgment. In the course of outlining the procedural chronology, the Judge described the May Letter (at [19]) as “provocative because it suggested, erroneously, that the Redomiciliation would render the undertakings devoid of subject matter or unworkable, and proposed, unreasonably, that they should be discharged and not replaced by anything”. He went on:

“By the time the parties were back before the court, to argue the payment into court application, RPC had modified their explanation of the position, and it was in substance common ground (as it was before me) that the Undertakings would continue (and did continue) to have application to the relevant block of shares in En+ after it moved to the Russian SAR.”
42. Likewise, when setting out the Undertakings, the Judge stated (at [39]):

“A key issue initially, as to whether Mr Deripaska may have acted in breach of his Undertaking, given the terms of the B-Finance Undertaking, was whether the Redomiciliation caused “the Shares”...to cease to exist because it caused En+ no longer to be a company incorporated in Jersey. That is because, provocatively...the May...Letter suggested it was Mr Deripaska’s position that indeed “the Shares” (as defined) would be destroyed by the Redomiciliation when it completed... however, it was always the claimants’ position, by the time the parties were in front of Teare J on 3 July 2019 it was effectively also Mr Deripaska’s position, and before me it was common ground, that after the Redomiciliation completed, “the Shares” (as defined) would still exist and have still existed, being then the relevant block of 45,500,000 shares in En+ as incorporated in the Russian SAR.”
43. He went on to refer (at [40]) “for example” to Berard 4 where Ms Berard:

“...stated the claimants’ position to be that the B-Finance Undertaking “draws a clear distinction between the Shares in En+ and the Share Certificates relating to the Jersey shares in EN+. The Undertakings...relate specifically to the shares in EN+. Consequently, the Undertakings extend to the shares in EN+ held by B-Finance after the Redomiciliation (i.e. the shares in the Russian EN+ entity, which

will come to replace B-Finance’s current shares in the Jersey EN+ entity), even if those shares are held in dematerialised form”. I agree with that analysis, except to say that although it is not an unnatural use of language, it is not strictly correct to say or imply that “the Russian EN+ entity” and “the Jersey EN+ entity” were other than the same legal person, after and before a change of domicile. By contrast, in part, but in other part agreeing with Ms Berard, Mr McGregor’s responsive evidence on the one hand asserted that at all events the RPC Undertaking would become unworkable (on the mistaken premise that selling the Shares would require or necessarily involve a transfer of the Share Certificates deposited with RPC), but on the other hand stated, as had Ms Berard, that EN+’s shares in “the new Russian entity post-Continuance” would be subject to the B-Finance Undertaking, which could only mean that “the Shares” as there defined would still exist, so as to be the subject matter of B-Finance’s obligations, for example not to dispose of or deal with them.”

44. When moving on to the events surrounding the redomiciliation, the Judge said (at [51]):

“The effect of the Redomiciliation was and is that En+ has continued in existence throughout. En+ today, now incorporated in the Russian SAR following the Redomiciliation, should be recognised and treated by this court as the same legal person that existed, as a company incorporated in Jersey, when the Undertakings were given. En+ did not die and leave its estate to a Russian heir; it moved home from Jersey to the Russian SAR. For that reason, the 45,500,000 unencumbered shares in En+ that existed in certificated form in June 2018, when En+ was a company incorporated in Jersey, continued to be owned by B-Finance, and there is no evidence to suggest that they had become encumbered in any way. As between B-Finance and En+, it seems right to say that they were the same shares, before and after the company moved to the Russian SAR. That might not mean, without more, that “the Shares” as defined in the B-Finance Undertaking necessarily continued to exist, because that depends on the meaning and effect of the definition, but as I have already said it was common ground before me that in fact they did (paragraph 38 above)”.

45. The Judge recorded (at [50]) that the possibility of a redomiciliation of EN+ Jersey to Russia was in the public domain at the time that the Undertakings were provided, although that was not referred to between the parties or mentioned to the court at the time.

The Judge’s approach and findings in relation to the Appellants’ knowledge of the redomiciliation

46. At [65] to [76] the Judge addressed the Appellants’ awareness over time of the pursuit or possible pursuit by EN+ Jersey of a continuance to Russia. In the context of his view that in bringing the Contempt Application the Appellants “took on a quasi-prosecutorial role in the public interest”, he agreed that if, prior to the summer of 2019, the Appellants were aware of, yet made no complaint about, the planned redomiciliation, that was “plainly relevant”: it went to the Appellants’ “prosecutorial motive and to a fair assessment of the seriousness of what Mr Deripaska was alleged to have done”. It might, said the Judge, be exculpatory generally on the question of whether Mr

Deripaska should be treated as in contempt at all; further, some of the Appellants' evidence in support of the Contempt Application was misleading if indeed Mr Chernukhin had had prior knowledge of the redomiciliation but raised no concern about it.

47. The Judge rejected what he described as the Appellants' "misguided" stance that their prior knowledge was irrelevant to the Contempt Application. Whilst they did not refuse to provide any information at all, they sought to provide "a bare minimum of information", only when pressed, and Mr Chernukhin did not give even written evidence. The Judge was not satisfied that they had produced all the evidence that he would have wanted to see in order to assess properly what Mr Chernukhin knew when, who was advising him, on what and to what effect, and why the proposal for redomiciliation "generated no alarm bells at all until the May...Letter".
48. The Judge went on to repeat that the planned redomiciliation was "newsworthy and in the open". It was improbable that a well-advised businessman with reason to be keenly interested in the value of EN+ Jersey shares, such as Mr Chernukhin, would not have kept himself aware of developments. The Judge found that there was a strong case for Mr Chernukhin to answer that he was well aware of, and probably well advised about, the planned redomiciliation and its possible consequences well before the May Letter, yet chose to make no complaint about it at all, let alone suggest that Mr Deripaska was or might be guilty of contempt of court in relation to it. He also held that an adverse inference was to be drawn from Mr Chernukhin's evasiveness on the point, through the CPR Part 18 responses, misleading presentation of the case (through Ms Berard's evidence) and failure to give evidence himself, such that it should be held i) that Mr Chernukhin was aware at all material times that EN+ Jersey was actively considering a redomiciliation to Russia, ii) that he was untroubled by the possibility that the Jersey shares would move from Jersey to Russia, and content to treat the Undertakings as acceptable alternatives to a continuation of the WFO nevertheless, and iii) that the motivation for the contempt application was therefore not a belief or concern on Mr Chernukhin's part that the redomiciliation had somehow prejudiced or threatened to prejudice Mr Chernukhin's interests.
49. He outlined five media reports seen by Mr Chernukhin contemporaneously (in June, August and November 2018). He referred to Ms Berard's evidence that she only realised the effect that the redomiciliation would have on the Undertakings when she saw the May Letter. The Judge understood how the assertion in the May Letter that the Undertakings should be discharged due to the redomiciliation might have come as a surprise; but that was uninformative as to Mr Chernukhin's relevant prior knowledge and understanding.
50. The Judge rejected Ms Berard's evidence if she meant by it that she and her clients had no understanding of what redomiciliation was or how it would operate. His primary assessment of her evidence, however, was rather that it had not occurred to her or her clients that it might be suggested that after the redomiciliation the Undertakings would be worthless; he had sympathy for that. However, matters moved on from that "initial shock quite quickly, still months before the contempt application was issued, and in my judgment the [Appellants] and Ms Berard, effectively did not".
51. His assessment was that only in cross-examination was Ms Berard "confronting properly for the first time how, once the errant idea in the May...Letter that the

Undertakings should be thrown away had itself been discarded, there was or may well have been nothing for the [Appellants] to complain about as regards the Redomiciliation”, or that it had been or may well have been significantly to the Appellants’ benefit that it happened, “as an element of the saving of EN+ from collapse and/or Russian nationalisation”. A proper self-critical analysis well before the hearing might, in the Judge’s view, have led to the view that a contempt application should not be made.

52. The Judge rejected Ms Berard’s assertion that Mr Chernukhin did not know before the May Letter of the EN+ Jersey shareholders’ meeting that had taken place on 20 December 2018. He concluded that it was highly implausible that Mr Chernukhin was not so aware; if there was a credible case to that effect, it required Mr Chernukhin to give evidence accordingly.

#### The Judge’s finding on Mr Chernukhin’s personal animus

53. Mr Deripaska had previously mounted a private prosecution against Mr Chernukhin for allegedly perverting the course of justice, something about which Ms Berard stated in her evidence that Mr Chernukhin was “furious”. On 10 May 2019 Mr Chernukhin was summonsed to appear in a Magistrates’ Court on 31 May 2019 to answer the charge. Mr Chernukhin applied to set the summons aside. On 24 March 2020 the CPS, which had taken over conduct of the proceedings, gave notification that the proceedings were to be discontinued.
54. The Judge stated as follows (at [103]):

“The dropping of the private prosecution by the DPP came four months after the contempt application was issued in November 2019. At that earlier date, I find, the private prosecution was very much a live issue, about which Mr Chernukhin was livid. I agree with Mr Pillow QC that it is a fair and natural inference to draw, and in the absence of any evidence from Mr Chernukhin I do draw the inference and find, that the contempt application was a matter of tit for tat, in revenge for the failure to drop the private prosecution.”

#### The Judge’s findings on breach of the Undertakings

55. The Judge emphasised that he had not reached his conclusions on breach when dismissing the Contempt Application as an abuse of process. He therefore considered breach only for the purpose of the Contractual Claim.
56. He held (at [108]) that, “[o]nce it is appreciated, contrary to the stance initially adopted by the May Letter but from soon thereafter and still now common ground, that the [Jersey shares] were not extinguished, rather they were continued from Jersey to the Russian SAR, it can be seen that there was no disposal of or dealing with the [Jersey shares] by B-Finance in voting in favour of the Redomiciliation of EN+”. Any allegation of breach by Mr Deripaska of the Negative Undertaking therefore failed *in limine*. In any event, said the Judge, there was no basis for a finding that Mr Deripaska himself did anything (either directly or indirectly) to procure B-Finance’s vote in favour of the redomiciliation after having given the Negative Undertaking.

57. As for the breach of the Positive Undertaking, in the Judge’s view, this came down to whether, given its terms, Undertaking B required Mr Deripaska to instruct Mr Anton Vishnevskiy (“Mr Vishnevskiy”) as sole director of B-Finance to use B-Finance’s voting rights to block the redomiciliation:
- “...That in turn depends on whether the Redomiciliation would have the effect, and so has had the effect in the event, of making the Shares no longer “available for direct enforcement”. In my judgment, it did not. The insuperable difficulty for the [Appellants’] case is that Undertaking B does not say that the Shares had to remain shares registered in Jersey. If that is what the [Appellants] wanted Mr Deripaska to promise...[they] should have made that clear...”
58. The Judge went on (at [118]) to state that, further, objectively, what mattered to the Appellants was:
- i) Having access to B-Finance, the relevant EN+ Jersey shareholder;
  - ii) The Jersey shares remaining in B-Finance’s unencumbered ownership;
  - iii) The Jersey shares being ultimately beneficially owned by Mr Deripaska, so that they could stand behind what mattered to the Appellants, namely payment.
59. At [119] the Judge stated that the phrase “available for direct enforcement” did not have only one clear and obvious meaning. Enforcement could be enforcement of Mr Deripaska’s monetary obligations, should he default, or enforcement of the B-Finance Undertaking, should it default. On the terms of the Positive Undertaking, strictly construed, they did not require Mr Deripaska to procure that B-Finance as shareholder in EN+ Jersey block the redomiciliation by voting it down. He confessed to being “glad to have reached that conclusion” since Mr Deripaska might otherwise have been in an impossible situation: he could understandably have come to a view that he needed B-Finance to vote for the redomiciliation to ensure its continued value.
60. Thus, the Judge concluded that there was no breach by Mr Deripaska of either the Positive or Negative Undertaking and dismissed the damages claim.

The Judge’s approach to and findings on abuse of process

61. The Judge (at [138]) referred to the power to strike out a contempt application if brought for an improper purpose. He stated that the relevant authorities had in mind the applicant’s actual (subjective) motive or purpose. He described civil contempt proceedings as “quasi-criminal” in character, something which in his view had certain important consequences, including:
- i) The obvious materiality of motive; and
  - ii) That the applicant pursues a contempt charge as much as quasi-prosecutor serving the public interest as it does as private litigant pursuing its own interests in the underlying dispute. The applicant’s proper function is to act “generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves” (referring to the judgment of Teare J in *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm) (“*Ablyazov 12*”) at [15]). This was



the approach to be taken, said the Judge, at all events in a case like the present where any private litigation interest of the Appellants was spent.

62. The Judge thus found that the Contempt Application ought to have been pursued dispassionately by the Appellants as parties with no interest in the outcome: “it was instead pursued in an aggressive, partisan fashion, as if it were just the latest round in this long-running, “no-holds barred”, commercial litigation wrestling match”. This was especially inappropriate, said the Judge, where Mr Deripaska had been found dishonest in the previous arbitration proceedings. This was therefore a “paradigm example” of a case where an alleged contemnor needed the protection of a scrupulously careful and even-handed prosecution.
63. He dismissed the *Henderson* challenge: on a fair reading of the materials for and transcript of the hearing before Teare J on 3 July 2019, whether there was any breach of the Deripaska Undertakings was a matter for another day and another application, if brought, as had been submitted for Mr Deripaska on that occasion. He suggested that “with the benefit of hindsight” it would have been better for Teare J to have said nothing on the question of breach of undertaking<sup>6</sup>.
64. However, he went on (at [154]):
- “Adopting the approach, then, that this contempt application ought to have been prosecuted dispassionately and even-handedly as an application brought solely in the public interest and not to serve any partisan agenda of the [Appellants’], and that particular care was called for not to allow an appearance of unfairness to be created because of what was said in court on 3 July 2019, I can now set out the features that I concluded had come together to render the application an abuse of the process of court.”
65. Those identified features were as follows:
- i) The Appellants’ refusal to be open with Mr Deripaska or with the court as to the extent of their awareness of the redomiciliation from time to time and as a result failed to explain to the court why they were content with the Undertakings. Allied to that, there was no dispassionate, self-critical appraisal of the possibility of pursuing Mr Deripaska for contempt once the “errant notion initially promulgated by RPC that the Undertakings would need to be discarded following the Redomiciliation had been put to bed”. Mr Deripaska was deprived of a real prospect that a fair decision might have been taken not to pursue committal proceedings;
  - ii) The Appellants’ evidence in support of the contempt charge was in material respects misleading or not the whole truth, or both. The Judge placed heavy emphasis on the picture painted as to the knowledge of the Appellants and their solicitors of the forthcoming redomiciliation;

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<sup>6</sup> At [152] the Judge went so far as to state that the parties should have invited Teare J to reconsider the appropriateness of expressing any view on breach when perfecting and approving the transcript of his judgment. I cannot endorse that suggestion: such an approach would have been an inappropriate attempt to interfere with the judgment that Teare J had delivered. As set out above, Teare J had said in terms in his ruling that he considered the question of breach to be relevant to his determination on 3 July 2019.

- iii) There was “real reason to suppose” that Mr Chernukhin instructed Clifford Chance to issue and pursue the contempt charge as an act of revenge for Mr Deripaska’s twin moves in May 2019, namely the May Letter and the private prosecution. As to the latter, there was “real reason to think” that Mr Chernukhin was further incensed by RPC’s refusal to treat it as a matter to be bargained over as part of the resolution of the underlying business dispute. The Judge considered it appropriate to draw the inference, in the absence of any explanation from Mr Chernukhin, that:
- “revenge and personal animosity towards Mr Deripaska was the real reason for the contempt application, not any public-minded desire to bring matters to the court’s attention for it to consider the issue of breach and, if relevant, sanction...”;
- iv) The Contempt Application was presented to the court in a “heavy-handed, aggressively partisan fashion that was inappropriate, vexatious and unfair to Mr Deripaska”;
- v) Berard 8 in support of the Contempt Application was “replete with tendentious comment, argument, and irrelevant but prejudicial material, including multiple references to and quotations from findings of dishonesty made against Mr Deripaska...”; and
- vi) The Appellants misstated the effect of the redomiciliation and adopted a “clumsy, unfairly partisan approach”.
66. At [161], having referred to his experience of the potentially legitimate, if “regrettable”, “modern style” conduct of business disputes, the Judge went on to say:
- “...when the court is being asked by a private litigant to consider a charge of contempt of court against the other side, especially against an individual whose liberty the applicant therefore seeks to put at risk, a better standard of conduct is not merely desirable, it is essential to the fairness and the appearance of fairness of the process...”
67. He commented (at [163]) that it would have been better (though not mandated) if the Contempt Application had not been by the same Clifford Chance team as had acted for the Appellants in the arbitration, the Arbitration Act proceedings and the WFO application. It was his clear view that “quasi-prosecutorial judgment...was clouded [by the prior conduct of the dispute, the huge animosity between the lay clients and the [Appellants’] prior successes in obtaining damning findings about Mr Deripaska]...leading to a process that was, and might reasonably be thought by an impartial observer to be, unfair to Mr Deripaska.”

### **The parties’ respective positions**

#### The Appellants’ position

68. The overarching submission for the Appellants is that the Judge’s conclusions were premised on a “fundamental misunderstanding” of the consequences of Mr Deripaska’s actions. The conduct of which the Appellants complained was that Mr Deripaska either assisted in procuring, or at the very least failed to prevent, the dissolution of EN+ Jersey, and the incorporation of EN+ Russia. As a result, Mr Deripaska’s shares in EN+ Jersey were cancelled; and the protection which the Deripaska Undertakings had been intended to provide was rendered worthless. The error said to have been made by the Judge was (i) to disregard the dissolution of EN+ Jersey and treat the shares in EN+ Russia as the same shares which formed the subject matter of the Undertakings, and (ii) in the process to ignore the very obvious and significant difference between the Appellants’ ability (on the one hand) to enforce the Award against shares in a Jersey-registered company whose share certificates were held by way of security in England by English solicitors, and (on the other hand) their ability to enforce the Award against “dematerialized” shares in a Russian-registered company which were beneficially owned by a man “widely recognised as being extremely close to the Russian government and highly influential in his home country”. The Judge incorrectly recorded that it was common ground that the Jersey shares would still exist after the domiciliation.
69. Against that background, the Appellants’ arguments (in summary only) are as follows:
- i) Ground 1: it is said that the Judge was wrong to conclude that the Contempt Application was an abuse of process:
    - a) He applied the wrong standard to the Appellants’ conduct. A civil litigant seeking to pursue committal proceedings for breach of an undertaking given to the court pursuant to Part II of CPR 81 is not required to assume the role of a “quasi-prosecutor” or under a positive obligation to act dispassionately. It is said that the Judge conflated the principles applicable to proceedings for criminal contempt under Part III of Part 81 with those applicable to proceedings for civil contempt (under Part II of Part 81). A litigant bringing civil contempt proceedings is not acting solely in the public interest;
    - b) He erred in concluding that the Appellants’ subjective motive was relevant and/or could by itself render a committal application an abuse of process;
    - c) He erred in concluding that the Appellants’ alleged knowledge of Mr Deripaska’s alleged breaches was relevant;
    - d) He erred in concluding that the Appellants’ evidence was misleading and/or incomplete.

It is also said that, had the Judge found (as it is said he should have done), that Mr Deripaska was in material breach of the Deripaska Undertakings (or at the very least that there was a strongly arguable case that Mr Deripaska had

committed serious breaches of the Deripaska Undertakings), then he could not properly have found that the Contempt Application was an abuse of process;

- i) Ground 2: it is said that the Judge was wrong to conclude that there had been no breach of the Deripaska Undertakings:
  - a) The conclusion that the Positive Undertaking had not been breached was plainly wrong and/or perverse, not least given Mr Deripaska's failure to prevent a vote in favour of the redomiciliation of EN+ from Jersey to a special zone within Russia;
  - b) Equally, the conclusion that the Negative Undertaking had not been breached was plainly wrong and/or perverse.

70. In his oral submissions, Mr Crow QC<sup>7</sup> emphasised that, once it is understood that an accepted purpose of a committal application is to draw to the attention of the court serious contempt, then (in the context of an abuse application) a consideration of the question of breach is necessary; breach "has to be a material factor". It was clear on the evidence, including the May and June letters, that the acknowledged effect of the redomiciliation was to render the Undertakings valueless and unworkable. In particular, by reference to the Positive Undertaking, it was clear that there was a breach: the direct enforcement intended by both sides was the sale and transfer of the Jersey shares represented by the certificates held by RPC; the underlying assets were the Jersey shares; Mr Deripaska could have taken steps to ensure that they remained available for direct enforcement by causing B-Finance to vote against the redomiciliation. This may have been an unwelcome (or even commercially undesirable) step, but it was certainly a possible one. As for the Negative Undertaking, the redomiciliation involved a dealing with or disposal of the Jersey shares and the Judge was wrong to conclude that the allegation that Mr Deripaska procured B-Finance's vote was purely speculative.

71. As for abuse, Mr Crow emphasised that the procedural differences that exist between civil and criminal contempt applications exist for good reason. The Judge was wrong to treat subjective motive as relevant as a matter of principle, authority and practicality. His findings as to knowledge were illogical and, in any event, knowledge would not go to motive (even if relevant). The Judge's criticisms of Ms Berard's evidence were unfounded as a matter of principle or unfair themselves.

#### Mr Deripaska's position

73. For Mr Deripaska it is said that the "nub" of the matter is that this is a case where a contempt application was not brought to enforce compliance with any order of the court or undertaking and where the Judge made a series of findings of fact which are barely challenged. These include that Mr Chernukhin was aware at all material times that EN+ Jersey was actively considering a redomiciliation to Russia but was "untroubled" by that possibility; that the motivation for the Contempt Application was a "matter of tit for tat" and driven by "revenge and personal animosity"; that the Appellants had chosen

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<sup>7</sup> Who did not appear below.

deliberately to await payment of the Award before launching the Contempt Application; and that the Contempt Application was presented in a heavy-handed, aggressively partisan fashion and relied on materially misleading evidence, replete with tendentious comment and argument. Against this background, it is said that the Judge's conclusions on abuse were obviously correct.

74. Beyond this, in summary only again, Mr Deripaska responds as follows. As for Ground 1 and abuse of process:

- i) The suggestion that the Judge wrongly conflated the principles applying to criminal and civil contempt proceedings is rejected. Civil contempt proceedings are quasi-criminal and bear some of the hallmarks, in particular the procedural safeguards, of criminal proceedings. The Judge's point in any event was simply that, in the light of the special and punitive nature of contempt applications, the pursuit of contempt applications was an area in which the personal interests of litigants have to be kept in check. Reliance is placed on the fact that his conclusions have been endorsed recently in *TBD* and *Cole*. It is said that the Judge's conclusion that the Appellants had no interest in the outcome of the Contempt Application was in no way perverse. It was a justified finding of fact. It is well-established that the contempt jurisdiction is not to be used as a means of providing compensation (see *Johnson v Walton* [1990] 1 FLR 350 at 353). There is no obvious relevance of Mr Deripaska's alleged breaches to any ongoing proceedings between the parties in Jersey;
- ii) It is said that the Judge was clearly correct to take into account the Appellants' motive behind the Contempt Application (by reference to the authorities upon which the Judge relied). The judgment in *Sectorguard plc v Dienne Plc* [2009] EWHC 2693 (Ch) ("*Sectorguard*") (on which the Appellants rely) is said in fact to support Mr Deripaska's position;
- iii) Equally, it is submitted that the Judge was right to take into account the Appellants' knowledge of the redomiciliation prior to the conclusion of the undertakings. For example, it formed part of the factual matrix against which to construe the undertaking, to the seriousness of the alleged breaches and to prosecutorial motive;
- iv) There is no legitimate basis on which to criticise the Judge's findings that the evidence of the Appellants was misleading and/or incomplete. The challenges are to findings of fact and in any event misconceived.

75. By a Respondent's Notice Mr Deripaska advances additional reasons for upholding the judgment on abuse:

- i) The Contempt Application infringes the rule in *Henderson*, and the Judge was wrong to hold otherwise. The Appellants made allegations that Mr Deripaska was in breach of undertaking at the hearing before Teare J on 3 July 2019 and at no point indicated that, even if a payment into court was made and the Award satisfied, contempt proceedings against him would still be pursued;
- ii) Even if the Deripaska Undertakings were breached, any such breach was incapable of forming the basis of a contempt application because compliance

with the undertakings was impossible (see *Perkier Food Ltd v Halo Foods Ltd* [2019] EWHC 3642 (QB) at [10] to [14]) (“*Perkier Food*”);

- iii) The Deripaska Undertakings and any breach were not clear beyond all question;
- iv) The Contempt Application did not seek to enforce compliance and any conceivable contempt had been purged before the Contempt Application was issued; and
- v) In all the circumstances, the Contempt Application was disproportionate (see *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2014] EWHC 4370 (Comm) (“*Maksimov*”) at [21] to [22]).

76. As for Ground 2 and breach, Mr Deripaska emphasises at the outset the (criminal) standard of proof to be met, and the need for clear and unequivocal undertakings which themselves should be constructed strictly. Beyond that, (including by way of additional points raised in the Respondent’s Notice):

- i) The Positive Undertaking: there is no sustainable basis on which to contend that the Judge was incorrect in his conclusion as to the legal effect of redomiciliation. The Jersey shares were not cancelled and remained available for direct enforcement (according to the relevant provisions of the Companies (Jersey) Law 1991 and the Russian Federal Law on International Companies, which establish that a company continues uninterrupted in its corporate existence following a redomiciliation). This is said to have been unchallenged below, and consistent with evidence submitted by the Appellants and oral submissions on their behalves. Further, the Judge was correct to conclude that the subject-matter of the undertakings was not cancelled following the redomiciliation (since the Jersey shares continued after the redomiciliation as a matter of Jersey and Russian law and were treated as having been Russian shares since the date of incorporation). Further, the Judge was correct to record that this was common ground. Equally, the Jersey shares remained available for direct enforcement within the meaning of the Positive Undertaking, properly construed. If the Appellants are correct in their construction of the Positive Undertaking, on the facts found by the Judge, without the redomiciliation EN+ Jersey faced ruin or nationalisation (or both) such that voting for the redomiciliation was necessary to ensure that the Jersey shares remained available for direct enforcement; and
- ii) The Negative Undertaking: there was no disposal of or dealing with the Jersey shares. Further and in any event, the only allegation was that B-Finance voted in favour of the redomiciliation at the general meeting of EN+ Jersey’s shareholders. That cannot be construed as an act of “disposing of” or “dealing with”. Thus, B-Finance (and so Mr Deripaska) committed no breach. In any event, as the Judge found, the suggestion that Mr Deripaska procured the vote was speculative only. And even if Mr Deripaska procured the vote, and the redomiciliation constituted a disposal of or dealing with the shares, the necessary causation was not established. The vote was but one of a long series of preparatory steps, all of which needed to be completed before the proposed redomiciliation could occur. Nor did the vote prevent, impede or obstruct B-Finance from fulfilling its undertakings. Finally, the Negative Undertaking was not sufficiently clear, precise or unambiguous to justify a finding of clear breach.

77. In his oral submissions Mr Pillow emphasised that there was no challenge to the Judge’s findings of fact as to motive and knowledge or to the effect that the Appellants failed to act properly as a quasi-prosecutor. His position was that any application for contempt, if issued out of revenge, would be rendered abusive without more. The authorities on improper collateral purpose (such as *Integral Petroleum SA v Petrogat FZWE and another* [2020] EWHC 558 (Comm) (“*Integral*”)) demonstrate the relevance of subjective motive. Litigants do not have the legal right to seek committal out of malice or spite. It would be surprising, submitted Mr Pillow, given that the possible outcome in each case is imprisonment, for there to be different approaches to the applicant’s motive in civil and criminal committal proceedings. Merit, said Mr Pillow, does not trump motive; but motive must always trump merit.
78. As for breach, Mr Pillow submitted that the Judge proceeded at all times on the basis that the Contempt Application was arguable. It was not necessary to go further for the purpose of the Abuse Application, and indeed it would have been wrong to do so (as it would be for this court to do).

### **Contempt of court applications: relevant general principles**

79. Contempts of court have traditionally been classified as being either criminal or civil. Proceedings for civil contempt are sometimes described as “quasi-criminal” because of the penal consequences that can attend the breach of an order (or undertaking to the court). They are criminal proceedings for the purpose of Article 6 of the European Convention on Human Rights (“Article 6”). The charges raised have to be clear; the criminal standard of proof applies; and the respondent has a right to silence. There must be a high standard of procedural fairness.
80. However, they are not to be equated with private prosecutorial proceedings: see *Guildford BC v Smith* (The Times 15 October 1993) where Russell LJ stated:

“In my judgment, an application for committal for civil contempt has more than one purpose. Its object may be to coerce a contemnor into a course of action or coerce a contemnor to desist from a course of action. That is not a feature of a private criminal prosecution. The application for committal in respect of civil contempt also normally has as its object the protection of the plaintiff. That too plays no part in a private prosecution. It may also have, however, in common with a private prosecution, the need to punish. It is in my view a misunderstanding of the true position of an application to commit for contempt in civil proceedings to equate it, as the learned judge did, with a private prosecution.”

Nor does the fact that they are criminal proceedings for the purpose of Article 6 mean that they are not civil proceedings (see for example *Masri v Consolidated Contractors International Company SAL and another* [2011] EWHC 1024 (Comm) at [157]).

81. This distinction between civil and criminal contempt proceedings is reflected in the provisions of CPR Part 81 (both as they apply to proceedings pre- and post- 1 October 2020): there are different procedural paths to follow in each case. In this case, the pre-1 October 2020 rules apply. Civil contempt proceedings are there addressed in Part II and criminal contempt proceedings in Part III. Proceedings for civil contempt can be brought as of right; they are normally commenced by the party aggrieved. Under (old)

CPR Part 81.10 the application notice must set out in full the grounds on which the application is made with separate, numerical identification of each alleged act of contempt, and be supported by one or more affidavits “containing all the evidence relied upon”. By contrast, a committal application in respect of a criminal contempt can only be made with the permission of the court (see (old) CPR Part 81.12(3)); it may be commenced by the court of its own motion or by the Attorney General, and in practice also by an interested party. The application proceeds under CPR Part 8; there is an oral permission hearing unless the court considers that such a hearing is inappropriate. As part of the application for permission, the court considers, amongst other things, whether the applicant is a proper person to bring the application. Under the new (post 1 October 2020) rules, the requirement for permission for the bringing of criminal contempt remains (see (new) CPR 81.3(5)).

82. The following relevant general propositions of law in relation to civil contempts are well-established:
- i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court’s attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches;
  - ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose;
  - iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for committal. Breach of a court undertaking is always serious, because it undermines the administration of justice;
  - iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking;
  - v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted;
  - vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied;
  - vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant;



- viii) Contempt proceedings are not intended as a means of securing civil compensation;
  - ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking).
83. The two contentious aspects of the law raised in the instant case are i) the relevance (if any) of the subjective motive of an applicant in civil contempt proceedings; and ii) the proper role of an applicant in civil contempt proceedings. I address these below in the context of a consideration of the substantive merits of the appeal.

### **The power to strike out for abuse of process: relevant general principles**

84. CPD 81.16 (applicable to proceedings before 1 October 2020) expressly provides for the power to strike out a committal application (on application by the respondent or on the court's own initiative) if it appears to the court:
- i) That the application and evidence served in support of it disclose no reasonable ground for alleging that the respondent is guilty of a contempt of court;
  - ii) That the application is an abuse of the court's process or, if made in existing proceedings, is otherwise likely to obstruct the just disposal of those proceedings; or
  - iii) That there has been a failure to comply with a rule, practice direction or court order.

This power echoes the general power to strike out a statement of case for abuse of process in CPR 3.4 (2)(b). (CPD 81.16 has been revoked under the post 1 October 2020 rules but the court's inherent power to strike out remains.)

85. The court should be astute to detect when contempt proceedings are not being pursued for legitimate aims. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings improperly. It is generally not appropriate to carry out a mini-trial on the merits when considering an application to strike out for abuse.

### **Discussion and analysis**

86. The Judge was faced with what was on any view a challenging exercise; there were multiple applications to be addressed over a short period of time, with a very large volume of written material and heavily contested issues of fact and law. The landscape was complicated further by the fact that (until the second day of the hearing) Mr Deripaska had reserved his right to submit that there was no case to answer. Additionally, Mr Deripaska in particular relied on submissions based on Jersey and Russian corporate law, but neither side had adduced any expert evidence of foreign law. The Judge clearly thought very carefully about how best to proceed and worked long and hard to dispose of the matters before him fairly and efficiently.

87. The course that he followed was, however, not one without difficulty. First, he delivered an ex tempore “headline” ruling on abuse of process midway through the hearing in circumstances where the issues raised involved intricate analysis of the facts and substantive issues of law. Secondly, he proceeded on the basis that he would address breach separately and only after he had resolved the Abuse Application; however, he had at the time of his decision on the Abuse Application received full written submissions on breach and Ms Berard’s oral evidence on breach under cross-examination on the topic. Thirdly, his decision on breach was reached after his dismissal of the Contempt Application for abuse. No one suggests that the Judge in some way “reverse engineered”, but the Appellants at least have not viewed the sequencing as an entirely comfortable platform for this part of the exercise.
88. The Judge was clearly right to dismiss the arguments advanced (albeit late in the day) in the Abuse Application on the basis of the *Henderson* principle. That principle confirms that it is in the public interest that there should be finality in litigation and that a party should not be “twice vexed” in the same matter (see *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31A-D). However, the Contempt Application was not an impermissible attempt to re-litigate an issue that not only could, but should, have been raised in the context of the application for interim relief before Teare J on 3 July 2019 (see *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018; [2021] 1 WLR 179 (at [42])). At the payment in hearing, the Appellants specifically alleged that the Undertakings had been breached; Mr Deripaska’s position, through his leading counsel, was in terms that any question of breach was a matter for another day, and another application, if brought. It was at the very least reasonable for the Appellants to bring the Contempt Application separately from their application for injunctive relief (and Mr Deripaska’s application to be released from the Undertakings) (and later).
89. Beyond that, I acknowledge at the outset, as Mr Pillow has emphasised, the fact that the Judge had far more material and access to detail than this court does; he also saw and heard Ms Berard give evidence, an advantage which this court does not have. An appellate court will be reluctant to interfere with a first instance judge’s assessment of whether any given proceedings are abusive when the answer is arrived at by assessing and balancing a large number of factors. Nevertheless, a decision to strike out is not an exercise of discretion, because there is only one right answer on the point (see the notes in the White Book at CPR 52.21.5). An appellate court will interfere if a judge has (i) taken into account immaterial factors, (ii) omitted to take into account material factors, (iii) erred in principle, (iv) come to a conclusion which was impermissible, or (v) reached a decision that was plainly wrong (see *Aldi Stores v WSP Group* [2008] 1 WLR 748 at [16] and *Stuart v Goldberg* [2008] 1 WLR 823 (“*Goldberg*”) at [76] and [81]).
90. For the reasons explored in more detail below, I have reached the conclusion that the Judge erred in the following central respects:
- i) He reached his conclusions on the basis of two fundamental misapprehensions:
    - a) First, that it was common ground before him (and indeed by the time of the hearing before Teare J on 3 July 2019) that the Jersey shares (i.e. “the Shares” (as defined in the B-Finance Undertakings)) would still exist upon and following the redomiciliation. This was not common ground at all, and Mr Pillow fairly did not suggest otherwise in his oral

submissions on appeal. There were in fact cogent reasons for concluding that the Jersey shares were “cancelled” and ceased to exist upon and following the redomiciliation;

- b) Secondly, that the redomiciliation was not damaging to the Appellants’ interests - indeed the Judge appears to have considered that it was positively beneficial to them (because it preserved and enhanced the commercial value of the shares EN+ Jersey/EN+ Russia). The Judge failed to appreciate that the Appellants’ concerns, which the Undertakings were designed to address, were not so much as to the commercial value of Mr Deripaska’s interest in EN+ Jersey, or his wealth more generally, but rather as to the Appellants’ ability to enforce the Award directly and readily against his assets outside Russia. If the effect of the redomiciliation was to extinguish certificated shares in a company incorporated in Jersey and to replace them with dematerialised shares in a company incorporated in a ring-fenced zone in Russia, this could readily be seen to be adverse to the Appellants’ ability to enforce the Award against those assets;
- ii) He failed to take any (or any proper) account of the fact that, as Mr Pillow conceded on the appeal, the Contempt Application was properly arguable. There was a real prospect of establishing to the criminal standard of proof that Mr Deripaska had committed serious (as opposed to merely technical) breaches of the Deripaska Undertakings;
- iii) He erred in treating Mr Chernukhin’s subjective motive, which he found to be revenge (for Mr Deripaska’s past failure to drop his private prosecution against Mr Chernukhin) and personal animosity as a ground for striking out the Contempt Application;
- iv) He erred in approaching the Abuse Application on the basis that it should have been prosecuted by the Appellants and their lawyers as an application brought solely in the public interest.

91. I develop each of the above in turn.

### Fundamental misapprehensions

92. As set out above, the Judge stated repeatedly that it was common ground (by as early as 3 July 2019) that “the Shares” as defined [in the B-Finance Undertakings] would still exist, and have still existed, being then the relevant block of 45,500,000 shares in En+ as incorporated in the Russian SAR” (see for example [39]). He stated that, whilst the contents of the May Letter had been provocative, they were in the event inaccurate, and everyone understood that to be so.

93. In adopting this position he relied on a passage in Berard 4<sup>8</sup> where (at [60]) Ms Berard expressed the view that the Undertakings extended to the shares in EN+ Russia held by

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<sup>8</sup> Which had not been prepared for the Contempt Application, but rather for the Appellants’ earlier application for a payment in which came before Teare J on 3 July 2019.

B-Finance after the redomiciliation. He also referred to Mr McGregor's conflicting evidence that the RPC Undertakings would become unworkable upon the redomiciliation, but pointed to Mr McGregor's apparent agreement with Ms Berard that the shares in EN+ Russia would be subject to the B-Finance Undertakings.

94. However, the reliance placed on the passage in question from Berard 4 is unsatisfactory. For example:

- i) Ms Berard's statement, made back in June 2019 for the purpose of the Appellants' application for a payment into court, was that the Undertakings extended to the replacement shares in EN+ Russia, not that the (dematerialised) shares in EN+ Russia were materially the same as the certificated shares in EN+ Jersey;
- ii) Her statement was made in response to RPC's assertion that the Undertakings should be withdrawn without replacement and needs to be seen in context. In her evidence, she confirmed (in answer to the Judge) that the statement represented her understanding at the time of the affidavit. However, she also stated that when she wrote it:

“...At the time that this affidavit was prepared we were in alarm bells mode. We were looking at salvaging the security...and trying to hold on to the Undertakings in so far as they were still valid...”

95. More importantly, there was an abundance of (subsequent) material advanced between Berard 4 and the Committal Application itself which made it clear that it was not common ground that the Jersey shares were the same as the shares in EN+ Russia:

- i) RPC never resiled from the contents of the May Letter and, indeed, wrote in similar vein a month later in the June Letter (to which the Judge did not refer);
- ii) Two days after the June Letter, on 28 June 2019, Mr McGregor signed McGregor 2. There he stated at [52] that he was instructed that:

“...the existing shares and share-certificates in respect of Jersey-domiciled En+ will, upon completion of the Continuance, automatically be cancelled (including the shares certificates in respect of the Undertakings Shares held by RPC pursuant to the Undertakings) ...”

He continued to state that the Undertakings would not be workable upon the date of registration of the Russian legal entity (at [54], [74] and [75]);

- iii) The Contempt Application itself stated that the effect of the redomiciliation was that “...the shares in EN+ secured pursuant to the Undertakings (and defined therein as “the Shares” would be automatically cancelled and all prior shareholders in EN+ granted new shares (on a one-to-one basis) in a new Russian-domiciled company...”;
- iv) Berard 8, produced in support of the Contempt Application and consistent with that position, referred to the effect of the redomiciliation on the Jersey shares as being that it destroyed them (and their value, by which she confirmed in her oral evidence she meant their value in terms of enforceability);

- v) Mr McGregor (in McGregor 1) stated in terms that the nature of the Jersey shares changed following completion of the redomiciliation;
- vi) The Appellants' skeleton argument on the Committal Application referred to the May Letter, confirming the Appellants' position that the Jersey shares which formed the subject-matter of the Undertakings had become (or were shortly to become) worthless as a result of the redomiciliation. For example, at [47] it was stated:

“Whether or not the notional value of the Russian EN+ entity would have been equivalent to the Jersey entity (as suggested in McGregor 1...) is irrelevant: for obvious reasons, assets held (and tradeable) within Russia were effectively worthless to the Applicants in light of the difficulties of enforcing against those assets.”

Again, at [93] of the skeleton argument, the May Letter was treated as being accurate: the effect of a redomiciliation would be to destroy the protection intended to be afforded by the Undertakings, “by effectively destroying the Jersey Shares and rendering the certificates held by RPC valueless”;

- vii) Finally, Mr Mill QC for the Appellants in oral submission made it clear that the Appellants' position was that the Jersey shares (as defined) did not continue in existence after the redomiciliation. They “were different shares; not certificated and in a different company”.

96. The Judge's understanding as to the Appellants' position as to the effect of the redomiciliation on the Jersey shares was thus incorrect. But for that misunderstanding, he may well have queried the correctness of the proposition that the Jersey shares (as defined in the B-Finance Undertakings) continued to exist after the redomiciliation. Indeed at [51] of the Judgment he did question it, but went on immediately to refer to the fact that it was common ground that the Jersey shares did so continue.

97. The Judge would have been right to question the correctness of the proposition. The simplest analysis of the change brought about by the redomiciliation is (at least arguably) as follows. Before the redomiciliation took place, Mr. Deripaska owned shares in a Jersey registered company. This property comprised a bundle of rights under the constitution of the Jersey company and Jersey law which were enforceable against other shareholders and the company in Jersey. After the redomiciliation, those shares were cancelled and EN+ Jersey ceased to exist in Jersey. In their place, Mr. Deripaska came to own shares in a Russian incorporated company giving him rights governed by the constitution of the Russian company and Russian law and which were enforceable in Russia<sup>9</sup>. The Jersey shares and the shares in EN+ Russia were two very different

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<sup>9</sup> As already indicated, there was no expert evidence of foreign law and what follows is subject to that limitation. Reference was made to Article 7(13) of the Russian law. It appears that the rights attached to the shares in an international company must correspond to the rights under the foreign legal entity's charter or be broader than those rights. Although there therefore appears to be an attempt under Russian law to equate the content of the rights given to shareholders under Russian law to the rights that they had under Jersey law, from the perspective of a third country (England) they are plainly not the same rights, because they are not conferred under or enforceable in accordance with, the same legal system.

items of property which could not be equated either at all or in any event for the purposes for which the Jersey shares had been tendered under the Undertakings.

98. That leads to the second area of concern, namely the Judge's conclusion that the redomiciliation was not negative, but rather positively beneficial to the Appellants. He found (at [61]) that the redomiciliation was a key step to preserve the value of shares in "EN+" for the indirect benefit of the Appellants, producing by way of example "an instant surge in its listed GDR price".
99. But, as set out above, this is to miss the essential purpose and effect of the Undertakings. The Undertakings were all about securing assets for the Appellants that were outside Russia and available for ready enforcement of the Award. As set out above, the issue was not whether Mr Deripaska was sufficiently wealthy to satisfy the Award, but whether there were assets outside Russia against which the Appellants would be able to enforce. The ability to enforce was the consistent (and understandable) concern of the Appellants, identified from the very outset and recognised as such by Mr Deripaska. Reference can be made to the oral submissions by Mr Fenwick QC for Mr Deripaska before Knowles J on 19 June 2018; BCLP's letter to Clifford Chance dated 23 May 2018 and the second witness statement of Mr Rea of BCLP. Further, as already indicated, Russian assets were deliberately excluded from the scope of the WFO, reflecting the concerns expressed by Ms Berard in Berard 1 as to the difficulties of enforcement in Russia. Again in 2019 Mr McGregor (in McGregor 2) identified the interlinked nature of the Undertakings being offered with security in the form of shares in a Jersey company represented by share certificates being held in London by English solicitors. The package was formulated to avoid the need for the Appellants to have recourse to the Russian courts or Russian assets for enforcement purposes; it guaranteed that the Jersey shares could be realised as necessary.
100. Further, in terms of the value of shares in EN+ Jersey, the evidence at the time of the Undertakings was that Mr Deripaska's shares were worth no less than £160 million (on a conservative basis). The Appellants had the benefit of specific provision to obtain orders in respect of further shares (over and above the 45,500,000 the subject of the Undertakings).
101. These two misconceptions resulted in a lack of appreciation that the effect of the redomiciliation was (at least arguably) highly adverse to the Appellants' interests. They were fundamental to the Judge's approach to the Abuse Application; in particular, they coloured his view of the propriety of the commencement of the Contempt Application in the first place, of Ms Berard's conduct and degree of partisanship as a whole, and of the Appellants' motive. An example of this can be found in [75] of the Judgment: there the Judge recorded his assessment that only in the witness box did Ms Berard confront for the first time that:

"...there was or may well have been nothing for the [Appellants] to complain about as regards the Redomiciliation; how indeed it had been or may well have been significantly to the [Appellants'] benefit that it took place as it did, as an element of the saving of En+ from collapse and/or Russian nationalisation.

That was a self-critical analysis of the idea of prosecuting Mr Deripaska for contempt that ought to have been undertaken well prior to cross-examination at a committal hearing. Had it been undertaken properly, there is in my view a real

chance the view may have been taken that a contempt application need not and should not be made.”

### The role of the merits of the Contempt Application

102. I turn next to the question of the role of the merits of the Contempt Application in the context of the Abuse Application, focussing on the question of breach. I accept the submission for Mr Deripaska that it was not for the Judge to determine the question of breach outright for the purpose of the Abuse Application. Nor should this court attempt to do so for the purpose of this appeal. However, the merits were undoubtedly a factor relevant to the question of abuse and an assessment of whether or not the Contempt Application was properly arguable was required. Whether or not the Contempt Application was (at least) properly arguable should have informed the correct outcome on the Abuse Application: amongst other things, it went to the Judge’s assessment of the Appellants’ conduct in bringing the Contempt Application at all, and in particular that of Ms Berard. Further, on the Judge’s approach, subjective motive was relevant. The merits went directly to that: they should have been a factor to be weighed in the context of the suggestion that Mr Chernukhin’s sole motive in bringing the Contempt Application was to “vex and harass”.
103. I therefore do not accept the submission for Mr Deripaska that, once the threshold of arguability has been crossed, the merits no longer play any part in determining the question of abuse. Nor does *Goldberg* provide support for that proposition; the abuse under consideration there was a quite different type of abuse, namely re-litigation abuse under the *Henderson* principle. In that context it can readily be understood why the strength of the merits of the second set of proceedings were not relevant. Here, the merits go directly, as indicated, to the allegations of abuse being raised.
104. The following analysis on the law and facts was (at least) properly arguable:
- i) That, in breach of the Positive Undertaking, Mr Deripaska failed to take all steps necessary to ensure that the “underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc)” remained available for direct enforcement:
    - a) The “underlying assets” the subject of the Positive Undertaking were the Jersey shares, being the 45,500,000 certificated shares owned by B-Finance in EN+ Jersey in respect of which the certificates were held by RPC in London;
    - b) Those Jersey shares did not remain available for direct enforcement upon completion of the redomiciliation, since they then ceased to exist. The replacement shares in EN+ Russia were not the same shares;
    - c) Mr Deripaska could have caused B-Finance to vote against the redomiciliation, in which case the redomiciliation could not have proceeded. Such a step may have been unwelcome or commercially disadvantageous, but it was not impossible;

- d) The vote permitted by Mr Deripaska was causative of the redomiciliation;
  - ii) That, in breach of the Negative Undertaking, Mr Deripaska procured the taking of a step which had the effect of impeding or obstructing the fulfilment of the B-Finance Undertakings, in particular B-Finance's undertaking that it would not "dispose of the Shares or otherwise deal with them pending the final outcome of proceedings". Given Mr Deripaska's control over B-Finance (including the procuring of the B-Finance Undertakings), interest as ultimate beneficial owner of the Jersey shares, and the acknowledgment of Mr McGregor (in McGregor 2) that Mr Deripaska "did, via B-Finance, vote in favour of" the redomiciliation, Mr Deripaska (must have) procured B-Finance's vote in favour of the redomiciliation. This facilitated the cancellation of the Jersey shares which in turn amounted to a disposal of or dealing with the Jersey shares;
  - iii) The Undertakings were sufficiently clear and unambiguous in any event and/or when read in their proper context;
  - iv) The Contempt Application was not disproportionate to what would be a serious contempt, if made out, irrespective of the fact that Mr Deripaska had satisfied the Award.
105. The Judge ought therefore to have acknowledged (and factored into his reasoning) the arguable merits as set out above, including that it was properly arguable (to the criminal standard of proof) that Mr Deripaska had committed a serious (as opposed to merely technical) contempt of court, as alleged in the Contempt Application.
106. However, the Judge appears to have treated the question of breach in particular as an entirely separate matter. His comments at [104] of the Judgment suggest that he formed no view on the question of breach at all when dismissing the Contempt Application for abuse. This reflected Mr Deripaska's position, namely that the merits were all for another day (once any submission of no case to answer was put aside): it was submitted that on the Abuse Application the question was whether "in fact this case should even proceed to [a consideration of] the merits".
107. For Mr Deripaska it was suggested that the Judge did in fact proceed (correctly) on the (implicit) assumption that the Contempt Application was arguable, referring to a passage in the transcript where the Judge posed a question premised on the existence of a properly arguable case on breach. However, nowhere in the Judgment did the Judge expressly confirm the arguability of the Contempt Application. Indeed, to the extent that the Judge did consider the merits in the context of the Abuse Application, he appears to have been dismissive of them. I refer again to his views that the redomiciliation was not damaging to the Appellants' interests and the suggestion (at [75]) that on proper reflection the Appellants might have concluded that a contempt application "need not and should not be made". This was again consistent with Mr Deripaska's attitude: although before us Mr Pillow rightly conceded that the Contempt Application was arguable, that was not (at least expressly) the position below. Thus, as set out above, when it was indicated (after the first day of the hearing before the Judge) that Mr Deripaska would not be pursuing a submission of no case to answer, the Judge was told in terms that this did "not reflect a view being taken on the merits" on Mr Deripaska's side.



108. Whatever the position in terms of the Judge’s assessment of the substantive merits of the Contempt Application in the context of the Abuse Application, the Judge did not weigh the fact that this was a properly arguable application for serious contempt of court in the balance of his considerations on the Abuse Application.

The role of subjective motive (and knowledge)

109. Having earlier referred to *Sectorguard* (at [53]), *Maksimov* (at [22]), *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280; [2009] 1 WLR 2406 (“*KJM*”) (a case of criminal contempt) (at [17]), and *Super Max v Malhotra* [2019] EWHC 2711 (Comm) (“*Supermax*”) (at [10]), the Judge dismissed the submission for the Appellants that subjective motive of the applicant was not relevant to the question of abuse as follows (at [138]):

“In my judgment, contrary to a submission by Mr Mill QC to which he was perhaps driven by his client’s decision not to provide any evidence, the cases have in mind the claimant/applicant’s actual (subjective) motive or purpose, not (or not only) a purely objective question whether there might be said to be some proper purpose for the pursuit of a contempt charge.”

110. I do not agree with this analysis of the authorities. In my judgment, for the reasons set out below, where a civil contempt application:
- i) is made in accordance with the relevant procedural requirements;
  - ii) is properly arguable on the merits (by reference to the necessary constituents of a claim for contempt); and
  - iii) has the effect (and so at least the objective purpose) of drawing to the attention of the court to an allegedly serious contempt<sup>10</sup>,

then the fact that the application is motivated, whether predominantly or even exclusively, by a personal desire for revenge on the part of the applicant is not a good reason for striking out the application as an abuse of process.

111. *Sectorguard*, properly understood, does not point in a different direction and, at least until the Judgment, the contrary does not appear to have been suggested. *Sectorguard*, so far as material, involved an application by Sectorguard plc (“Sectorguard”) addressed to Dienne plc (“Dienne”) and a director of Dienne, Mr Hare, for committal of all of Dienne’s directors for breach of what was described as “Undertaking 5”. Undertaking 5 was included in a court order in April 2009 and required Dienne to disclose on oath the identity of Sectorguard’s customers whom Dienne had contacted as a result of having used Sectorguard’s confidential customer list and/or CASH system, and the precise nature of such contact and any associated business.

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<sup>10</sup> There was never any suggestion that Mr Chernukhin did not genuinely intend to pursue the Contempt Application to its end, the inevitable consequence of which was to bring allegedly serious contempt to the attention of the court; on the contrary, the signs were all the other way.

112. Briggs J (as he then was) struck out the committal application for breach of Undertaking 5 as an abuse of process. When setting out the relevant general legal principles, he stated:

“47. Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court’s order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court’s attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those *legitimate ends*. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them.” (emphasis added)

113. He went on to find that the committal application was just such an abuse. “First and foremost”, the application carried no real prospect of success. Undertaking 5 was incapable of performance from the moment when it was given (see [52]). The evidence to this effect was all one way. Briggs J went on as follows:

“53. My conclusion that the application has no real prospect of success is of itself sufficient to render its further prosecution an abuse. Nonetheless there is a second reason pointing in the same direction. It is that, on the evidence as a whole, I consider it more likely than not that the application is being prosecuted otherwise than for the *legitimate motive* of seeking enforcement of Undertaking 5, or bringing to the court’s attention a serious rather than purely technical contempt. In that context, I bear in mind that as I have described, Sectorguard twice considered whether to seek an adjournment of the strike out application so as to answer the evidence served on 9th October, and twice decided not to do so. By contrast with the permission application, I have therefore been invited to decide the strike out application on the evidence as it stands.

54. The application to commit for breach of Undertaking 5 was launched without any prior warning or complaint. It followed correspondence from Sectorguard suggesting various other alleged contempts, none of which has at any time been pursued. The impression thereby created was that Sectorguard was searching around for some tenable basis for prosecuting committal proceedings, and alighted upon the breach of Undertaking 5 as a stick with which to beat its opponents, including Mr Hare personally, rather than as a genuine means of enforcing compliance, notwithstanding its protestations to the contrary in Mr Cleverly’s affidavit in support.

55. That impression is reinforced first by the pursuit of the contempt proceedings upon the assumption that it did not matter whether compliance with Undertaking 5 had always been, or had become, impossible, and by the failure by Sectorguard, until the matter was raised in argument at the hearing, to address the question how Mr Price and Ms Eyles’ evidence was to be undermined.

56. The same impression is powerfully fortified by the evidence served on 9th October, which includes material from four different sources to the effect that, on different occasions, Mr Higgins and Mr Cleverly had expressed a wish to have Mr Hare put in prison, whether for contempt or for other alleged misconduct, by any means available. While I pay due regard to the fact that this evidence is of comparatively recent origin, no application has been made for an adjournment of the strike out application during which to rebut it by evidence in response.”

(emphasis added)

114. *Sectorguard* was thus “[f]irst and foremost” a case where compliance with the relevant undertaking was found to be impossible at all material times; that set the context for all that followed. I do not consider that the subsequent reference in [53] to “legitimate motive” is a reference to subjective motive but rather a reference to legitimate *purpose* in the sense identified in [47], where Briggs J had identified the two “legitimate ends” of committal proceedings, namely enforcement or bringing to the court’s attention serious rather than technical breaches. The words “ends” and “motives” were being used interchangeably, but the clear thrust of [47] is that proceedings which are hopeless or relate to purely technical contempts are the signs to look for when searching for abuse, not questions of subjective motive.
115. It is correct that Briggs J took into account (at [56]) recent evidence to the effect that two directors of *Sectorguard* had expressed a wish to have Mr Hare put in prison, “whether for contempt or other alleged misconduct, by any means available”. But he did so only as a makeweight in circumstances where the application for contempt was hopeless in any event, and it is not apparent from the judgment that there was any suggestion that he should not do so as a matter of principle.
116. Neither court in *Maksimov* or *Supermax* addressed the question of subjective motive. In *Maksimov* Hamblen J (at [21] to [22]) endorsed the general principles identified in *Sectorguard* at [44 ] to [47]; in *Supermax* Sir Michael Burton GBE (sitting as a High Court Judge) endorsed the comments in *Sectorguard* on proportionality. There was no consideration of subjective motive.
117. *KJM* and *Tinkler v Elliott* [2014] EWCA Civ 564 (“*Tinkler*”) do not assist Mr Deripaska. Both relate to public law contempt proceedings for which permission to proceed was required. By public law proceedings is meant committal proceedings other than proceedings for breach of an order or undertaking (see *Malgar Ltd v RE Leach (Engineering) Ltd* [1999] EWHC 843 (Ch); [2000] FSR 393 referred to in *KJM* at [9]).
118. *KJM* confirms that permission to a person to pursue public law proceedings allows that person to act in a public rather than a private role, to pursue the public interest. The court will therefore be concerned to satisfy itself that the case is one in which the public interest requires that the committal proceedings be brought and that the applicant is a proper person to bring them (see [9], [11], [16], [28] and [29]). Those considerations do not arise in a private application for civil contempt and for which no permission is required. (Further, it is to be noted that the court concluded that permission to pursue the public law proceedings should have been granted to *KJM*, notwithstanding that *KJM*’s desire to bring the proceedings was “motivated largely by anger”.)

119. In *Tinkler* Gloster LJ concluded both that there was no public interest requiring the committal proceedings to be brought and that the proposed applicant was not a proper person to bring them. At [111] she stated that the first-instance judge had failed, amongst other things, to take any or any sufficient account of the fact that the proposed applicant had clearly demonstrated that he was a vexatious litigant with an agenda to pursue and “was not an appropriate guardian of the public interest”. Again, the question of whether or not the Appellants are appropriate guardians of the public interest is not an issue that arises here.
120. For Mr Deripaska it was submitted that there was no principled distinction to be drawn between criminal and civil contempt applications. But there is a very clear difference of approach for public law proceedings, as set out above, with separate jurisprudence attaching to each jurisdiction.
121. It is well-established that an application for civil contempt that is being used for an improper collateral purpose, such as a threat in order to secure a settlement, will be abusive (see *Integral* at [37] to [39], referring to *Knox v D’Arcy Ltd* Court of Appeal Transcript No. 1759 of 1995 (19 December 1995)). There was here no finding by the Judge that the Appellants were using the Contempt Application to secure any such advantage. Specifically, the revenge that he identified on the part of Mr Chernukhin was for Mr Deripaska’s *past* failure to drop the criminal proceedings against him (see [109] and [157] of the Judgment). I do not consider that *Integral* is an example of subjective motive being relevant to the question of abuse. Thus, in [51] of *Integral*, the reference to “proper motive” is, again, in context a reference to the “legitimate ends” for which a civil committal application can be brought. The suggested abuse in *Integral* was the use of the proceedings for an external (improper) purpose, a suggestion that does not arise here.
122. An approach which takes subjective motive into account for the purpose of an abuse application is one fraught with difficulty and, in my judgment, wrong in principle.
123. There will nearly always be a degree of animus between applicant and respondent to a civil committal application. The temptation for respondents to counter an application by seeking to enquire into and test the subjective motive of the applicant would be strong, if not overwhelming. Moreover, the more blatant and serious the alleged contempt, the more likely it would be for the applicant to be (justifiably) antagonised by the respondent’s acts or omissions, thus providing further ammunition for a respondent intent on diverting attention from the allegation of contempt.
124. There may also be disclosure issues and the prospect of days of cross-examination on what is an interlocutory application only; as set out above, Ms Berard was in the witness box for a full day and the Judge took the clear view that Mr Chernukhin himself should have given evidence. Questions would also be raised as to what degree of animus is permissible and impermissible; value judgments would be called for - as to what type of motivation is acceptable and unacceptable. What of greed, hatred or jealousy, for example?
125. I also have concerns (canvassed during the hearing) about the impact of an enquiry into subjective motive on an applicant’s right to legal professional privilege. Thus, by way of example, in reaching his conclusions on motive, the Judge relied on inferences that he drew to the effect that Mr Chernukhin was “probably well advised about the planned

Redomiciliation and its consequences well before the May 2019 Letter”. An applicant may not be able to advance the full explanation on motive without waiving legal professional privilege. (The transcript of Ms Berard’s evidence reveals the serious tensions in this regard, both in terms of the questions put to her and the answers that she was able to give; she had to tread a very difficult line in seeking to avoid, so far as possible, breaching the Appellants’ legal professional privilege, something which was not in her gift to waive.) Legal professional privilege is a fundamental human right long established in the common law and on which the administration of justice is based (see for example *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563 at [7] and *JSC Bank v Shalabayev* [2011] EWHC 2915 (Ch) at [7]). As a result, amongst other things, no adverse inference is to be drawn from the making of a valid claim to privilege (see *Wentworth v Lloyd* [1864] 10 HLC 589 (at 591-592) and for example *Sayers v Clarke Walker* [2002] EWCA Civ 910 at [16]).

126. In passing, it can also be noted that in the context of bankruptcy and winding-up petitions, which of course also carry potentially very serious consequences, it has been held that subjective reasons such as malice or personal animosity do not make a petition that is not otherwise an abuse of process an abuse of process (see for example *In re Maud (Aabar Block SARL and another v Maud)* [2016] EWHC 2175 (Ch); [2016] Bus LR 1243 at [93] and the cases there cited).
127. In short, if an application for civil contempt is i) justified as a matter of procedure and substance and ii) not being pursued for an illegitimate purpose, then iii) an applicant has the right to bring it, irrespective of any personal animus or other subjective motive.
128. Finally, in this context, I should touch on the criticisms made of the Judge’s approach to Mr Chernukhin’s contemporaneous knowledge of the redomiciliation process, as he found it to be.
129. The parties’ common knowledge at the time of the giving of the Undertakings, including knowledge of the redomiciliation and its consequences, could potentially be relevant as part of the factual matrix to the proper construction of the Undertakings. Beyond that, however, neither party could point to any authority demonstrating that knowledge on the part of an applicant as to a respondent’s alleged potential or actual civil contempt of court was relevant to the question of whether or not such a contempt had in fact been committed, or that such knowledge made the application abusive.
130. I also struggle with the suggestion that knowledge on the part of the Appellants would be relevant to “a fair assessment of the seriousness of what Mr Deripaska was alleged to have done” (see [56] of the Judgment), at least on anything other than a forensic level. As a matter of analysis, the gravity of Mr Deripaska’s alleged acts or omissions falls to be decided on its own merits, not by reference to the Appellants’ subjective beliefs.
131. In any event, any reliance by the Judge for the purpose of the Abuse Application on a finding that Mr Chernukhin knew of the consequences of the planned or actual redomiciliation is undermined by the fact that, as set out above, the Judge misunderstood the (arguable) nature of those consequences. In the circumstances, it is unnecessary to debate the issue of knowledge further.

The role and duties of an applicant in an application for civil contempt

132. There can be no doubt that the making of an application for civil contempt is a significant step which carries potentially very serious consequences for a respondent, including the loss of liberty. As already indicated and set out above, there must be a correspondingly high standard of fairness. Solicitors acting for such an applicant must, in the normal way, comply with their obligations to uphold the rule of law and the proper administration of justice, to act with integrity and not to allow their independence to be compromised. They must also act in the best interests of their clients and follow their instructions, provided that to do so would not offend their wider duties, including their duties to the court. That is not to say that solicitors do not carry personal responsibility for the tone of their correspondence and any evidence that they provide. The courts rightly deprecate undue aggression and hostility in the dealings between the parties' lawyers.
133. The Judge's finding as to the role and duties of the Appellants (and their lawyers) was that, in circumstances where the Award had been satisfied and the Appellants' private interest in enforcement of the Award was spent:
- “137....it was incumbent on the [Appellants] to prosecute the contempt application dispassionately as guardians of the public interest...
- 145...The contempt application ought to have been pursued dispassionately by the [Appellants] as parties with no interest in the outcome...”
134. This was to overstate the position. The Judge referred (at [143]) to *Ablyazov 12*. However, whilst at [15] Teare J did consider that it was fair and correct for the bank to let the facts adduced in evidence speak for themselves, he did not in fact endorse the proposition that the role of the bank was to play the role of a “dispassionate prosecutor”. Rather, he was simply recording a submission to that effect. In *TBD* Arnold LJ endorsed [141] to [143] of the Judgment (at [246]). But he was doing so in the context of an application to bring criminal contempt proceedings (during the course of ongoing proceedings) and, understandably, without focussing on the particular issue that arises in the present case. Equally, in *Cole Trower J* referred to [141] to [143] of the Judgment (at [32] and [85]). Again, this was in the context of an application for permission to make a contempt application under (new) rule CPR 81.3(5).
135. A private applicant for civil contempt, even where it is no longer necessary to seek enforcement of an order or undertaking, still has a proper private interest in the outcome of the application. Any private litigant will have an interest in the enforcement of a court order or undertaking which has been made to protect its interests. Apart from having this private interest in principle in the upholding of its rights under the order or undertaking, perhaps the most obvious private interest is that of deterrent for the future. That is of particular relevance on the facts here, where the parties continue to be embroiled in other ongoing litigation.
136. As it was put by the court during the course of the hearing, some of the Judge's comments (such as those at [143] of the Judgment) appear to cast the Appellants' solicitors effectively in the role of an independent criminal prosecutor with the Appellants as complainants. In fact, Clifford Chance was the firm of lawyers retained by and acting for the Appellants on the Contempt Application. Amongst other things,

that meant that Clifford Chance was duty bound to act on its clients' instructions, provided that to do so would not bring it into conflict with its wider professional obligations. There will be circumstances where a solicitor, acting in the client's best interests, will seek to dissuade a client from a certain course; but that course is ultimately the client's decision and the court will necessarily not know what discussions have taken place.

137. Further, to suggest that private applicants for civil contempt in circumstances such as these, at their own expense, should act as wholly disinterested parties would be to discourage litigants from pursuing such applications. The result would be that serious contempts would (or might<sup>11</sup>) not be drawn to the court's attention, contrary to the public interest and/or the proper administration of justice.
138. I repeat the importance of fairness, both substantively and procedurally, on an application for civil contempt. But that is not to say that the Appellants (or their lawyers) were under a duty to act wholly impartially or as if they had no legitimate private interest in the outcome of the Contempt Application.
139. This conclusion renders the Judge's findings on abuse, so far as they related to the Appellants' conduct of the Contempt Application, including the presentation of the evidence, unreliable. The Judge made it clear that he had made his assessment of that conduct by reference to the benchmark of "dispassionate prosecutor" of "an application brought solely in the public interest" (see [154]).
140. It is not necessary then to work through the individual matters to which he referred at [155] to [160] of the Judgment. Some are fundamentally undermined by the conclusions reached above, for example in terms of the relevance of the Appellants' knowledge, subjective motive and the impact of the redomiciliation on the worth of the Undertakings to the Appellants. On points of detail, however, I would note that there are also areas where the criticisms levelled at the Appellants and Ms Berard may not have been fair. For example, Ms Berard was criticised for referring (in Berard 8) to the previous findings of dishonesty made against Mr Deripaska (and previous failures to apologise for past breaches); on at least one reasonable view that material was relevant to issues of credibility and, for example, sanction. Equally, at [156(v)] the Judge found there to be an inconsistency between what Ms Berard had said in her seventh affidavit in June 2019 - to the effect that it was extremely important to the Appellants that the shares the subject of the Undertakings related to a Jersey company and that the certificates were in RPC's offices - and what she had said in her third affidavit in June 2018. On a close reading of that third affidavit, however, there is in fact no such inconsistency.

### **Conclusion and the way forward**

141. The Judgment reflects the Judge's very clear views as to the inappropriateness of the Contempt Application being launched in the first place. Those views were, in large part, based on the misapprehension that it was common ground that the Jersey shares (as

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<sup>11</sup> The court has the power to proceed on a contempt application of its own motion (see (new) CPR 81.6) and the Attorney-General has standing to apply for committal for civil contempt application. But in practice instances of those powers being exercised are very rare.

defined in the B-Finance Undertakings) continued to exist following the redomiciliation and that the redomiciliation had not (arguably) been damaging to the Appellants' interests. As set out above, that was not in fact common ground, and it is properly arguable that the Jersey shares were cancelled through the redomiciliation and ceased to exist, and further that the redomiciliation was contrary to the Appellants' interests. The Judge failed to pay due heed to the arguable merits of the Contempt Application and fell into error in treating Mr Chernukhin's subjective motive as a factor justifying a finding of abuse of process. His assessment of the appropriateness of the manner in which the Contempt Application was presented and pursued by the Appellants and their lawyers is undermined by the fact that it was carried out on the incorrect premise that their duty was to prosecute the Contempt Application solely as guardians of the public interest.

142. For these reasons, I would allow the appeal and remit the matter to the Commercial Court. In this context, I am conscious of the Judge's outright finding (for the purpose of the Contractual Claim) that there was no breach of the Undertakings. That finding was obiter, given the Judge's conclusion that there was no contractual relationship created by the Deripaska Undertakings. Secondly, it was premised on the Judge's incorrect understanding as to the common ground between the parties, as set out above. In so far as necessary for the purpose of the hearing of the Contempt Application in due course, the first-instance judge should not proceed on the basis that the Judge's finding (for the purpose of the Contract Claim) that there was no breach of the Undertakings is binding or persuasive (for the purpose of the Contempt Application) and should reach his/her own conclusion on the point.

**Lord Justice Snowden :**

143. I entirely agree with Carr LJ that the appeal must be allowed for the reasons that she has set out, and the Contempt Application should be restored for a hearing by the Commercial Court in the manner that she has described.

**Lady Justice Asplin :**

144. I agree with Carr LJ and endorse both her reasoning and the central principles in relation to civil contempt proceedings which she has distilled with such clarity.

**ANNEX A**

The RPC Undertakings



The RPC Undertakings, given by Mr Boswall of RPC, after referring to the WFO and the B-Finance Undertakings, and confirming "that original share certificates ("the Share Certificates") in respect of 45,500,000 shares ("the Shares") in En+ Group Plc (a company incorporated under the laws of Jersey) have been deposited at the offices of ... RPC ... in London", provided:

"I hereby undertake to the court in connection with the above proceedings and pursuant to irrevocable instructions I have received from the Company [i.e. B-Finance] (which owns the Share Certificates and the Shares) that RPC will hold the Share Certificates and not dispose of or otherwise deal with the Shares in any way pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim No.s CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018- 000121 between Navigator Equities Limited and Vladimir Chernukhin on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Proceedings"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and Navigator Equities Limited and Vladimir Chernukhin (on the other).

In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Proceedings in favour of the Claimants or any such settlement, and in the event Mr Deripaska fails within 42 days to make any payment required under such judgment or settlement, I hereby undertake that pursuant to irrevocable instructions I have received from the Company RPC will take appropriate steps to facilitate the sale of such number of the Shares as are required to satisfy any Order of the Court as regards a judgment debt or other order to complete the purchase of Navigator's shares in Navio Holdings Ltd on terms that the proceeds of such sale are paid to this firm and further undertake to remit such proceeds as required by the Court or agreement between the parties up to the amount ordered by the Court or agreed.

This letter shall be governed in all respects by English law and the courts of England and [Wales] shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter..."

### The B-Finance Undertakings

The B-Finance Undertakings, by letter to the court from Mr Anton Vishnevskiy ("Mr Vishnesvskiy") as sole director of B-Finance, first referred to the WFO (at paragraph 1) and next gave formal details about Mr Vishnevskiy and B-Finance (at paragraph 2), stating that Mr Deripaska was B-Finance's ultimate beneficial owner. Then by paragraph 3 it was confirmed and warranted:

- i) that B-Finance was "the legal owner of 245,000,000 unencumbered shares in En+ Group Plc (a company incorporated under the laws of Jersey) ("En+"). Of these 45,500,000 are held in certificated form ("the Shares");
- ii) that B-Finance had no current or contingent liabilities that could result in a claim being made against the Jersey shares;

- iii) and that on 19 June 2018 the Jersey shares were worth approximately £187 million.

By paragraph 4 it was confirmed that Mr Vishnevskiy considered it to be in the best interests of B-Finance to give the undertakings set out in paragraph 5, which were in these terms:

"5) I ... hereby undertake to the court in connection with the above proceedings, in my capacity as Director and on behalf of the Company [i.e. B-Finance], as follows:

(a) The Company will arrange for the original share certificates in respect of the Shares ("the Share Certificates") to be deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London.

(b) The Company will not dispose of the Shares or otherwise deal with them pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim Nos CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018-000121 between the Claimants on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Arbitration Claims"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and the fulfilment of any obligation imposed on Mr Deripaska and/or Filatona by the Court or such written agreement, following which all undertakings contained in this letter shall immediately lapse.

(c) I and the Company will irrevocably instruct RPC to (i) hold the Share Certificates and not to deal with or dispose of or otherwise deal with the Shares in any way pending the final outcome of the Arbitration Claims, or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and (ii) provide an undertaking to the High Court of England & Wales to that effect.

(d) In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Arbitration Claims in favour of the Claimants, and in the event Mr Deripaska fails within 42 days to comply with any obligations to make payment required under the terms of any such Order or agreement or by the terms of any Share Purchase Agreement or Order as may be ordered or agreed, the Company will take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance (following which all undertakings contained in this letter shall immediately lapse). In this event, the Company will make such irrevocable instructions as are necessary such that the said sale proceeds shall be received into RPC's bank account and paid by RPC directly to the Claimants or as otherwise ordered or agreed so as to satisfy any liabilities of Mr Deripaska and/or Filatona Trading Limited under a final judgment.

(e) The Company has not incurred and will not incur any liability that would have the effect of preventing, impeding, or obstructing the fulfilment of the undertaking at sub-paragraph (d) above.

6) This letter shall be governed in all respects by English law and the courts of England and Wales shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter..."

### The Deripaska Undertakings

After referring to the WFO (at paragraph 1) and the B-Finance Undertakings (at paragraph 2), by paragraph 3 Mr Deripaska confirmed and warranted that he was the ultimate beneficial owner of B-Finance. Then the Deripaska Undertakings were given:

"4) Once the undertakings have been provided by ... B-Finance, I understand that Fidelitas is unable to take any step to frustrate compliance with, and/or enforcement of, the undertakings. Nevertheless, and for the avoidance of doubt, I hereby further undertake to the court in connection with the above proceedings, as follows:

(a) I shall not take any steps or procure the taking of any steps, whether directly or indirectly, in my capacity as ultimate beneficial owner or in any other capacity, which has the effect of preventing, impeding or obstructing the fulfilment of the undertakings set out in the B-Finance Letter as they may fall due for performance.

(b) I shall take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in En+ Group Plc) remain available for direct enforcement...

6) This letter (and all matters arising out of it) shall be governed in all respects by English law and the courts of England and Wales shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter..."