Neutral Citation Number: [2023] EWHC 2563 (Comm)

Case No: CL-2009-000709

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

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

Date: 16/10/2023

**Before** :

**THE HONOURABLE MR JUSTICE HENSHAW**

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**Between :**

| | |
|---|---|
| **DEUTSCHE BANK AG** | **Claimant/ Applicant** |
| **- and -** | |
| **(1) SEBASTIAN HOLDINGS INC** | **Defendant** |
| **(2) ALEXANDER VIK** | **Defendant for costs purposes only/Respondent** |

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**Sonia Tolaney KC, James MacDonald KC and Andrew McLeod** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
**Tony Beswetherick KC and Rupert Hamilton** (instructed by **Brecher LLP**) for Mr Vik

Hearing dates: 19 and 20 September 2023
Draft judgment circulated: 10 October 2023

# Approved Judgment

This judgment was handed down remotely at 10.30am on 16 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Henshaw:**



## (A) INTRODUCTION

1. This judgment relates to the effect of a suspended committal order made by Moulder J on 15 July 2022 (***the "Suspended Committal Order***"), arising from an order made in 2015 under CPR 71 in relation to the available assets of the Defendant company ("***SHI***"), which company Mr Vik controlled.

2. The hearing before me was listed for a further examination of Mr Vik, pursuant to one of the conditions set out in the Suspended Committal Order. However, late in the

preceding week Mr Vik raised a new argument, to the effect that the Suspended Committal Order had in fact been discharged according to its own terms, with the result that he was no longer obliged to attend a further examination.

3. The Claimant ("***DB***") responded by issuing an application on 15 September 2023 for orders that:

   i) the issue of the status of the suspension imposed by paragraph 2 of the Suspended Committal Order be determined (if time permits) at the conclusion of the further examination of Mr Vik for which the hearing had been listed (the "***Further Examination***");

   ii) for the avoidance of any doubt, Mr Vik is required to attend the Further Examination in person;

   iii) on the proper construction of paragraph 2 of the Suspended Committal Order, the term of the suspension thereby imposed ends and only ends upon the conclusion of the Further Examination;

   iv) in the alternative, paragraph 2 of the Suspended Committal Order be rectified under CPR 40.12 or varied under CPR 3.1(7); and

   v) the suspension in paragraph 2 of the Suspended Committal Order be continued (on the same terms) until the date three months after the date on which the Further Examination (including any adjourned hearing) finally concludes.

4. DB also applied for orders to be made on the papers on Monday 18 September 2023, in advance of the hearing, on the terms indicated in subparagraphs (i) and (ii) above. I declined to do so, on the basis that it appeared inappropriate to make any order, on the papers and before hearing argument, that might prejudice one or more of the substantive issues that had arisen between the parties. I therefore heard argument on those issues at the hearing on 19 and 20 September. In the event, the argument, in which both sides were ably represented by leading and junior counsel, and on which some 48 pages of skeleton arguments were filed, occupied the whole of the two days and involved substantive issues of law and construction.

5. After consideration of those arguments, I have come to the conclusions that:

   i) the Suspended Committal Order, by its terms, resulted in a suspended sentence which came to an end, absent any prior application by DB, on 24 August 2023;

   ii) the Suspended Committal Order cannot be corrected under the 'slip' rule in the way DB proposes;

   iii) the court lacks power to vary the Suspended Committal Order in the way DB seeks, because it would extend rather than ameliorate the suspended sentence;

   iv) for the same reason, the court lacks power to continue the suspended sentence so as to expire three months after the Further Examination;

v) the principles of abuse of process and collateral attack do not preclude Mr Vik from arguing, or the court from concluding, that the suspended sentence imposed by Moulder J expired on 24 August 2023;

vi) Mr Vik is not estopped from advancing his present contention to that effect;

vii) the parties cannot have extended the period of the suspended sentence by agreement; and

viii) I do not construe Bryan J's order made on 1 September 2023, for Mr Vik to attend the Further Examination in person rather than remotely, as being a freestanding direction, independent of the Suspended Committal Order, for attendance at a further examination. Whether the court would have the power to make such an order may be a matter for another day.

My reasons are set out below.

## (B) BACKGROUND

6. This is a long-running piece of litigation, commenced in 2009 following large losses incurred by SHI during the 2008 financial crash on transactions undertaken with DB. The background is set out in some detail in previous judgments, including (most pertinently for relevant purposes) Moulder J's judgment dated 24 June 2022 ([2022] EWHC 1599 (Comm)) concluding that Mr Vik was guilty of contempt of court (***the "Contempt Judgment***") and her further judgment dated 15 July 2022 ([2022] EWHC 2057 (Comm)) sentencing Mr Vik to a suspended term of imprisonment for those contempts (the "***Sentencing Judgment***"). I do not aim to repeat the background in detail, but provide an overview of the earlier stages of the litigation and then focus on the events most directly relevant to the issues before me.

### (1) Overview of events to July 2022

7. Mr Vik is a Monaco-resident billionaire. He formerly carried out high-value and complex equity and FX trading through SHI, which was (in Moulder J's words) Mr Vik's "*personal trading vehicle*" and "*creature company*", using prime brokerage services provided by DB. In October 2008, SHI's trading became heavily loss-making and DB made margin calls. SHI paid some but not all of what was due, leading DB to commence proceedings in this jurisdiction for the outstanding sum of about US$250 million. SHI (acting through Mr Vik) brought a counterclaim against DB for US$8 billion.

8. The claim and counterclaim were heard over 14 weeks in a Commercial Court trial before Cooke J. Cooke J made a US$243m order in favour of DB against SHI, which was to be paid to DB by 22 November 2013 (the "***Judgment Debt***"). Cooke J also awarded DB 85% of its costs, to be assessed on the indemnity basis, and ordered SHI to make an interim payment on account of costs of approximately £34.5 million by 22 November 2013.

9. Cooke J, whose judgment was upheld on appeal, found that starting in October 2008 Mr Vik stripped SHI of over US$1 billion of assets to impede recovery by DB. This court and the Court of Appeal have found that Mr Vik "*is a man who will do what is*

*necessary to prevent [DB] obtaining its judgment debt*" and who has attempted for years "*to avoid liability, to deceive the court and to conceal the true state of SHI's financial affairs*".

10. Following Cooke J's judgment, DB applied for a non-party costs order against Mr Vik on the grounds, *inter alia*, that he was personally responsible for SHI's dishonest conduct of the proceedings and that he had caused SHI to defend the proceedings and bring its counterclaim for his sole benefit. DB also applied for an order that SHI's proposed appeal against the Judgment Order be made subject to conditions. Both applications were successful.

11. Following DB's successful application for a non-party costs order against Mr Vik, Mr Vik paid the interim payment on account of costs. However, SHI failed to pay any part of the Judgment Debt (which now exceeds US$300 million including interest).

12. DB made a without notice application on 20 July 2015 seeking an order pursuant to CPR 71.2 against Mr Vik in his capacity as a (then) director of SHI. In July 2015, Teare J made an order under CPR 71 (the "***CPR 71 Order***"). In summary, the CPR 71 Order required Mr Vik, in his capacity as (then) director of SHI:

    i) to produce, by 14 October 2015, "all documents in [SHI's] control which relate to [SHI's] means of paying the amount due under the [Judgment] and the [Judgment Order]", including certain specific categories of documents listed in a non-exhaustive Schedule to the CPR 71 Order; and

    ii) to attend an examination before a judge on 28 October 2015 "to provide information about the judgment debtor's means and any other information needed to enforce the judgment or order".

13. On 24 August 2015, Mr Vik applied to vary and/or strike out the CPR 71 Order. On 7 October 2015, Cooke J handed down judgment substantially upholding the CPR 71 Order but providing that the date for Mr Vik's oral examination should be put back to 11 December 2015.

14. On 14 October 2015, Mr Vik disclosed certain hard copy documents pursuant to the CPR 71 Order. Mr Vik provided further disclosure on 9 December 2015 and 10 December 2015.

15. DB's solicitors, Freshfields, wrote to Cooke Young & Keidan LLP, solicitors then acting for Mr Vik, on 27 November 2015 enclosing a list of the topics that DB intended to cover at the oral examination.

16. Mr Vik's oral examination under CPR 71 took place over the course of one day on 11 December 2015 before Cooke J.

**(2) The committal application**

17. DB alleged that Mr Vik was in contempt of court by failing to comply with both paragraphs of the CPR 71 order, and applied for his committal. A long saga then ensued, including an appeal to the Court of Appeal and an attempt by Mr Vik to appeal to the Supreme Court, which ultimately resulted in DB being able to serve a committal application on Mr Vik.

18. DB issued an application to commit on 7 May 2019, amended (ultimately) on 17 December 2021, seeking:

> "an order (a draft of which is attached) pursuant to CPR 81 that for his contempt Mr Vik stand committed to HM Prison Pentonville for a period of six months from the date of his apprehension, and that a Warrant for Committal shall be issued to that effect, with the Warrant for Committal to remain in the Court Office at the Royal Courts of Justice and the execution of it be suspended for a period of six months on condition that Mr Vik complies with the terms set out in the Schedule to that order, after which the sentence and Warrant of Committal be discharged unless prior to that date an application has been made by DBAG to lift the suspension"

(The committal documents use the acronym "*DBAG*" for the Claimant.)

19. The Schedule to the draft order set out the terms on which the Warrant of Committal was to be suspended. At this stage, it provided for Mr Vik *"to attend Court at 10:30 am on [date] and [date] to be examined by DBAG on the matters listed in paragraph 3 below (the Specified Matters)"*; to produce specified documents by a date to be inserted into the order; and to provide a witness statement by a date to be inserted into the order.

20. Eventually, following an 11-day trial (at which Mr Vik gave oral evidence over four days), Moulder J held that Mr Vik had deliberately breached the CPR 71 Order. She found that Mr Vik deliberately gave false evidence to the court about SHI's former assets in numerous respects and deliberately failed to disclose entire categories of documents required by the CPR 71 Order. For example, Mr Vik had not disclosed any electronic documents relating to SHI's means of paying the Judgment Debt, despite his having conducted business remotely on his Blackberry/iPhone. Moulder J held that Mr Vik was a dishonest witness who had "*lied*", given answers that were "*wholly incredible*", "*clearly absurd*", "*disingenuous*" and "*clearly a lie*"; and who treated cross-examination "*as an intellectual challenge*".

**(3) The sentencing process**

21. The case then proceeded to a sentencing hearing before Moulder J on 15 July 2022. By this stage, Mr Vik had stated (as recorded in § 34 of the Sentencing Judgment) that he intended to seek to appeal from the court's findings in the Contempt Judgment. In an updated draft put forward to the judge by DB the day before the hearing, the body of the order had been revised to accommodate the possibility of an appeal. Paragraphs 1 and 2 of the updated draft read:

> "1. Mr Vik be committed to Her Majesty's Prison [Pentonville] for a period of [two years] from the date of his apprehension, and that a Warrant of Committal shall be issued to that effect.
>
> 2. The committal of Mr Vik to prison under paragraph 1 above shall be suspended until whichever is the later of (i) a period of the date [six months] from the latest date by which any notice of appeal from this Order must be filed, or (ii) in the event of such notice of appeal being

> so filed, the date [six months] from the final determination of any appeal from this Order, and the warrant of committal remain in the Court Office at the Royal Courts of Justice, on the condition that Mr Vik complies with the terms set out in Schedule B to this Order, after which paragraph 1 of this Order and the Warrant of Committal shall be discharged unless prior to that date an application has been made by DBAG to lift said suspension."

22. In this updated version of the draft order, Schedule B § 1, rather than envisaging a specific date being inserted for the Further Examination hearing, now provided for it to take place *"on a date or dates to be fixed, to be no less than [no. days] days from (i) the latest date by which an appeal from this Order must be filed, or (ii) in the event that an appeal is filed, from the final determination of the appeal"*. Paragraphs 4 and 5 continued to envisage that specific dates would be inserted for the production by Mr Vik of documents and a witness statement.

23. Mr Vik, in his written submissions on sentence, stated that the imposition of a suspended sentence, subject to Mr Vik's compliance with certain terms as set out in the Schedule to the draft order, rather than an order for immediate imprisonment, was appropriate where the goal was to get the defendant to comply with the order that had been breached. He submitted that the period of any suspension should correspond with the conditions imposed and the time it was likely to take for them to be complied with, *"which should be considered in conjunction with the terms of the Schedule to the draft order and the timetable laid down for production of documents and attendance for further XX"*.

24. At an early stage of the oral submissions on sentence, the judge asked whether suspension of the sentence would achieve anything, in circumstances where the parties still had disagreements about the terms on which any suspension should occur. Counsel for Mr Vik argued for suspension, and submitted that the time for compliance with the conditions should run from the completion of any appeal process (and making clear that Mr Vik intended to seek to appeal). The judge ruled first on the length of the sentence, concluding that it should be 20 months, and then heard submissions on suspension. In the meantime, Mr Vik's team had provided proposed amendments to the draft order, which DB said had led it (in combination with other factors) to conclude that the sentence should be for immediate custody rather than being suspended. Counsel for Mr Vik responded that Mr Vik had every intention of complying with the orders the court made, but that *"one is not going to get compliance without suspension"* in the sense that a heavy sentence of 20 months' immediate custody would not provide much coercion or compulsion for Mr Vik to honour his remaining obligations. Counsel stated that the period of suspension should allow for the possibility of an appeal, otherwise the appeal might be rendered nugatory. By the time of the "*deadline*" of the suspension, Mr Vik should have, following any appeal, a last opportunity to comply and time within which to do so. It was, he submitted, better to have the threat of imprisonment hanging over Mr Vik, to coerce compliance, than to sentence him to immediate custody. Suspension of the sentence would provide an opportunity to comply.

25. In the Sentencing Judgment, delivered on 15 July 2022, Moulder J recorded that:

> "2. The Claimant ("DBAG") now seeks an order that, for his contempt, Mr Vik be committed to prison for a period of two years and that the committal be suspended for a period of six months on condition that Mr Vik complies with certain conditions, that six-month period to run from the latest date by which any notice of appeal must be lodged or six months from the final determination of any appeal."

26. She cited the provision in CPR 81.9(2) that *"...An order of committal and a warrant of committal have immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant".* The judge addressed the question of harm, noting that some $346 million remained outstanding to DB from SHI in respect of the Judgment Debt, and that DB still has far from a complete picture of the assets that might be available to discharge it. Moulder J referred to her findings that Mr Vik had lied to the court at the oral examination hearing in several respects, and to the multiple breaches which increased his culpability. Mr Vik had committed serious and deliberate breaches. Overall, Moulder J concluded that the harm and culpability of Mr Vik's offending placed it towards the top of the range, bearing in mind the two-year maximum, and merited a sentence of 20 months' custody: 10 months as the punitive element and 10 months as the coercive element to encourage future cooperation. The judge stated that Mr Vik's actions were "*very likely to have been designed to keep DB out of its money*", that his breaches were "*of themselves significant and in addition have caused significant harm*" and that Mr Vik "*continues to do what he can to thwart*" DB's enforcement efforts.

27. Moulder J concluded that the sentence should be suspended on conditions. She referred to the observations in *Hale v Tanner* [2000] 1 WLR 2377 (CA) that *"[s]uspension ... is usually the first way of attempting to ensure compliance with the court's order"* and *"[t]he length of the suspension requires separate consideration although it is often appropriate for it to be linked to continued compliance with the order underlying the committal."* Moulder J concluded:

> "80. As I say, I have hesitated long and hard as to whether or not to suspend this sentence. On balance, I have decided that I should give Mr Vik the opportunity to comply with the order in the sense that he should comply with the conditions which are to be imposed. The draft conditions which are before me are now largely agreed, although there may be some small matters of grammar.
>
> 81. Dealing with those matters which I believe are the substantive differences between the parties, Mr Matthews was resisting the formulation "make all reasonable efforts". In my view, the language may or may not make a significant difference but it must be clear to Mr Vik that he is to do his utmost to comply and therefore I prefer the formulation "all reasonable efforts"."

and, after resolving two further unresolved matters:

> "84. Beyond that, I think I would hope that typographical, grammatical changes can be agreed between the parties. There has been some progress in the last 24 hours or so. As I say, I express no great confidence as to whether or not these conditions will lead to

> progress. I very much hope that it will and it seems to me that the authorities would urge me and encourage me to suspend the sentence and therefore that is what I order."

28. Following the sentencing hearing, there were further discussions between the parties about the precise form of the order. It was not possible to agree all of these, so a letter was submitted to the judge on 27 July 2022 attaching rival drafts: a clean copy of DB's draft and a mark-up showing Mr Vik's proposals. Before me, DB reserved its position as to the admissibility of this communication. Counsel for Mr Vik relied on it as indicating what order the judge was being invited to make; DB pointed out (and I accept) that the letter is not evidence of what the judge actually decided unless it was clear that she accepted the particular submission being made. For completeness, however, I record the main points as follows. There was no dispute about the body of the proposed Suspended Committal Order, which now read as follows (in terms which match that of the Suspended Committal Order as ultimately made):

> "…UPON the Court being satisfied so as to be sure that Mr Vik has been guilty of contempt of Court…
>
> "AND UPON hearing Leading Counsel for DBAG and Leading Counsel for Mr Vik as to the matter of sentencing and other consequential matters…
>
> IT IS ORDERED THAT:
>
> 1. Mr Vik be committed to Her Majesty's Prison Pentonville for a period of 20 months from the date of his apprehension, and that a Warrant of Committal shall be issued to that effect.
>
> 2. The committal of Mr Vik to prison under paragraph 1 above shall be suspended until whichever is the later of (i) a period of the date six months from the latest date by which any notice of appeal from this Order must be filed, or (ii) in the event of such notice of appeal being so filed, the date six months from the final determination of any appeal from this Order, and the warrant of committal remain in the Court Office at the Royal Courts of Justice, on the condition that Mr Vik complies with the terms set out in Schedule B to this Order, after which paragraph 1 of this Order and the Warrant of Committal shall be discharged unless prior to that date an application has been made by DBAG to lift said suspension.
>
> 3. Mr Vik pay DBAG's costs of this application on the indemnity basis, subject to detailed assessment. Mr Vik is to pay DBAG the sum of £1,200,000 by way of interim payment on account of such costs by 4pm on 12 August 2022.
>
> 4. Mr Vik has liberty to apply to the Court to purge his contempt and discharge the Order in paragraph 1 above.

> 5. Pursuant to CPR r81.9(3) personal service of this order shall be dispensed with. DB shall serve this Order on Mr Vik by way of email to his solicitors, Brecher LLP.
>
> 6. Mr Vik is to file and serve any appellant's notice pursuant to CPR r52.12(2)(b) and CPR PD52D.9.1 by 4.30pm on 5 August 2022."

29. The parties' remaining disagreements concerned the timings set out in Schedule B. Thus, Schedule B §§ 1 and 2 stated:

> "Attendance at Court for further examination as to SHI's means of paying the Judgment Debt
>
> 1. Mr Vik is to attend Court to be examined by DBAG on the matters listed in paragraph 3 below (the Specified Matters) on a date or dates to be fixed, to be no less than [8 weeks] [10 weeks] from the date in paragraph 1.1 below.
>
> 1.1. That date is whichever is the later of:
>
> (a) The [30 October 2022] [21 November 2022]; or
>
> (b) in the event that an appeal is filed, the date of final determination of any such appeal.
>
> 2. Upon attending Court on the dates referred to in paragraph 1 above, Mr Vik is required to provide accurate answers, to the best of his knowledge and belief, to any questions as may be asked of him by DBAG or the Court in relation to the Specified Matters."

with 8 weeks and 30 October 2022 reflecting DB's position and 10 weeks and 21 November 2022 reflecting Mr Vik's position. Paragraph 5 of the draft Schedule provided for Mr Vik to provide the specified documents within 4 weeks of the date specified in § 1. Paragraph 6 provided for Mr Vik to provide a witness statement within 4 weeks (*per* DB) or 6 weeks (*per* Mr Vik) of the date specified in § 1.

30. The letter to the judge explained the parties' reasons for taking these respective positions. Mr Vik's part of the letter included the following points:

> "1. At the hearing on 15 July, the order made by the Court was to be substantially in the form of the Bank's draft, with certain amendments ordered by the Court or agreed. Counsel for the Bank indicated that there were outstanding amendments to be made to the drafting of paragraphs 5 and 6 of Schedule B to bring them in line with the form of paragraph 1, which paragraphs deal with the timetable for Mr Vik to produce further documents, etc. (Transcript p133, line 22 onwards).
>
> 2. The Bank's draft order provided (at paragraph 2, in square brackets) for a period of suspension ending 6 months after the determination of any appeal; however, paragraphs 1, 5 and 6 of Schedule B did not specify times within that period for Mr Vik to produce documents and

> a witness statement and to submit for further XX and these points were not addressed at the hearing.
>
> 3. Since the hearing, the parties have sought to agree the appropriate timeframes for Mr Vik to comply with the requirements referred to above. The parties are close to agreement and only a small difference remains in relation to timing.
>
> 4. The parties have agreed a formulation for fixing the time for compliance which differs from that provided for in the draft order: in return for Mr Vik agreeing to produce documents within only a very short time (4 weeks) after any appeal is concluded, the Bank has agreed in effect that the earliest possible date by which Mr Vik shall be required to produce documents is 4 weeks after Sunday 30 October (i.e. 27 November) – even if the appeal is determined before 30 October. The earliest dates by which Mr Vik may be required to produce a witness statement and submit for XX are also defined by reference to this 30 October date (respectively 4 weeks and 8 weeks after 30 October, i.e. 27 November and 25 December)."

Mr Vik proposed that the earliest dates by which he should have to produce documents, provide a witness statement and attend the Further Examination, however quickly his appeal might be determined, should be 19 December 2022, 2 January 2023 and 30 January 2023 respectively.

31. DB's portion of the letter indicated that it agreed with quoted paragraphs 1-4 above but did not accept the remaining points. It submitted that deadlines running from 30 October 2022 would give ample time for compliance. DB noted that:

> "The length of suspension is, in this case, somewhat notional. Unlike a case where the conditions and length of suspension is tied to the duration of a continuing obligation in the underlying order (e.g., the non-molestation order in *Tanner v Hale* [2000] 1 WLR 2377), the conditions of this suspension involve performance on one particular day, and therefore the fact that suspension is to last for six months should not slow down the timeline for compliance, especially given the extended period necessary for DBAG to ascertain the fullness and truthfulness of Mr Vik's compliance."

**(4) The Suspended Committal Order**

32. Thereafter, Moulder J made the Suspended Committal Order, which was sealed on 29 July 2022. The provisions relevant for present purposes were these:

> "…**UPON** the Court being satisfied so as to be sure that Mr Vik has been guilty of contempt of Court…
>
> "**AND UPON** hearing Leading Counsel for DBAG and Leading Counsel for Mr Vik as to the matter of sentencing and other consequential matters…

**IT IS ORDERED THAT:**

1. Mr Vik be committed to Her Majesty's Prison Pentonville for a period of 20 months from the date of his apprehension, and that a Warrant of Committal shall be issued to that effect.

2. The committal of Mr Vik to prison under paragraph 1 above shall be suspended until whichever is the later of (i) a period of the date six months from the latest date by which any notice of appeal from this Order must be filed, or (ii) in the event of such notice of appeal being so filed, the date six months from the final determination of any appeal from this Order, and the warrant of committal remain in the Court Office at the Royal Courts of Justice, on the condition that Mr Vik complies with the terms set out in Schedule B to this Order, after which paragraph 1 of this Order and the Warrant of Committal shall be discharged unless prior to that date an application has been made by DBAG to lift said suspension.

3. Mr Vik pay DBAG's costs of this application on the indemnity basis, subject to detailed assessment. Mr Vik is to pay DBAG the sum of £1,200,000 by way of interim payment on account of such costs by 4pm on 12 August 2022.

4. Mr Vik has liberty to apply to the Court to purge his contempt and discharge the Order in paragraph 1 above.

5. Pursuant to CPR r81.9(3) personal service of this order shall be dispensed with. DB shall serve this Order on Mr Vik by way of email to his solicitors, Brecher LLP.

6. Mr Vik is to file and serve any appellant's notice pursuant to CPR r52.12(2)(b) and CPR PD52D.9.1 by 4.30pm on 5 August 2022."

…

"**SCHEDULE B**

**TERMS OF SUSPENSION**

The terms on which the committal in paragraph 1 of this Order and execution of the Warrant of Committal are to be suspended pursuant to paragraph 2 of this Order are as set out below.

Attendance at Court for further examination as to SHI's means of paying the Judgment Debt

1. Mr Vik is to attend Court to be examined by DBAG on the matters listed in paragraph 3 below (the Specified Matters) on a date or dates to be fixed, to be no less than 9 weeks from the date in paragraph 1.1 below.

1.1. That date is whichever is the later of:

> (a) 14 November 2022; or
>
> (b) in the event that an appeal is filed, the date of final determination of any such appeal.
>
> 2. Upon attending Court on the dates referred to in paragraph 1 above, Mr Vik is required to provide accurate answers, to the best of his knowledge and belief, to any questions as may be asked of him by DBAG or the Court in relation to the Specified Matters.
>
> …
>
> Provision of documents
>
> …
>
> 5. Mr Vik is by no later than 4pm on the date 4 weeks after the date specified in paragraph 1.1 above to produce to DBAG's solicitors, Freshfields Bruckhaus Deringer LLP, in hard and/or soft copy, all documents falling within the categories listed in paragraph 8 below (the Specified Documents).
>
> 6. Mr Vik is, by no later than 4pm on the date 5 weeks after the date specified in paragraph 1.1 above, to provide to DBAG a witness statement which must, to the best of Mr Vik's knowledge and belief: [requirements set out]"

**(5) Appeal from the Suspended Committal Order and resulting deadlines**

33. Mr Vik appealed Moulder J's decisions (as to both liability and sentence) and his appeal was heard on 7-9 February 2023. On 24 February 2023, the Court of Appeal unanimously dismissed all grounds of appeal, awarded DB indemnity costs and refused Mr Vik's application for permission to appeal to the Supreme Court.

34. The dismissal of Mr Vik's appeal engaged the timetable built into Schedule B of the Suspended Committal Order. Under that timetable:

    i) the Further Examination was to be listed on or after 28 April 2023, being (under §1.1 of Schedule B) the date no less than 9 weeks from the later of (a) 14 November 2022 and (b) 24 February 2023;

    ii) the deadline for production of documents was 24 March 2023; and

    iii) the deadline for provision of Mr Vik's witness statement was 31 March 2023.

35. The dismissal of the appeal also meant that the 6-month period referred to in § 2 of the body of the Suspended Committal Order ended on 24 August 2023, the date 6 months from the final determination of the appeal.

### (6) Listing of the Further Examination

36. On 1 March 2023, shortly after the dismissal of Mr Vik's appeal, Freshfields wrote to Mr Vik's solicitors, Brecher, to arrange the listing of the Further Examination on an expedited basis. Freshfields invited Brecher to confirm that Mr Vik would support DB's request for expedition. On 10 March 2023, Brecher responded, suggesting that there was "*no obvious urgency*" in listing the Further Examination and that "*expedition hardly seems justified*". They stated that Mr Vik would oppose any request for expedition unless DB agreed to two conditions: first, that the Further Examination be fixed "*by reference to counsel's availability*"; and, secondly, that Mr Vik "*may attend via video link*". Freshfields replied on 16 March 2023 indicating that the video link condition was unacceptable, that the extent to which counsel's availability could be taken into account on listing would be a matter for the court, and that they would be applying for the expedited listing of the hearing.

37. DB instructed its counsel's clerks to liaise a view to listing the Further Examination, noting that it could not be listed for a date prior to 28 April 2023. A message from counsel's clerk dated 14 March 2023 indicates that DB's instructions were to seek agreement to the listing of a mutually agreeable date in September 2023 (if the court was willing to consider one); alternatively to press for a date in the week of 11 December 2023, which was understood to be the earliest period the court was presently able to accommodate in the ordinary course. In advance of the listing appointment, the court office had indicated to the clerk to DB's counsel that, absent expedition, it was currently listing two-day hearings for the week commencing 11 December 2023. It does not appear to have occurred to either side that there might be a need for the Further Examination to take place within the 6-month period of suspension of the sentence, i.e. before 24 August 2023.

38. On 15 March 2023, the clerks to DB's and Mr Vik's counsel attended a listing appointment to fix the Further Examination. The evidence indicates that Mr Vik's counsel's clerk sought to adhere to the two conditions on expedition referred to above, and that the earliest date on which Mr Vik's counsel was available was in late January 2024. It appears that the earliest date on which both parties' chosen leading counsel were available was in early April 2024. The listing officer decided to refer to the Judge in Charge.

39. Further correspondence ensued between Freshfields and Brecher about whether Mr Vik should attend the Further Examination in person. Mr Vik took the position that it was essential for him to have at the Further Examination his chosen counsel, who was familiar with the proceedings and the committal application. However, on 22 March 2023 Mr Vik's instructions changed, and his counsel's clerk indicated that he now had instructions to fix the Further Examination for one of two windows in September 2023, which is what then occurred. An exchange between counsel's clerks and the listing office on 23 March 2023 indicates that the parties were told that an expedition request would be required if the parties wanted a listing earlier than September 2023, but that the parties were content with 19/20 September and did not seek an earlier date.

## (7) Mr Vik's Variation Application

40. On 21 March 2023, Brecher requested 28-day extensions of time for compliance with the conditions of the suspension requiring production of documents and a witness statement. DB was unwilling to agree this without an explanation, given the time that had elapsed since the Suspended Committal Order was made. Freshfields wrote on 24 March 2023 refusing to agree the extension, stating that Mr Vik had "*breached a condition of his suspended sentence*" by failing to meet the deadlines. DB reserved its position as to whether Mr Vik's request for an extension of time should be determined at the conclusion of the Further Examination, so as to enable a proper view to be taken of the adequacy of Mr Vik's document production and his compliance with the other terms of suspension.

41. On 28 March 2023 Mr Vik served notice of an application to extend those two deadlines by 28 days (***the "Variation Application***"). His evidence in support included the following passage:

> "the Applicant asks the Court to vary the Order so as to extend the time for compliance … by 28 days. This would mean that the date for production of documents under paragraph 5 would become 21 April 2023 and the date for the provision of the statement under paragraph 6 would become 28 April 2023. The documents and the Applicant's witness statement would thus still be produced well in advance of the Applicant's attendance for further examination (on the basis that this is likely to be listed for September 2023) and the Applicant will respond to and assist with any reasonable further requests that the Respondent may make following its receipt of the documents and the Applicant's witness statement in the period leading up to his attendance for further examination."

42. On 5 April 2023, Freshfields wrote to Brecher repeating its position that the Variation Application should be heard at the conclusion of the Further Examination. To address Mr Vik's concern that DB would seek to have him committed for breach of the remedial disclosure order before the Further Examination took place, Freshfields offered DB's undertaking that:

> "it will not before the Vik Evidence Hearing [i.e. the Further Examination] seek to have Mr Vik imprisoned on the basis that he has breached the condition in the Committal Order concerning the date on which he was required to produce all Specified Documents (as defined within the Committal Order)."

43. Brecher responded on 12 April 2023 agreeing to this proposal. They stated:

> "we note your confirmation that DB will not seek, before the Vik Evidence Hearing, to have Mr Vik imprisoned on the basis that he has breached the condition in the Committal Order concerning the date on which he was required to produce all Specified Documents. On that basis, Mr Vik agrees that the Variation Application should be determined at the Vik Evidence Hearing."

44. Thus the parties were evidently proceeding on the basis that Mr Vik remained subject to a condition of suspension of the sentence, requiring him to attend the Further Examination now listed for September 2023.

**(8) The Remote Attendance Applications**

45. Correspondence in March and April 2023 left it unclear whether Mr Vik would resist attending the Further Examination in person. DB therefore issued an application on 19 May 2023 for directions confirming that Mr Vik was required to attend the Further Examination in person. Mr Vik served responsive evidence by the agreed deadline, 23 June 2023. On the same date, Mr Vik served his own application notice, seeking permission under CPR 32.3 to attend the Further Examination remotely by video-link from Connecticut, USA.

46. The two applications were heard by Bryan J on 1 September 2023.

47. As part of his written submissions to Bryan J, Mr Vik made the point that whilst attendance at the Further Examination was a condition of the suspension of the Suspended Committal Order, there was "*at present no order that Mr Vik attend court*"; there was "*a condition*" not "*a compulsion*"; and on that basis DB's own application should be dismissed. Mr Vik's submissions thus proceeded on the basis that the Suspended Committal Order remained in effect. Similarly, Mr Vik submitted that he wanted the opportunity to "*to continue to comply with the terms of the suspension of the Committal Order*" by attending remotely, whereas *"[i]f permission is not granted…Mr Vik will face the risk of becoming a fugitive from justice as a result of not being permitted the opportunity to answer questions which he is quite willing to answer*". Mr Vik's counsel's oral submissions were to similar effect, stating for instance that "*Mr Vik wishes to give evidence remotely to lift the suspended sentence against him should he choose to give evidence to that purpose";* and that if Mr Vik were required to attend in person then this court could "*exercise coercive powers against him*".

48. No suggestion was made to Bryan J that the Suspended Committal Order might have expired, by reason of the 6-month suspension period having elapsed, and there was no argument on any such issue.

49. Bryan J dismissed Mr Vik's application on its merits ([2023] EWHC 2234 (Comm)). As to Mr Vik's suggestion that attendance at the Further Examination was a (mere) condition of the suspension, Bryan J said:

> "12… on behalf of Mr Vik, it is submitted that, "The Committal Order does not require Mr Vik to attend the examination – it makes it a condition of the suspension of the sentence." I have to say that I do not follow that submission or the distinction which is sought to be drawn. It is indeed a "condition of the suspension of the sentence" and as the Committal Order expressly states at [2], "The warrant of committal remains in the Court office …on the condition that Mr Vik complies with the terms set out in Schedule B." Mr Vik is required to comply with the terms in Schedule B and one of those is, I am satisfied, that "Mr Vik is to attend Court", language which is mandatory in nature.

> 13. At some point in Mr Mathews' oral submissions, it appeared to be suggested that compliance with the terms of the Committal Order and attendance at the Further Examination was optional on the part of Mr Vik. I consider that that is contrary to the express language of the Committal Order and also the meaning and spirit of that Order.
>
> 14. The terms on which the Committal were suspended were precisely that, terms of the suspension, like any other terms of a suspended Sentence Order. The party concerned being ordered to undertake those requirements, whether in some cases (for example) unpaid work or a rehabilitation requirement, or in this case the provision of further documents and attendance at Court for Further Examination. Those are things that the Committal Order requires to be undertaken by Mr Vik.
>
> 15. It is noted on Mr Vik's behalf that DBAG seeks an order that, "Mr Vik shall attend the Vik examination hearing to be examined in person", and it is submitted that this would, "elevate a condition into a compulsion in a manner inconsistent with the basis of the suspension of the Committal Order." I again have difficulty with this submission. If, as it is, it is a condition of the suspension that Mr Vik attend Court for Further Examination, it is a condition that should be complied with. On any view, Mr Vik is under an obligation to attend for Further Examination (however that is done) otherwise he would be in breach of the suspension terms and liable to face an application for breach and an order for immediate imprisonment. Indeed, in criminal cases, alleged failures to comply with conditions of a suspended sentence order are frequently (and correctly) referred to as "breach" proceedings."

50. Bryan J stated that he could, nonetheless, vary Moulder J's order if he considered it appropriate for Mr Vik to attend the Further Examination remotely. He added that he proposed to address each of the two applications on their merits, though *"[i]n reality the application that is on the operative path is the Vik Application because (as appears on the authorities) the burden is upon Mr Vik to show "good reason" as to why, in the exercise of the court's case management powers, he should be granted permission to give evidence by video link"*. Having addressed the merits of Mr Vik's application, Bryan J continued:-

> "95. Accordingly on the applicable principles, and for the reasons addressed above, I dismiss Mr Vik's Application. Conceptually that determines matters, as unless Mr Vik succeeded on the Vik Application and secured an order that he be permitted to attend by videolink he must attend in person.
>
> 96. I have already indicated my reasons why I consider under the Committal Order Mr Vik is required to attend at Court in person. However, had I been mistaken in my interpretation of the Committal Order that is in any event the consequence of my dismissal of the Vik Application.

97. Either way the DBAG Application, whilst properly brought, is not on the operative path and is academic. Nevertheless as it has been made, and for completeness, I will address it. The DBAG Application is for an order that pursuant to the Court's general case management powers under CPR 3.1(2)(c) Mr Vik be required to attend in person to be examined at the Further Examination hearing listed pursuant to paragraph [1] of Schedule B to the order Moulder J, dated 29 July 2022. If necessary, I am satisfied that I should make that order. The authorities that I have identified show that it is appropriate that a contemnor in a position of Mr Vik should attend in person and should be cross-examined in person in the context of the sentiments which have been expressed by both this Court and appellate Courts in the authorities that I have identified.

98. The circumstances are that the Further Examination forms part of a detailed set of conditions imposed by the existing Committal Order by which Mr Vik's term of committal was suspended. I am satisfied that the Court's ability to be in control of Mr Vik's evidence, and the likelihood of the truth and accuracy of his evidence being properly tested will be greatest if Mr Vik attends in person. I am also satisfied that it would be wrong to expose DBAG to the risks inherent in Mr Vik giving evidence remotely. Whilst it is true that the videolink proposals in the protocol are appropriate steps to take if videolink evidence was appropriate, there can be no guarantee that there would not be difficulties arising from the technology during the two days of the Further Examination.. Experience shows that notwithstanding the advances in technology over the years, there can still be problems with bandwidth and there can still be time lags, however short. Counsel, particularly enthusiastic Counsel, often ask questions quickly, and on occasions over speak a witness over a videolink where the same is not true, or is less likely to occur, when the witness is in person. Witnesses on occasions find the experience more difficult over a videolink with a degree of disconnect that is not there when everyone is in person. As is reflected in the Practice Direction (as already quoted above), remote evidence is inevitably not as ideal as having the witness physically in the Court and equally the degree of control the Court can exercise at a remote site is more limited than it can exercise over a witness physically present before it.

99. In any event, in circumstances where Mr Vik is an admitted contemnor, I do not consider that DBAG should be exposed to any risk of technological failure or exposed to potential shortcomings in the process due to any potential time lags, overlapping questions and answers or the like. These are all risks to which there is no reason why DBAG should be exposed, and which are avoided by Mr Vik giving evidence in person. Accordingly, I am satisfied that it is also appropriate to grant the DBAB Application pursuant to my general case management powers under CPR 3.1(2)(c) whereby Mr Vik's attendance at the Further Examination is to be in person. Accordingly,

> and for those reasons, the DBAG Application (whilst academic) also succeeds."

51. Bryan J refused Mr Vik permission to appeal, certifying that his proposed appeal was totally without merit.

**(9) Issue raised as to expiry of the suspended sentence**

52. On 4 September 2023, following the sealing of the Bryan J order, Freshfields wrote to Brecher seeking confirmation that Mr Vik would attend the Further Examination in person. There was no response to that letter as such.

53. On 13 September 2023, out of the blue, Brecher wrote to Freshfields stating (for the first time) that:

> "3. The period of suspension of the sentence imposed by the Committal Order, namely six months from the final determination of Mr Vik's appeal from the Committal Order, ended on 24 August 2023. To the best of our knowledge, no application to lift the suspension of sentence was made by your client prior to that date. As such, the order for committal and the Warrant have now been discharged, pursuant to paragraph 2 of the Committal Order.
>
> 4. Subject to you identifying any reason to the contrary, it seems to us that the Committal Proceedings are now at an end and there is no reason for Mr Vik to attend for any further examination.
>
> 5. It appears to us that the parties should inform the Court of this fact as soon as possible so that the listing for the 19-20 September 2023, which is fast approaching, can be vacated."

54. Mr Vik's evidence in response to DB's present application indicates that the point made in this letter had not been identified until shortly before the letter was sent. The thirteenth witness statement of Mr James Clarke, a partner in Brecher, states *inter alia*:

> "28. I confirm (without waiving privilege) that the point that the effect of the terms of the Committal Order meant that the period of suspension of Mr Vik's sentence had expired and the discharge of the order of committal and the warrant had taken effect on 24 August 2023 was not identified until only shortly before my firm wrote to Freshfields drawing attention to the point on 13 September 2023 and after the hearing before Mr Justice Bryan on 1 September 2023 (referred to below)."

55. After brief further correspondence, DB issued the present application.

## (C) CONSTRUCTION OF THE SUSPENDED COMMITTAL ORDER

### (1) Principles

56. As to the general approach when interpreting court orders, in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, Lord Sumption (giving the judgment of the Privy Council) said:

> "13. … the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.
>
> 14. It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.
>
> 15. As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background. … the reference in the order to "the issue of damages", although necessary, begged the question "Which issue of damages?" The order does not itself answer it. Only extrinsic evidence can do that. The Proprietor accepts this. Mr Nelson's case was that it is admissible to consult the arbitrators' Terms of Reference to identify "the issue of damages" to which the order referred. But it appears to the Board that this concession, which was clearly rightly made, exposed the illogicality of the Proprietor's case. If it is admissible to construe an order of remission by reference to the issues in the arbitration, it cannot rationally be held inadmissible to construe it by reference to the issues which the remitting court regarded as calling for reconsideration by the arbitrators. …
>
> 16. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a Court's reasons to interpret the language of its order, and using it to contradict that language. The point may be illustrated by the decision of the Court of Appeal in England in *Gordon v. Gonda* [1955] 1 WLR 885, where an attempt was made to contradict what the Court regarded as the inescapable meaning of an order, by arguing that the circumstances

> described in the judgment could not have justified an order which meant what it clearly said. Therefore, it was said, the judge must have meant something else. The answer to this was that any inconsistency between the circumstances of the case or the reasoning of the Court and the resultant order was properly a matter for appeal. A very similar argument was rejected by the Board for the same reason in *Winston Gibson v Public Service Commission* [2011] UKPC 24 . Decisions such as these (and there are others) are not authority for the proposition that a Court's reasons are inadmissible to construe its order. They only show that the answer depends on the construction of the order and that the reasons given in the Judgment may or may not make any difference to that."

57. Applying those principles, Picken J in *Sea Master Special Maritime Enterprise v Arab Bank (Switzerland)* [2022] EWHC 1953 (Comm) concluded that parties' submissions could, at least in principle, be considered when construing an order, since the issues before the court might be apparent only from the parties' submissions. In addition, where a judge or arbitrator accepted a party's submissions, they could (and should) be looked at because they thereby become part of the judge or tribunal's reasons. However, as the majority of the Court of Appeal made clear in *SDI Retail Services v The Rangers Football Club* [2021] EWCA Civ 790, a process of analysing parties' submissions in order to discover their motives for seeking particular orders was *"a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract"* (*SDI* §§ 66 and 80, quoted in *Sea Master* at § 42).

58. DB also cited the statements of Mr Edward Murray (as he then was), sitting as a Deputy High Court judge, in *Secretary of State for Business, Innovation and Skills v Feld* [2014] EWHC 1383 (Ch), where he said:

> "27. In a court order; one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.
>
> 28. The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come

> into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case. In the context of statutory interpretation, Lord Reid pointed out in *Cozens v Brutus* [[1973] AC 854], and Lord Hoffmann in *Moyna* [*Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 ], the importance of interpreting the natural and ordinary meaning of the words used in the relevant statute in light of the "*syntax, context and background*" in which those words were used (*Moyna* at [24], quoted by Dyson LJ In *Evans* [*R v Evans* [2004] EWCA Crim 3102] at [14]).
>
> 29. Dyson LJ, as already noted, confirmed in *Evans* that these observations also apply to interpretation of a court order. …"
>
> (§§ 27-29)

59. Evidence of a party's subjective interpretation is not an aid to construction: *Premier Exports London Ltd v Bhogadi* [2021] EWHC 3500 (Ch) § 37.

60. A strict construction must be applied to orders whose breach carries penal consequences. In *JSC BTA Bank v Ablyazov (No. 10)* [2015] UKSC 64, a case about the construction of a freezing order, Lord Clarke (with whom the other members of the court agreed) said:

> "19. I further agree that orders of this kind are to be restrictively construed in accordance with Beatson LJ's strict construction principle [in the court below], which he described in this way in para 37:
>
> > "The third principle follows from the 'fundamental requirement of an injunction directed to an individual that it shall be certain': *Z Ltd v A-Z and AA-LL* [1982] QB 558 , 582 per Eveleigh LJ. It is that, because of the penal consequences of breaching a freezing order and the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed: *Haddonstone Ltd v Sharp* [1996] FSR 767 , 773 and 775 (per Rose and Stuart-Smith LJJ); *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695 , 1705C and 1713C-D (per Mummery and Nourse LJJ). In *Anglo Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 1702 (Ch) Neuberger J stated:
> >
> > > 'A freezing order, which has been referred to as a nuclear weapon, should … be construed strictly' because the court is 'concerned with an order which has a potentially draconian effect on the commercial and economic freedom of an individual against whom no substantive judgment has yet been granted'."
>
> He added at para 66 that strict construction is also an aspect of the "great circumspection" with which Lord Mustill, in *Mercedes Benz AG v Leiduck* [1996] AC 284 , 297, stated that the jurisdiction should be

> exercised. I agree. One of the reasons for this principle, as I see it, is the risk of oppression."

61. Similarly, in *Wilkinson v S* [2003] EWCA Civ 95, a case about the interpretation of the rules applicable to appeals from suspended committal orders, Hale LJ (giving the judgment of the court), made clear that such orders are in substance orders for imprisonment:

> "55. There is no doubt that a suspended committal order is an order which commits a person to prison. It orders that the person concerned 'be committed for contempt to prison' for the period specified. On the other hand, it does not result in the immediate imprisonment of the person concerned. A further order of the court is required. Unlike an immediate committal order, the refusal of habeas corpus, or a secure accommodation order, the person concerned is not immediately deprived of his liberty. It could be said, therefore, that the policy of the exception does not require an automatic right of appeal without the delay involved in having first to seek the permission either of the trial or the appeal judge. …
>
> 56. In other contexts, however, it has often been emphasised that a suspended sentence of imprisonment should always be regarded as a sentence of imprisonment. It should not, therefore, be imposed for an offence which is not serious enough to merit an immediate sentence. Nor should a suspended committal be for longer than the immediate term which would be imposed: see, eg, *Hale v Tanner* [2000] 2 FLR 879, CA at para 28. The reasons for this are obvious. There may well come a time when the court has to consider whether or not the terms of the suspension have been broken. If they have been broken, the court will be concerned with whether the suspension should be lifted and the committal served: see *Re W(B)(An Infant)* [1969] 1 All ER 594, CA. Although the court has a discretion whether or not to implement the committal, it will begin with a predisposition to do so once a breach of its terms has been proved, and it will not at that stage be concerned with whether the original committal order was correct. ...
>
> 57. Although a suspended committal does not immediately deprive the contemnor of his liberty, therefore, it hangs a sword of Damocles over his head which puts his liberty at much greater risk than did the order which he has been found to have breached. To the extent that there is any doubt about the meaning of the rules, it should be resolved in favour of the citizen whose liberty is thus put in jeopardy. ..."

62. Although *Wilkinson* concerned the interpretation of the rules, rather than of the suspended committal order itself, it underlines the penal nature of such orders. The penal consequences of non-compliance with a suspended committal order are at least as immediate as those for breach of a freezing order (probably more so, since the contempt itself has *ex hypothesi* already been established). It must follow, in my view, that a suspended committal order should be clear and unequivocal, and must be strictly construed.

### (2) Application

63. The context of the Suspended Committal Order, as DB points out, included Mr Vik being a convicted contemnor, who has been held deliberately to have breached Teare J's CPR Part 71 order in multiple and serious respects. DB submits that the purpose of the Schedule B conditions was to give Mr Vik one last opportunity to comply and to purge his contempt, failing which he would go to prison. That was also the understanding of the Court of Appeal, which stated that Moulder J had suspended the custodial sentence "*on condition that Mr Vik complied with various conditions as to future co-operation*" ([2023] EWCA Civ 191 § 123).

64. DB submits that the terms of the Suspended Committal Order envisage that compliance with the Schedule B conditions would take place within the 6-month period provided for in § 2, in order to incentivise Mr Vik to get on with producing the requisite disclosure and witness statement and attending the Further Examination. DB further submits as follows:

i) Consistently with § 1 of the Suspended Committal Order and the purpose of the Order, § 2 plainly envisages that the suspension will continue until Mr Vik has had the opportunity to comply with the Schedule B conditions. If, as in fact occurred, the date for the Further Examination were listed outside the 6-month period identified in § 2, then the suspension would continue until the completion of that examination.

ii) That is why § 2 provides that the sentence and the warrant are discharged only "*after*" the conditions have been complied with ("*after which…*"), with "*that date*" in the final portion of § 2 referring to the date for compliance with the conditions.

iii) Were it otherwise, Mr Vik could simply evade a prison sentence and defeat the whole purpose of the order by listing his Further Examination after the 6-month period (as he in fact did). DB would be unable to avoid this result by applying within the 6-month period to lift the suspension, because Mr Vik would have the (irrebuttable) argument that he had not yet had the opportunity to comply so his sentence could not be activated. Such a result would be inconsistent with Moulder J's intentions, would undermine this court's authority and its coercive powers, and would be self-defeating by rendering the sentence impossible to activate if the Further Examination occurred outside the 6-month period.

iv) Schedule B makes provision for the <u>earliest</u> date on which the Further Examination could occur, but contains no longstop. Accordingly, the terms of Schedule B mean that the deadline for the final step in Mr Vik's compliance might not be known for some time and could depend (at least in part) on court availability, as well as on any possible extensions to the deadlines for Mr Vik to complete his disclosure exercise (such as the application Mr Vik in fact made).

v) The result for which Mr Vik is contending would be particularly egregious in this case given his conduct and representations. The Further Examination was listed for the convenience of Mr Vik's own counsel. Mr Vik delayed in

producing disclosure and asked DB not to take a point on it. The parties have proceeded at all times on the basis that the suspension remained in force pending completion of the Further Examination, as considered later in the context of estoppel.

vi) Paragraph 2 of the order seeks to give Mr Vik (for his benefit, given that at the time it was made he intended to appeal) more rather than less time to comply, by providing for the 6-month period to run from the later of two dates, whichever is more beneficial to Mr Vik. The corollary of Mr Vik's current argument is that he would have benefitted from arguing for a shorter suspension period at the sentencing hearing, because his obligations would have expired earlier.

vii) Accordingly, § 2 must be read as providing for suspension for a period of time in which Mr Vik was granted the opportunity to comply with the Schedule B Conditions, "*after which*" the suspension ends.

65. I regret that I am unable to accept those submissions. In my view, the natural meaning of § 2 of the Suspended Committal Order, read in context and in conjunction with § 1 and Schedule B, is as follows. During the 6-month suspension period, Mr Vik was required to comply with the Schedule B conditions as and when they arose: on stipulated dates in the case of the disclosure and witness statement conditions, and on the date of the Further Examination hearing for the Schedule B § 1 condition. The custodial sentence was suspended, during that 6-month period, only "*on the condition that*" Mr Vik did so comply. If he did not – for example if he failed to disclose the necessary documents by the date stipulated in Schedule B § 5 – then the sentence in § 1 could be activated, i.e. he could be imprisoned. However, the order did not keep the suspended sentence extant indefinitely or until some future date when the Further Examination took place. Rather, it kept the sentence alive for a finite period of 6 months, subject to DB being able to apply, before the end of the 6-month period, to activate the sentence in the event that Mr Vik had breached any of the conditions of suspension during the 6-month period. Hence, the words "*on the condition that Mr Vik complies ...*" have the effect that breach during the 6-month suspension period could result in lifting of the suspension, i.e. activation of the § 1 custodial sentence; the words "*after which*" mean after the 6-month suspension period; and the words "*unless prior to that date*" refer to the last date of that 6-month period.

66. Part of DB's submission is that the words "*after which*" must instead mean after Mr Vik has complied with all of the Schedule B conditions. At first sight there might be something to be said for such a construction, bearing in mind that those words appear immediately after the phrase "*on the condition that Mr Vik complies with the terms set out in Schedule B to this Order*". However, in my view it is irreconcilable with the existence of the last clause of § 2. There could be no basis for any application by DB to apply to lift the suspension, i.e. to activate the custodial sentence, unless Mr Vik had failed to comply with one or more of the Schedule B conditions. Schedule B defines in clear terms the steps that Mr Vik is required to take in order to comply: to attend the Further Examination pursuant to Schedule B § 1 and provide accurate answers to the best of his knowledge (Schedule B § 2); and to provide disclosure and a witness statement meeting the requirements set out in Schedule B §§ 5 and 6. There is no room for an argument that the provision for DB to apply to lift the suspension is necessary in case, for some reason, DB wished to contend that Mr Vik should be sent

to prison despite having done all the things required by Schedule B. It follows that the premise of the last clause of § 2 must be that Mr Vik has or may have failed to comply with Schedule B in some respect. The clause has the effect that the sentence nonetheless falls away absent a timely application by DB. It is therefore inconsistent with any suggestion that "*after which*" means after full compliance with the Schedule B conditions.

67. The further question arising on DB's approach is what "*date*" is referred to in the phrase "*unless prior to that date an application has been made by DBAG to lift said suspension*". On DB's case, it is the date on which Mr Vik has had the opportunity to fulfil all of the Schedule B conditions, with the result that the suspension continues until the 6-month period has expired and (if later) the Further Examination has taken place, unless by then DB has applied to lift the suspension. This approach is reflected in the draft rectified version of § 2 for which DB contends in its alternative application under the slip rule which I consider later. That formulation is as follows, indicating changes from the existing order by underlining/strikethrough:

> "2. The committal of Mr Vik to prison under paragraph 1 above shall be suspended (and the warrant of committal remain in the Court Office at the Royal Courts of Justice) until whichever is the later of (i) ~~a period of~~ the date six months from the latest date by which any notice of appeal from this Order must be filed~~,~~; ~~or~~ (ii) in the event of such notice of appeal being so filed, the date six months from the final determination of any appeal from this Order~~,~~; or (iii) the date on which the further examination of Mr Vik directed pursuant to paragraphs 1 and 2 of Schedule B to this Order finally concludes (the "Relevant Date") ~~and the warrant of committal remain in the Court Office at the Royal Courts of Justice~~, on the condition that Mr Vik complies with the terms set out in Schedule B to this Order~~,~~ ~~after which paragraph~~ Paragraph 1 of this Order and the Warrant of Committal shall be automatically discharged after the Relevant Date unless prior to that date an application has been made by DBAG to lift said suspension."

68. The problem with this approach is that it is difficult to see how one can reach it (or its functional equivalent) by a process of interpreting the wording of § 2 of the Suspended Committal Order. The words "*that date*" most naturally refer to a date identified in the preceding wording of § 2. As I have already indicated, the obvious such date is the end of the 6-month period. In order to achieve the result for which DB contends, it would be necessary to read extra words into the phrase that begins "*until whichever is the later of (i) …",* so that the words "*that date*" in the last clause would then refer to the later of the end of the 6-month period and the date of the Further Examination. I do not consider that to be a tenable reading of a clause which by its ordinary language suspends the sentence for a fixed period of 6 months from a particular date. Moreover, the result would be a materially different, and potentially longer, period of suspension from that which the plain language of § 2 provides for. In my view, § 2 cannot be read in that way, particularly when construed strictly, and certainly cannot be regarded as clearly and unequivocally having that effect.

69. DB submits that § 2 should not be construed in the way I have indicated in § 65. above, because it would create a risk of Moulder J's objective being defeated in the event that the Further Examination were not listed in time. A striking example would

have occurred in the absence of any appeal, because the effect of Schedule B § 1 would then have been to make 16 January 2023 the earliest date for the Further Examination, less than three weeks before the end of the 6-month period provided for in § 2 of the body of the Suspended Committal Order (absent an appeal, 6 months from 5 August 2022, hence 5 February 2023).

70. However, as was common ground and as the evidence indicates, Mr Vik had made clear that he intended to appeal, and the main focus of argument around deadlines concerned the position where an appeal was brought. In that event, the effect of Schedule B § 1 was that the Further Examination could not occur earlier than 9 weeks after the determination of the appeal, and the 6-month period in § 2 of the body of the Suspended Committal Order expired 6 months after the determination of the appeal. That is not an inherently unworkable timetable. For example, as events transpired, the appeal was determined on 24 February 2023. The earliest date for the Further Examination was therefore 28 April 2023 and the 6-month suspension period expired on 24 August 2023.

71. DB submits that that created an unrealistically tight timetable for the listing of the Further Examination, with the result that § 2 of the Suspended Committal Order must have envisaged prolongation of the suspension period if the Further Examination were not fixed within the 6-month period. It is true that (as in fact occurred) the parties would be able to seek a listing as soon as the appeal were determined (in the event, 24 February 2023), as they in fact did; nonetheless, fixing a hearing for a likely 2-day hearing within the ensuing 6 months was always bound to be problematic.

72. Whilst I see the force of the point about foreseeable listing problems, as a potential contextual point when interpreting the order, I do not consider that it permits a construction that departs so far from the express language of § 2. First, there is no evidence that the court or the parties were or must have been aware that the court would be unable – even if expedition were granted – to list a hearing for the Further Examination within 6 months of the relevant date. Secondly, there is no indication that the court or (if relevant) the parties were actually contemplating the Further Examination taking place outside the 6-month period following determination of the appeal. In any event, § 2 expressly provides for a suspension period ending 6 months from a stated, ascertainable date. To read it as referring instead to the later of that date and the date of a hearing yet to be fixed would, it appears to me, involve rewriting the Suspended Committal Order rather than interpreting it.

73. DB also makes the point that, on Mr Vik's construction of the Suspended Committal Order, he could refuse to agree to a listing within the 6-month period and thereby escape from the obligation to attend a Further Examination. However, it is well arguable that by refusing to agree to a listing within the 6-month period (had DB asked for one), Mr Vik would have placed himself in breach of the Further Examination condition of the Suspended Committal Order. In addition, in circumstances where the Suspended Committal Order would expire on 24 August 2023, DB would have had a compelling basis on which to ask the court to list the hearing with the necessary expedition and without regard to counsel's availability. In any event, I do not consider that these considerations, as a contextual consideration, could lead to a different construction of the Suspended Committal Order. DB's construction would require a frank rewriting of its provisions.

74. DB appeared to advance an alternative submission, to the effect that the 6-month period in § 2 of the Suspended Committal Order could be construed as a deadline for compliance by Mr Vik with the Schedule B conditions. Schedule B §§ 4 and 5 already provide specific deadlines for the disclosure and witness statement. However, Schedule B § 1 does not provide a latest date for the Further Examination to occur. DB submitted that if, contrary to its primary submission, the end of the 6-month period in § 2 of the Suspended Committal Order does operate as a strict cut-off point, then the consequence of the Further Examination not having occurred by then must be that Mr Vik is in breach and liable to imprisonment. It was for him, as contemnor, to ensure that he complied with the conditions of suspension within the 6-month period, including ensuring that the Further Examination was brought on within the 6-month period, otherwise he would be in breach of the conditions and liable to immediate imprisonment. However, I very much doubt that the Suspended Committal Order could be read as meaning that Mr Vik would be in breach, and liable to imprisonment, even in circumstances where neither party had attempted to list the Further Examination within the 6-month suspension period. Even if it could be so read, the result would be that at the end of the 6-month period DB would have been entitled to serve an application to activate the custodial sentence. Absent any such application, the sentence would fall away. No such application having been made, the point cannot assist DB.

75. I therefore conclude that the Suspended Committal Order, by its terms, resulted in a suspended sentence which came to an end, absent any prior application by DB, on 24 August 2023.

## (D) APPLICATION UNDER THE SLIP RULE

### (1) Principles

76. DB applies, in the alternative, for rectification of § 2 of the Suspended Committal Order so as to read in the manner quoted in § 67. above. DB submits that this can be done pursuant to the 'slip' rule in CPR 40.12:

> "**40.12— Correction of errors in judgments and orders**
>
> (1) The court may at any time correct an accidental slip or omission in a judgment or order.
>
> (2) A party may apply for a correction without notice."

77. PD40B § 4.5 states:

> "The court has an inherent power to vary its own orders to make the meaning and intention of the court clear."

78. In *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] EWCA Civ 414, [2001] RPC 45, a trial judge had ordered the claimant to pay two defendants' costs up to a certain date but thereafter only one set of costs. The Court of Appeal allowed an appeal from that decision. It set aside the judge's costs order and provided that both defendants should recover their costs of the trial. That order had the unintended effect that interest on the costs ran from the date of the Court of

Appeals' order, so that the claimant lost interest which had accrued pursuant to the judge's order up to the date of the Court of Appeal's order. The Court of Appeal subsequently exercised its power under CPR 40.12 in order to correct matters.

79. The Court of Appeal referred to previous decisions in which the Court of Appeal had found the slip rule to be inapplicable. These included *Bentley v O'Sullivan* [1925] WN 95, where an order had been made that the plaintiff should recover his costs to be taxed if not agreed. On taxation the plaintiff sought to recover costs on the High Court scale in the absence of a certificate to that effect. The matter was referred to the special referee, who agreed to amend his report by inserting after the words "*costs to be taxed*" the words "*on the High Court scale*". The Court of Appeal held that he was not entitled to make that amendment. Aldous LJ, giving the lead judgment in *Bristol-Myers,* said he suspected that was a case of "*second thoughts*" about an order (§ 19).

80. Similarly, in *Hulbert v Thurston* [1931] WN 171, an infant plaintiff brought a personal injury claim, winning at first instance but losing on appeal. The appeal court made a costs order against the infant but not the infant's next friend. Scrutton LJ refused an application to amend the order:

> "In his opinion the addition now asked for was not one that could be made under the slip rule. That rule was intended for the correction of an order which, as drawn up, did not express that which was decided by the Court. It was quite possible that an order in the terms now asked for might have been made if an application had been made at the time, but no such application was made."

Aldous LJ referred to this too as "*an attempt to amend an order after second thoughts*" (*Bristol-Myers* § 20).

81. By contrast, in *Adam & Harvey Ltd v International Maritime Supplies Co. Ltd* [1967] 1 WLR 445 the Court of Appeal allowed an appeal (granting unconditional leave to defend). During the course of the argument as to costs, the court indicated that there was to be no immediate taxation. However the order as drafted simply provided for the costs to be paid. The Court of Appeal amended the order pursuant to the slip rule. Harman LJ said:

> "As far as I am concerned, as I say, I did not intend … that there should be this exceptional order for payment of costs at once, but that costs should be in any event those of the successful appellant. That was the order I intended to pronounce and I thought I had done so. But I see there is some room for mistake owing to the fact that after I had made the observation which showed I did not intend an immediate taxation, an application was made which could have had that result and was so interpreted by the associate. I think that is a slip and I think it is a slip which can be amended under RSC Ord. 20, r. 11, because inadvertently the order as drawn did not express the intention of the court owing to a misunderstanding between the associate and the court which pronounced it …."
>
> (quoted in *Bristol-Myers* § 21)

82. In *Mutual Shipping Corporation v Bayshore Shipping Co.* [1985] 1 Lloyd's LR 189, the Court of Appeal corrected, under the applicable rule, an arbitral award which transposed the names of the parties. Sir John Donaldson M.R. said at page 193:

> "The High Court Slip Rule (RSC 0.20.r.11) which is similarly worded, was considered only recently by this Court in *R v. Cripps ex parte Muldoon* [1984] 1 QB 686. We there pointed out the width of the power, but also drew attention to the fact that it does not enable the Court to have second thoughts (p.697).
>
> It is the distinction between having second thoughts or intentions and correcting an award or judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under s. 17 or under o. 20, r. 11. It cannot normally even be corrected under section 22. The remedy is to appeal, if a right of appeal exists. The skilled arbitrator or Judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or Judge later accepts as having been erroneous."

Robert Goff LJ having considered the authorities said this at page 195:

> "In none of the last five cases I have cited did the judgment or order as drawn fail to give effect to the intention of the Court at the time when it was drawn. In each case there was, however, an error in the judgment or order arising from an accidental slip or omission — by a party, or by his Counsel, or by his solicitor. Furthermore, there is authority that if a Court makes an order in certain words which do not have the effect which the Court intended them to have, that order may be corrected under the slip rule to make it accord with the Court's actual intention: see *Adam & Harvey Ltd v International Maritime Supplies Co-ordination drawings Ltd* [1967] 1 WLR 445 ."

and:

> "I do not think it would be right for me to attempt in this judgment to define what is meant by "accidental slip or omission": the animal is I suspect, usually recognizable when it appears on the scene."
>
> (quoted in *Bristol-Myers* §§ 22-24)

83. Having cited those cases, Aldous LJ in *Bristol-Myers* continued:

> "25 Those cases establish that the slip rule cannot enable a court to have second or additional thoughts. Once the order is drawn up any mistakes must be corrected by an appellate court. However it is possible under the slip rule to amend an order to give effect to the intention of the Court. ...

> 26 In the present case the only issue raised on the cross-appeal was whether the restriction placed by the judge was appropriate. At no time was that part of the judge's order that required Bristol Myers to pay the defendants' costs challenged and it was not the intention of this Court to alter that part of the order. The intention of this Court was to remove the restriction; not to alter the general right to costs that had been ordered. Thus the correct order allowing the cross-appeal should have left the part of the order of the judge which was not challenged in the form in which it existed.
>
> 27 I reject Mr Turner's submission that the mistake was as to the legal effect of the order. The legal effect was not in issue. In my view the terms of the order did not meet the intention of the Court contained in the judgments and that had an unexpected legal effect. The order setting aside the whole of the judge's order on costs was an accidental slip which can and should be corrected under r.40.12. The intention of the Court was to vary the judge's order so as to remove the restriction."

84. In *Foenander v Foenander* [2004] EWCA Civ 1675, the President of the Family Division made a civil restraint order that *inter alia* forbade the applicant from "*making any further application or issuing any new proceedings if those proceedings relate to the former marriage*" of the applicant. The Court of Appeal upheld a subsequent decision by Coleridge J to amend that order under the slip rule, to make clear that it covered the pursuit of any outstanding applications, even if they had already been commenced. Wall LJ said:

> "In my judgment, the phrase in the President's order, "making any further application" taken without reference to her judgment is ambiguous. It could mean (1) making a fresh application — for example a further, but new application to set aside the order of 12 December 1994; or (2) making a further application to the court in an outstanding application already before the court. Coleridge J's order clears up that ambiguity. He thought "further application" meant any application, as the President's judgment makes clear. In my judgment, that is the correct view. …" (§ 56)

citing *Bristol-Myers* for the proposition that:

> "Although it is of course the case that the "slip rule" is primarily designed to correct typographical or grammatical errors, it is permissible to use it to use it to amend a court order to give effect to the intention of the court …" (§ 57)

85. In *Leo Pharma v Sandoz* [2010] EWHC 1911 (Pat), the court held a patent to have been infringed, and made an order providing for disclosure and for the claimant then to elect whether to pursue an account of profits or a damages claim. Paragraph 9 of the order provided for the defendant to pay to the claimant any sums found due on the taking of said inquiry into damages or account of profits "*together with interest at the judgment rate (being 8%) from the date of this Order*". The defendant applied for the order to be corrected under CPR 40.12 on the basis that there had been no discussion at the hearing about interest (save that the defendant had submitted that any such

question should be reserved). After the hearing, the parties had disagreed about aspects of the minute of order, but at a certain stage counsel for the defendant had indicated that the defendant was prepared to agree the claimant's proposed form of order, which was signed and in due course sealed by the court. On the CPR 40.12 application, the defendant contended that counsel had not discussed the point about interest, and the defendant's counsel indicated that he had never intended to agree to judgment rate interest.

86. Floyd J rejected the application. He noted that in *Bristol-Myers*, an order that had been in agreed form was correctable because, when the court made the order, it did not intend to deprive the defendants there of accrued interest, yet, inconsistently, the written order had that effect. By contrast, Floyd J noted, in *SmithKline Beecham v Apotex Europe Limited* [2005] EWHC 1655 Lewison J had refused to allow the slip rule to be used to expand a cross-undertaking given in an order to cover third parties affected by an injunction. It was contended that the court must have intended to make an order following the precedent injunction in the Practice Direction supplementing CPR Part 25. Lewison J said:

> "The slip rule allows the court to correct an "accidental" error or omission. Was the form of the cross-undertaking an accidental error? At first blush the answer must be "No". It was a cross-undertaking deliberately given in the form in which it was intended to be given. It was embodied in an order settled by junior counsel for each party; and approved by the judge." (§ 63)

Floyd J noted that one ground on which Lewison J refused to correct the order was that it was not clear what order would have been made if the alleged "*accidental slip*" had not occurred (*Leo Pharma* § 16).

87. As to the case before him, Floyd J stated:

> "17. It is important to note that it is not every failure of an order to give effect to the intention of the court which can be corrected under the rule. The operation of the rule is limited to accidental slips or omissions. It is common for the court to encourage parties to agree matters of detail in the drawing up of its order with the proviso that the parties may mention the matter again to the court in the event of disagreement. Whilst in such circumstances it could be said that the court had no specific intention at the time it spoke its order, a subsequent agreement as to the form of order would plainly be within the intention of the court, and such an agreement could not, as it appears to me, be corrected under the slip rule. There is neither a failure to reflect the intention of the court, nor any accident or slip. Another quite common case is where the parties agree to a minute of order which is inconsistent with an order spoken by the judge: for example a longer period of time than the judge allowed for some act to be performed. A party who had agreed such a variation cannot seek to revert to the original time on the basis that it had not been the intention of the court to extend the time. There is no accidental slip or omission in the order.

> 18. Counsel for Sandoz suggested that the answer to this is that matters of detail such as this could be worked out between the parties, but that it was not open to the parties to include a new matter of substance which is not part of the intention of the court. I reject that submission. Matters deliberately included by the parties in an order drawn up and sealed by the court do not constitute accidental slips or omissions within the rule. It is different where, as in Bristol Myers , the order had an unexpected and unintended effect inconsistent with the court's intention.
>
> …
>
> 21. Neither side accordingly suggests that the court had a definite intention at the hearing to make an order about the precise rate or period of interest. The stay of the financial remedies was dealt with globally, and without the dispute about the rate and period of interest being brought to my attention as requiring resolution.
>
> 22. Putting aside for the moment what is said to be the mistake in agreeing to the order, I do not think that the order as made is inconsistent with the intention of the court at any stage. Firstly, when the order was spoken, the precise form of order about interest was one of the matters to be settled between counsel, and was, at least on the face of it, so settled. The case is therefore not within the principle enunciated in Bristol Myers where the order had an unintended effect inconsistent with the court's intention. Secondly, there would on this scenario be no accidental slip."

88. *Leo Pharma* was distinguished in *Fiona Trust & Holding Corporation v Privalov* [2015] EWHC 527 (Comm), which is an example of the exercise of the court's inherent power, referred to in PD 40B § 4.5, to vary its own orders to make the meaning and intention of the court clear. The facts were somewhat complex. Simplifying as much as possible, charterers had initiated arbitration proceedings to determine whether owners had validly rescinded certain charterparties. Owners sought to pursue monetary claims against charterers if owners succeeded in the arbitrations. They brought proceedings for that purpose, which were stayed pending the outcome of the arbitrations. Owners also sued two of their former officers, alleging that they had dishonestly entered into certain schemes. Those proceedings led in due course to a judgment which concluded, *inter alia*, that the claims against "*the other defendants [including the charterers] are to be dismissed in so far as they are based upon these schemes*". The judge asked for counsel's assistance in drafting an order to give effect to its judgment. The order was perfected in December 2010. Paragraph 6 provided "*The claims against [inter alios, the charterers] are dismissed in so far as they are based on the following alleged schemes...the Sovcomflot time charters scheme ...".* Later, an issue arose about whether that order determined the consequential monetary claims. Various types of relief were sought, including under the slip rule and the inherent power.

89. As to the slip rule, Andrew Smith J concluded that although § 6 of the order had been included by agreement, the case did not fall within the principle in *Leo Pharma*. The court had not asked the parties to draw up an agreement including what they saw fit in

the light of the judgment; it had asked counsel to help draw up an order to give effect to the judgment:

> "33. The position in this case is different from that discussed by Floyd J. The slip rule is used to deal with errors and omissions that result from "accidents" on the court's own part as well as those of the parties. In the example given by Floyd J of the parties agreeing a longer time than the judge had allowed, such an agreement is so common that it would be implicit in the judge's order that he was content for the parties to agree adjustments of this kind: it was "within the intention of the court", even though the court had "no specific intention at the time it spoke its order". There would therefore be no accident on the part of the judge in endorsing the parties' agreement. But here my judgment did not invite the parties to agree what they saw fit in light of it, but asked for the assistance of counsel to draft an order to give effect to the judgment. I did not give the parties licence to agree that the court should make an order that did not do so. It is commonplace for a judge to seek such assistance of counsel. For my part, I do not think that counsel are then always acting as agents for the parties: for example, on occasions counsel might assist even though the client has withdrawn instructions. I acknowledge that in this case Mr Dunning referred to discussions between the parties, but I do not think that much can be read into that. In any case, I endorsed the relevant part of the order on the basis that it gave effect to my judgment, and I cannot accept that, if through the parties' agreement it did not do so, therefore there was no "accidental slip or omission" within the meaning of CPR 40.12 .
>
> 34. However, I am not satisfied that there was any relevant slip or omission for another reason. My intention was to dismiss all the claims in the four actions before me that had not been stayed except only in so far as I made an order for relief on them. As I see it, my order did give effect to that intention.
>
> 35. My order did not, however, deal specifically with the possibility, which had not occurred to me, that the parties believed that the monetary relief claims were not stayed and that there were therefore claims in the proceedings that had not been advanced during the trial. If I had appreciated that the parties believed this, I would, I think, have included some words in my order to the effect that, if and in so far as they were not covered by the stay, they were dismissed. I am not persuaded that the slip rule in CPR 40.12 is designed to cover this situation, or that it should [be] so used. But should I spell this out using the inherent power referred to in CPR 40 BPD4.5 (and of which the slip rule may [be] seen simply as a specific aspect: Zuckerman on Civil Procedure (3rd ed, 2013) para 23.34)? ...
>
> 36. Nevertheless, I have concluded that it would be proper to use the inherent jurisdiction to clarify the position about the consequential monetary relief claims. As I see it, the purpose and effect of doing so is … to prevent the litigation, and in particular the order of 10 December

> 2010, hampering the arbitral process because it gives room for the parties to dispute the meaning effect of paragraph 6."

90. *Fiona Trust* was accordingly an example of the court exercising its inherent power to vary an order, not in order to correct a slip, but simply to spell out more clearly that which the court considered that it had in fact already ordered.

**(2) Application**

91. As a preliminary point, Mr Vik submits that *Leo Pharma* shows that the slip rule is not available where an order has been drawn up by the parties and approved by the judge. I would not accept that submission. The discussion in *Fiona Trust* indicates that the slip rule can nonetheless be used in appropriate cases, including where the court has asked the parties to draw up an order reflecting its intention but the order as drawn up accidentally fails to do so.

92. DB submits that it is plain from the Sentencing Judgment that Moulder J intended the suspension of Mr Vik's committal to prison to be contingent on his compliance with the Schedule B Conditions. If the position were otherwise, the carefully structured timetable for Mr Vik to comply first with the disclosure condition, then the witness statement condition, and finally to attend the Further Examination, would have served no purpose. Moreover, the clear coercive purpose of the judge's order, designed to secure Mr Vik's compliance with the conditions, would be defeated. Moulder J's intention was that the suspension would afford Mr Vik the opportunity to purge his contempt by, *inter alia*, attending the Further Examination and giving truthful answers. She did not intend Mr Vik simply to be able to escape from both the Schedule B conditions and the custodial sentence merely by lapse of time. Like *Bristol-Myers*, this is a case where the written order needs to be corrected in order to give effect to the intention of the court and to correct an unexpected legal effect.

93. Approaching the matter at a fairly high level of generality, I can see the force of the point that Moulder J's Sentencing Judgment contemplated that Mr Vik would have the opportunity to avoid custody if, but only if, he complied with all of the Schedule B conditions, which included attending the Further Examination and giving accurate answers to the questions asked there. I could also accept, at least with the benefit of hindsight, that in view of the court's usual lead times (which are routinely published), there was always going to be a possibility that the Further Examination – unless given particular expedition – would be listed for a date more than 6 months from the conclusion of the appeal. Had this prospect been focused on during the hearing before Moulder J, it is certainly possible that she would have made a different form of order.

94. Nonetheless, I do not consider that Moulder J's order can be corrected under the slip rule. Regrettably, the present case in my view instead falls into the 'second thoughts' category.

95. Moulder J no doubt intended that Mr Vik should avoid custody if, but only if, he complied with all of the Schedule B conditions, including attending the Further Examination and giving accurate answers to the questions asked there. However, Moulder J must also be taken to have intended to set the suspension period at 6 months, in accordance with the application before her (see § 2 of the Sentencing

Judgment, quoted in § 25. above). There is no evidence that the court considered, or the parties suggested, that the 6-month period might be too short to accommodate all three of the Schedule B conditions, including the Further Examination. Indeed, in the context of its alternative application to vary (considered later), DB submits that *"[a]t the time the Committal Order was made, the Court and the parties assumed that the Court would have availability to accommodate a listing of the Further Examination within six months from the date on which Mr Vik's appeal was dismissed"*; and that seems consistent with the reference in § 2 of the parties' post-hearing letter to the judge (with which DB concurred) to "*a period of suspension ending 6 months …*" and the wish to "*specify times within that period for Mr Vik to produce documents and a witness statement and to submit for further XX*" (see § 30. above, my emphasis added). Nor was it self-evident that that approach was patently unrealistic. It may well be the case that, at any given time, the court's ordinary lead times would indicate a listing for a 1-day or 2-day hearing (it is not clear what time estimate the court or parties had in mind for the Further Examination at the time of the Suspended Committal Order) hearing more than 6 months from the date of the listing appointment. However, the court might reasonably have anticipated that this matter, involving a time-limited suspended committal order, would merit expedition.

96. Had any such potential problem been raised and considered, then there are a number of ways in which Moulder J might have approached it. For example,

i) Moulder J might have taken the view that the sentence should not remain extant for longer than 6 months, so the Further Examination would have to be listed within that period, giving the matter whatever degree of expedition was appropriate from a listing perspective in order to achieve that;

ii) The judge might have selected a suspension period longer than 6 months;

iii) The judge might, alternatively, have considered that the Further Examination could be listed for any date after the expiry of the 6-month period, with the sentence remaining extant but suspended meanwhile;

iv) The judge might have taken the view indicated in (ii) above, but only on the basis that the Further Examination was listed within a finite period (e.g. 3 months) after the expiry of the 6-month period;

v) The judge might have taken the view indicated in (ii) above, but only on the basis that that all possible efforts were made to list the Further Examination promptly (that being a formulation adopted by DB, in oral reply submissions, as an approach the judge would likely have taken);

vi) On either of alternatives (iii), (iv) and (v) above, the judge might have ordered that the sentence would remain extant but suspended up to and including the date of the Further Examination itself (as DB's draft rectified order envisages), or until a date some weeks/months after that, (in order to allow DB whether, in the light of the course of the Further Examination, to issue an application to lift the suspension, and to prepare the application). Thus, for example, § 3 of DB's draft order (reflecting § 5 of its application notice), sought pursuant to DB's variation application, would provide that:

> "The suspension pursuant to paragraph 2 of the Committal Order of the committal of Mr Vik to prison under paragraph 1 of the Committal Order shall be continued (subject to Mr Vik's compliance with the same terms) so as to end on the date 3 months after the date on which the Further Examination (including, for the avoidance of doubt, any adjourned hearing of the Further Examination) finally concludes."
>
> DB submits that that would reflect "*Moulder J's intention in setting up the carefully engineered regime to encourage and coerce Mr Vik into complying with the Part 71 Order and affording DBAG an opportunity to consider Mr Vik's attempts to comply and decide whether to seek to activate the sentence*".

97. Any of alternatives (ii) to (vi) above would in fact have meant that the sentence was suspended not for 6 months but for a longer period. Alternative (iii) (which reflects DB's draft rectified order) and alternative (v) (which reflects the point DB made in oral reply submissions) would both have meant the sentence remained suspended for a period that could not be determined until the Further Examination were listed. Alternative (v) would also make it impossible for Mr Vik, DB, the Tipstaff or anyone else to know for sure whether or not the sentence had expired, or when, because it would depend on whether the Further Examination had been listed using all possible expedition. Alternatives (ii) and (iv), on the other hand, would require the court now to conclude that Moulder J must have intended some particular time period over and above the 6-month period, despite there being no basis on which to conclude that she had any such period in mind.

98. I cannot be confident that Moulder J would necessarily have taken any of approaches (ii) to (vi) above, had she considered the matter, or, if so, which one. The present case is some distance away from cases like *Bristol-Myers*, *Adam & Harvey Ltd*, and *Foenander* where it could realistically be said that the court had, or lacked, a reasonably specific intention as the order it was making: respectively, not to disturb the accrued interest entitlement, not to order immediate taxation of costs, and to prevent the pursuit in future of any relevant application. Here, it can be said, at a general level, that Moulder J did not intend Mr Vik to avoid custody if he failed to comply with the conditions. However, in circumstances where the application and order also provided for there to be some kind of 6-month suspension period, any application of the slip rule would require the court now to decide how Moulder J intended that period to interact with the higher level intention expressed in my previous sentence. That question cannot be answered, in the context of the slip rule, simply by asking how the court would approach the matter now.

99. Moreover, I am not convinced that this is a case of an order having an unexpected legal effect, in the relevant sense. In *Bristol-Myers*, for example, although the problem became apparent only later, it is a feature from the outset of the order as made that it did not give effect to the court's intention. In the present case, I do not consider that the same can be said. The order as made on its face gave effect to the court's intention, and was capable of being implemented accordingly. On reflection, it would have been better if the order had provided for a suspension period that was longer, to avoid the risk of needing an expedited listing of the Further Examination. However, that appears to me to fall into the 'second thoughts' category of cases, rather than being a case of the correct expression of 'first thoughts' where the slip rule can be applied.

## (E) CORRECTION OR VARIATION OF THE ORDER UNDER CPR OR INHERENT POWERS

100. In the further alternative, DB asks the court to vary Moulder J's order, pursuant to CPR 3.1(7), so that § 2 reads in the way quoted in § 67. above, and, further, by extending the suspension (and the period within which DB has to make any application to lift it) by three months beyond the date of the Further Examination.

101. DB submits that:

i) the court has a discretion to vary its orders, to be exercised in all the circumstances, whether to vary an order. The discretion is primarily exercised where (a) there has been a material change of circumstances since an order was made or (b) the facts on which the original decision was made were (innocently or otherwise) misstated: *Tibbles v SIG Plc* [2012] 1 WLR 2591 §§ 39-42. The Court of Appeal in *Tibbles* added that *"it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory context"* (§ 39(vii)). There may be room of for prompt recourse to a court to deal with a matter that in genuine error was overlooked by the parties and the court, and *"[o]n that basis, the power within the rule would not be involved in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court"* (§ 41); and

ii) the present case meets the requirement for a material change of circumstances. At the time the Suspended Committal Order was made, the court and the parties assumed that the court would have availability to accommodate a listing of the Further Examination within 6 months from the date on which Mr Vik's appeal was dismissed. Some 9 months after the Suspended Committal Order was made, the factual position was quite different to that assumption, not least as the 6-month period stretched into the summer vacation. That is a sufficient basis for the court now to vary § 2 of Moulder J's order. There would be no prejudice to Mr Vik, who until very recently was content to proceed on the basis that he was subject to an obligation under the Suspended Committal Order to attend a Further Examination in September 2023.

102. Mr Vik submits that:

i) When a sentence is varied (which may be done either by the court of its own motion or on an application by the contemnor to purge), the original sentence cannot be varied by way of increase; only variation by amelioration of the sentence is possible: *Harris v Harris* [2001] EWCA Civ 1645 § 19. In determining whether a variation would be permissible as an amelioration, this "*should be self-evident and almost irrefutable*" (*Harris* § 22). The variation sought by DB would self-evidently be an increase in Mr Vik's sentence and therefore cannot be granted.

ii) In any case, it seems highly doubtful whether CPR 3.1(7) applies to give any power to vary the Suspended Committal Order. In accordance with its words, the rule gives the court power to amend only orders made in exercise of a

power given by the CPR: see *Deg-Deutsche Investitions-und Entwicklungsgesellschaft mbH v Koshy (No.2)* [2004] EWHC 2896 (Ch) §§ 10 and 17-21; White Book 2023 note 3.1.17.4. Given that the power to commit a contemnor (and to suspend an order for committal) is part of the court's inherent jurisdiction (*Lee v Walker* [1985] 1 QB 1191H-1192C; *Deutsche Bank AG v Sebastian Holdings Inc (Nos 1 and 2)* [2018] EWCA Civ 2011 § 35) rather than a power given by the CPR, CPR 3.1(7) does not confer jurisdiction to depart from the usual rule that a court of first instance has no power to review, revoke or vary an order made by another first instance court.

iii) DB's further application for continuation of the suspension so as to end 3 months after the Further Examination must fail for the same reasons as given: (a) there appears to be no jurisdiction for the court to vary a sentence on the application of a party other than the contemnor; and (b) any variation must reduce the sentence – the court cannot increase it.

103. As to the first of these points, in *Harris* the applicant had been sentenced on 23 March 2001 to a total of ten months' imprisonment for repeated breaches of injunctions granted in order to protect his former wife or his children. He could thus ordinarily expect to be released at the half-way point, around 23 August 2001. The applicant made two unsuccessful applications to purge his contempt. He made a third application on 14 June 2001, seeking in the alternative an order for release on terms that the remaining part of the sentence be suspended. Munby J ordered that, the applicant having conditionally purged his contempt, he be released forthwith from prison on terms that the execution of the remaining part of his sentence be suspended for nine months until 14 March 2002, when the release order and the committal order would cease to have effect, on condition that until 14 March 2002 the applicant complied with the terms of the injunction.

104. On appeal, the applicant contended *inter alia* that (a) a contemnor applying to purge his contempt faced only three possible outcomes: (i) immediate release, (ii) deferred release at a stated future date, or (iii) the refusal of his application: the court has no power to vary the original sentence save in one of those ways, and no power to impose a fresh sentence; and (b) even if the court had any such power, it did not permit the suspension of the sentence beyond the period that the contemnor would actually have spent in prison had he served his sentence, alternatively, beyond the length of the original sentence as formally declared.

105. Thorpe LJ (with whom the other members of the Court of Appeal agreed) stated that the appeal raised the question: *"can a court releasing a contemnor on his application to purge his contempt impose a suspended sentence in respect of the unserved balance of the prison sentence and, if yes, for what period can the court order the suspension to run?"* (§ 6). He stated that the sentence first imposed is mutable, either by the judge of his own motion or a as a consequence of an application by the contemnor to purge:

> "… However no one is liable to be sentenced twice for the same contempt nor can the original sentence be varied by way of increase. Much of the argument before us has turned upon whether the judge's order of 14 June constituted a variation of an existing sentence or the

> imposition of a fresh sentence and whether, if a variation, it was a variation by way of amelioration. …"

106. The Court of Appeal concluded that the judge lacked jurisdiction to make the order he did, "*for two principal reasons*" (§ 20). The first reason was that, in the interests of clarity and certainty, a sentence could not be partly immediate and partly suspended (§ 21). Secondly:-

> "22. .. it cannot in my opinion be said with any certainty that the order represents a variation of the original sentence rather the imposition of a fresh penalty. Certainly RSC Ord 52 as presently framed suggest to me that the only power to suspend is the power to suspend the execution of the first order of imprisonment. The court's choice is only between warrant to be immediately executed or a warrant to be suspended. That choice is made at the sentencing hearing and does not recur. Furthermore even if the order of 14 June could be accepted as a variation of the order of 23 March I am by no means clear that it is a variation by way of amelioration. Whilst on the one hand I recognise the argument that a reduction of two months and eight days on a sentence of five months must be counted a significant amelioration (and Mr Harris must so have regarded it since that was what he sought in the alternative) a balance still has to be struck between the element of amelioration and the price paid by imposition of the Damoclean sword throughout a period of future liberty. The principle that variation must be by way of amelioration is important and in my judgment amelioration should be self-evident and almost irrefutable. Of course it would be possible to contrast extremes such as an immediate release ordered early into a long sentence balanced by a suspended sentence of brief duration for a limited period and an immediate release well into the original sentence balanced by a suspension for an indefinite period. Although Mr Harris in this case was not in doubt as to his preference it is easy to postulate the hypothetical contemnor who would prefer to serve his term in order to achieve unconditional liberty." (§ 22, my emphasis)

107. Accordingly, one reason why the immediate custodial sentence in *Harris* could not be varied so as to produce a partly suspended sentence lasting longer than the original sentence was that that would not self-evidently have ameliorated the sentence. *A fortiori* in the present case, the variation of a sentence suspended for 6 months from the date of final disposition of Mr Vik's appeal, so as to result in a sentence suspended for a longer period, would not self-evidently ameliorate the original sentence.

108. DB submits that the amelioration principle is not an absolute one, and can be overridden by reference to the court's and the parties' intention. Further, the original sentence in *Harris* had been the intended sentence, whereas in the present case the proposed variation would achieve what the court and the parties intended. I do not accept those submissions. The decision in *Harris* does not in my view allow room for the suggestion that the amelioration principle can be overridden. Further, in applying that principle the court must surely compare the proposed varied order to the original order as made, rather than to some broader idea of what was intended. On the footing

that DB has not succeeded in its arguments on construction or the slip rule, § 2 of Moulder J's order has the effect that the sentence imposed on Mr Vik was discharged on 24 August 2023. The variation DB proposes would reinstate it.

109. The point could perhaps be made that DB's proposed variation would ameliorate Mr Vik's sentence in the sense that it would give him further time to purge his contempt and comply with the Schedule B conditions, by attending a Further Examination and giving accurate information. However, on the basis that the custodial sentence has been discharged, there is no real benefit to Mr Vik in reinstating it. It would simply expose him anew to the risk of being imprisoned. Should he of his volition wish to attend a Further Examination, in order to purge his contempt, he would be free to do so even without being subject to the threat of imprisonment.

110. DB cites the decision of Carnwath J in *Secretary of State for Defence v Percy* [1999] 1 All ER 732 for the proposition that the court does have the power to extend a term of suspension. However, that decision pre-dates *Harris* and contains no consideration of the court's jurisdiction to make such an order. In addition, the circumstances were somewhat unusual. The defendant in April 1997 breached an injunction restraining her from entering certain military premises, and in June 1997 was sentenced to 6 months' imprisonment suspended for 12 months. In October 1997 a final injunction was granted against the defendant. The defendant then proceeded to gain access to the premises on nine further occasions. The motions before Carnwath J were to commit the defendant for breach of the October 1997 injunction, and the same incidents were also relied on as breaches of the conditions of the suspended sentence (p734c). The core of the judge's reasoning was this:

> "It follows that Ms Percy had no legal justification for going on to the ministry's land to remove the notices and she was, therefore, in breach of the injunctions against her. It follows also that she is in breach of the terms on which Lloyds J's sentence was suspended. I have therefore to consider both whether it is appropriate to activate that sentence, and what, if any, further punishment should be imposed in respect of the present breaches." (p.743g)

> "[After referring to various extenuating circumstances] The position is therefore different from that which faced Lloyd J. In these circumstances, I do not think it would be just simply to activate the suspended sentence, or otherwise to impose an immediate custodial sentence. In view of Ms Percy's limited means, I do not see any purpose in imposing a fine, although there will, no doubt, be an application for at least some part of the costs in respect of these proceedings. What I propose to do is to extend the period of the suspended sentence, so that the 12 months will run from the date of this judgment, and the suspended sentence will remain at six months." (p.744d)

111. Thus, the judge was in a position where he was entitled to impose a further, separate sentence of imprisonment for breach of the October 1997 injunction, as well as considering activating the suspended sentence. The situation was therefore somewhat different from a stark decision to prolong a suspended sentence. In any event, the

decision would not entitle me to depart from the principle subsequently stated by the Court of Appeal in *Harris*.

112. It follows that I accept Mr Vik's first submission: I do not consider that I have power to vary the Suspended Committal Order in the way DB seeks. For the same reason, I cannot grant DB's application to extend the suspended sentence so as to expire three months after the Further Examination.

113. In those circumstances it is not strictly necessary to consider Mr Vik's second point, regarding the scope of CPR 3.1(7). That rule provides that *"[a] power of the court under these rules to make an order includes a power to vary or revoke the order"*. On the basis of the authorities referred to in § ii) above, it is arguable that (i) CPR 3.1(7) does not provide a power to vary orders made under the court's inherent jurisdiction as opposed to those made under the CPR, and (ii) whilst the CPR in part regulates the conduct of contempt proceedings (see, in particular CPR 81.9), civil contempt orders are made under the court's inherent jurisdiction (see e.g. White Book note 81.9.5 citing *Lee v Walker*). Mr Vik accepted, though, that the court must have an inherent power to vary orders made under its inherent jurisdiction. The decisive considerations are therefore whether the court can or should vary the order in the circumstances of the case. Those circumstances are likely to include whether the order was an interim or a final one (cf the discussion in White Book note 3.1.17), and, most pertinently in the present case, whether the court has power to vary an order so as to prolong a suspended sentence of imprisonment. The latter point is in my view decisive here.

## (F) ABUSE OF PROCESS AND COLLATERAL ATTACK

### (1) Principles

114. DB relies on the principle that a party is precluded from fighting again an interlocutory battle that has already been fought, absent either (1) a significant change of circumstances or (2) proof that the party has become aware of facts that he could not reasonably have known or discovered in time for the first battle: *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485, 492-493; *Orb a.r.l. v Ruhan* [2016] EWHC 850 (Comm) § 82. Relitigation of this kind amounts to a collateral attack on the previous order made by the court on the first occasion and an abuse of process on *Henderson v Henderson* grounds. In *Orb*, for example, a party was not allowed to take later a point about the adequacy of the fortification of a cross-undertaking in damages that could have been taken earlier. Popplewell J said:

> "81. The first and short answer to this argument is that it was open to the Orb Parties to take the point before Cooke J and they failed to do so. None of the material relied on has come to their attention subsequently ... There has been no significant or material change of circumstances.
>
> 82. That is fatal to this ground for discharge: see *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory

> application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions." (§ 82)

115. In *The Processing Centre v Pitney Bowes Ltd* [2017] EWHC 3903 (QB), a case about variation of an injunction due to material change of circumstances, Jefford J stated that a new argument does not amount to a relevant change of circumstances, nor do facts that could have been adduced at the prior hearing (§ 25). The principle applies even where the order recording the decision under collateral attack includes an express liberty to discharge or vary the order: *Esal Commodities Ltd v Pujara* [1989] 2 Lloyd's Rep 479, 484.

116. In *MAD Atelier v Manes* [2020] EWHC 1014 (Comm), Bryan J held that a decision of the Paris Commercial Court did not give rise to binding issue estoppels, because French law lacked an equivalent doctrine and because the necessary privity of parties did not exist. As part of a summary of the English law doctrine, Bryan J noted that the same broad, merits-based analysis is adopted in deciding whether there is an abuse of process, under both the collateral attack and *Henderson v Henderson* limbs of abuse of process (§ 74). Although the judge there was concerned with a foreign decision, in this part of his judgment he was summarising the principles established by the English case law, which are of general application.

117. In relation to the collateral attack limb, Bryan J said that an abuse of process "*may*" arise where an allegation or claim is advanced in proceedings for the purpose of mounting a collateral attack upon a determination made in earlier proceedings by a court of competent jurisdiction, in the absence of issue estoppel (§ 75), though *"[t]here is no general rule preventing a party inviting the court to arrive at a decision inconsistent with that arrived at in an earlier case"* (§ 75(5)) and *"the threshold which engages the court's duty to act to prevent abuse of its process is a high one … There must be some " special reason " why the facts of the case make the determination in the current proceedings of the issue which has been determined in earlier proceedings an abuse of process, and the contention that the issue had been the subject of lengthy evidence and argument cannot amount to such "special reason"* (§ 75(5)). Further, *"[i]n order to determine whether there has been an abuse of process, the court must engage in a close, merits-based analysis of the facts, taking into account the relevant private and public interests"* (§ 76, citing *Michael Wilson & Partners Ltd. v. Sinclair* [2017] EWCA Civ 3 § 48).

118. As to the *Henderson* limb of abuse of process, Bryan J said:

> "78. An abuse of process may also arise where, in all the circumstances, a party is misusing or abusing the process of the court by bringing a claim or raising a defence in later proceedings which

> should have been raised in earlier proceedings: *Johnson v. Gore-Wood* at p 31.
>
> 79. This form of abuse of process, like the collateral attack doctrine, involves a broad, merits-based judgment which takes into account the public interest (that there should be finality in litigation, that a party should not be vexed twice in the same matter, and economy and efficiency in the conduct of litigation), the private interests of the parties, and also takes account of all the facts of the case."

**(2) Application**

119. DB submits that the present situation falls squarely within the *Chanel* principle for two reasons:

i) The very point that Mr Vik now seeks to make, viz that he is no longer required to attend the Further Examination, was fought and lost by him at the hearing before Bryan J. That battle turned on true construction of the Suspended Committal Order and the mandatory nature of the conditions that Mr Vik attend the Further Examination.

ii) Mr Vik was obliged at the hearing before Bryan J to raise any and every argument available to him that he wished for the court to consider in determining the question whether he was required to attend the Further Examination. The argument he now advances was plainly open to him at that hearing, which took place after the date that he now contends marked the end of the suspension. There has been no significant change in circumstance and no facts that Mr Vik has become aware of that he could not reasonably have known or discovered at the time of the hearing before Bryan J.

120. DB's application before Bryan J was made under CPR 3.1(2)(c): *"Except where these Rules provide otherwise, the court may … require a party or a party's legal representatives to attend the court"*. The application was for an order that *"[p]ursuant to the Court's general case management powers under CPR 3.1(2)(c), Mr Vik be required to attend in person to be examined at the further examination hearing listed pursuant to paragraph 1 of Schedule B to the Order of Mrs Justice Moulder dated 29 July 2022 (the Committal Order) for 19 and 20 September 2023 (the Vik Evidence Hearing)"*.

121. Bryan J's order following the hearing of both DB's and Mr Vik's applications read as follows:

> "**UPON** the Court having found Mr Alexander Vik ("**Mr Vik**") guilty of contempt of Court in failing to comply with paragraphs 1 and 2 of the Order of Teare J dated 20 July 2015 made under CPR Part 71 and having sentenced Mr Vik to a term of committal of 20 months by paragraph 1 of the Order of Moulder J dated 29 July 2022 (the "**Committal Order**") suspended pursuant to paragraph 2 of the Committal Order and subject to Mr Vik's compliance with the conditions set out in Schedule B to the Committal Order ("**Schedule B**")

**AND UPON** Mr Vik being required under paragraph 1 of Schedule B to attend Court on a date or dates to be fixed to be examined by the Claimant on the matters listed in paragraph 3 of Schedule B (the "**Vik Examination Hearing**") and being required at the Vik Examination Hearing under paragraph 2 of Schedule B to provide accurate answers, to the best of his knowledge and belief, to any questions on such matters as may be asked of him by the Claimant or the Court

**AND UPON** the Vik Examination Hearing being listed for 19 and 20 September 2023

**AND UPON** the Claimant's application by notice dated 19 May 2023 (the "**DBAG Application**") seeking an Order pursuant to CPR 3.1.2(c) that Mr Vik be required to attend in person to be examined at the Vik Examination Hearing

**AND UPON** Mr Vik's application by notice dated 23 June 2023 (the "**Vik Cross-Application**") for an Order under CPR 32.3 granting Mr Vik permission to attend the Vik Examination Hearing remotely by video-link from Connecticut, USA

…

**IT IS ORDERED THAT:**

1. The Vik Cross-Application is dismissed.

2. For the avoidance of any doubt, Mr Vik is required to attend the Vik Examination Hearing in person.

3. Mr Vik shall pay the Claimant's costs of the DBAG Application and the Vik Cross-Application, such costs being summarily assessed on the indemnity basis in the sum of £83,900.

**AND UPON** Mr Vik's application for permission to appeal against the decision to dismiss the Vik Cross-Application and grant the DBAG Application (the "**PTA Application**")

**AND UPON** the Court considering that the PTA Application was totally without merit

**IT IS FURTHER ORDERED THAT:**

4. Permission for Mr Vik to appeal against the dismissal of the Vik Cross-Application and the grant of the DBAG Application is refused.

5. The PTA Application is dismissed as totally without merit."

122. Both DB's application and Bryan J's order assumed that the Further Examination would take place, in some form or other, on 19-20 September 2023, and the order Bryan J made was that Mr Vik must attend that hearing in person. It is clear from Bryan J's judgment that he intended both to reject Mr Vik's application and to grant DB's application, even though he regarded the latter as academic: see, in particular, the last sentence of § 99 of his judgment, quoted earlier. Further, the portion of Bryan J's order dealing with permission to appeal indicates that he granted DB's application.

123. I deal later (in section (I)) with the effect of Bryan J's order in the event that Mr Vik is entitled to advance, and succeeds in, his contention that the suspended sentence has expired. For present purposes, the question is whether it would be an impermissible collateral attack or other abuse of process for Mr Vik to advance that contention. I have concluded that it would not.

124. It is of course true that Mr Vik's present contention is incompatible with the whole premise on which both sides' applications to Bryan J were made, and the premise of Bryan J's judgment and order. If Mr Vik's contention were correct, the whole question of attendance at the Further Examination required by the Suspended Committal Order was academic, because the sentence thereby suspended, and with it the applicable conditions, had fallen away.

125. On the other hand, the question of the existence or otherwise of the Suspended Committal Order was not considered by Bryan J, and in that sense his decision cannot be regarded as a ruling on the matter. The reason it was not considered was because Mr Vik did not raise it (and nor did DB address it). It is a contention that Mr Vik could and should have taken before Bryan J. The essential question is whether in those circumstances it is abusive to take the point now.

126. There is no suggestion that Mr Vik deliberately held back the contention he now seeks to advance, and I accept the evidence of his solicitor that the point was not noticed until a few days before the hearing before me. In considering the matter, it seems to me that I must have regard to the public interest in finality of litigation, as well as the private interests of the parties. However, I must also have regard to what is at stake here: not merely the outcome of an ordinary interlocutory hearing but the imposition of a custodial sentence. In addition to Mr Vik's private interest, the public interest in the proper administration of justice requires, in my view, that the court should not deem a custodial sentence to exist when on analysis it has expired. I do not consider that a defendant can, by failing to take a valid point when he could and should have done so, disable the court from reaching a determination as to the duration of a custodial sentence, even one imposed in civil proceedings.

127. Accordingly, the principles of abuse of process and collateral attack do not preclude Mr Vik from arguing, or the court from concluding, that the suspended sentence imposed by Moulder J expired on 24 August 2023.

## (G) ESTOPPEL

128. DB submits that Mr Vik is estopped by convention from denying that he has an obligation to attend the Further Examination. Applying the standard requirements for estoppel by convention as stated in *Tinkler v HMRC* [2021] UKSC 39, DB would need to show that:

i) DB shared with Mr Vik a common assumption of fact or law borne out by clear words or conduct between them;

ii) DB relied in its mutual dealings with Mr Vik on the common assumption, knew that Mr Vik shared the assumption and was strengthened, or influenced, in its reliance by that knowledge;

iii) Mr Vik (objectively) intended, or expected DB to rely on the assumption so as to have assumed some responsibility for it; and

iv) DB has suffered detriment or Mr Vik has benefited because of DB's reliance such that it would be unjust/unconscionable to allow Mr Vik to depart from the assumption.

129. In *Keen v Holland* [1984] 1 WLR 251, the Court of Appeal held that a tenancy qualified for protection under the Agricultural Holdings Act 1948, and that the court could not avoid that result on the basis that the tenant was estopped by convention from so contending. The court said:

> "Once there is in fact an actual tenancy to which the Act applies, the protection of the Act follows and we do not see how, consistently with *Johnson v. Moreton* [1980] A.C. 37 , the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as inapplicable. If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel. The terms of section 2(1) are mandatory once the factual situation therein described exists, as it does here, and it cannot, as we think, be overridden by an estoppel even assuming that otherwise the conditions for an estoppel exist: see, for instance, the somewhat similar though not wholly analogous position under the Rent Acts: *Welch v. Nagy* [1950] 1 K.B. 455. We agree with the judge that, having regard to the purpose of the Act of 1948, it cannot be said to be unconscionable for the tenant who is protected by it to rely upon the protection which the statute specifically confers upon him. Once the protection attaches, the jurisdiction to grant possession is exercisable only subject to the statutory provisions and it is a little difficult to see how the parties can, by estoppel, confer on the court a jurisdiction which they could not confer by express agreement." (p261C-f)

130. In *SmithKline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, the Court of Appeal rejected an argument that the defendant was estopped from denying that the claimant's subsidiary could benefit from a cross-undertaking in damages given in favour of the claimant. That was the case for each of three reasons, the first two of which were that:

i) an *inter partes* estoppel cannot operate so as to expand or contract the effect of a court order; and

ii) an estoppel cannot be used as a key element of a claim (sword not shield) and particularly it cannot operate to create a legal relationship when there was none at the outset (§ 103).

131. As to (i), the court made the point that the court itself was not alleged to be party to the estoppel, so as to be precluded from reading the order to mean what it said (§ 104). The parties could have made an express agreement to vary the order, but even that could not change the meaning of the order: *"All an express agreement can do is the lead the court to varying its order with effect for the future"* (§ 107).

132. As to (ii), the court stated that an estoppel inherently must be raised by way of a riposte (§ 110), and could not create a legally binding agreement when there never was one and never any intention to create one (§ 112). Similarly, in *Group Seven v Allied Investment Corpn* [2013] EWHC 1509 (Ch), Hildyard rejected an argument that a freezing order should be construed in accordance with an alleged shared understanding, stating at § 75(2) that a court order must be given a uniform meaning that can be ascertained by all persons affected by it; the fact that the parties might have chosen to adopt a meaning other than that intended by the words "*may well afford each a defence (whether by way of estoppel by convention or otherwise) if the other suddenly departs from their shared understanding",* but the court should not enforce an order otherwise than in accordance with its objective meaning.

133. In *Umerji v Khan* (*Zurich Insurance v Umerji*) [2014] EWCA Civ 357, the Court of Appeal reversed a judgment in which a Recorder on a trial on quantum had construed an 'unless' order as allowing the claimant to advance a particular contention (a plea of impecuniosity) in certain contexts even though the claimant had failed do that which the 'unless' order had required if the contention were to be advanced. In the context of a debate about the terms of the order, the court said:

> "36. I therefore believe that the terms of the order are clear. I can accept in principle that there may be cases where justice requires that the clear terms of an order be treated as having some different meaning in order to reflect the parties' common understanding, presumably (though this was not much explored in submissions) on the basis of an estoppel. I would, however, be cautious about going down that route except in a clear case. Orders will often have to be interpreted and enforced by parties (or advisers) or judges who were not present when they were made, and they ought to be capable of being understood without recourse to any other materials. But even on the most liberal approach I do not see that what was said at the two DJ hearings, or the Appellants' failure clearly to take a point about impecuniosity and duration in the first Counter-Schedule, could justify reading into the debarring order a qualification which is not there on its face. ..." (§ 36)

134. Those observations were accordingly *obiter dicta*, and *SmithKline* was not cited. (It makes no difference, in my view, that – as DB pointed out – Jacobs LJ was party to the judgments in both cases.)

135. In *Sea Master Special Maritime Enterprise* (cited earlier), Picken J at §§ 92ff gave brief consideration to a plea of estoppel by convention in relation to an order, but argument failed on the facts and there was no discussion of the authorities.

136. In response to a contention by Mr Vik that estoppel is limited to questions of private rights, DB referred to *Navigator Equities v Deripaska* [2021] EWCA Civ 1799. An application to strike out an application to commit for contempt as an abuse of process, the Court of Appeal held (*inter alia*) that the applicant's subjective motive was not relevant, and the applicant and its solicitors were not obliged to take on the role of a wholly impartial and dispassionate prosecutor (§§ 109-110). In that context, the court noted that proceedings for civil contempt are sometimes described as 'quasi criminal' given their penal consequences, are criminal proceedings for the purpose of Article 6 of the European Convention on Human Rights; the charges have to be clear and there must be a high standard of procedural fairness (§ 79). However, they are not to be equated with private prosecutorial proceedings: their objectives include the protection of the claimant, they remain civil proceedings, and the applicant retains a proper private interest in the enforcement of the court's order and future deterrence of the contemnor (§§ 80, 135).

137. Despite those observations, the authorities cited in the preceding paragraphs above indicate, in my view, that whilst estoppel might have some role in mitigating the effect of an order based on a shared understanding, there is no scope for deploying estoppel in order to hold a party to be in breach of an order that, according to its terms, has not been breached. *A fortiori* I do not consider that there can be any scope for a party to be barred by estoppel from contending that a custodial sentence which, according to the terms of the court's order, has expired must be treated as remaining extant.

138. Had it been necessary to consider the factual aspect of the estoppel argument, I would have had little difficulty concluding that there was a communicated common understanding that Mr Vik remained under an obligation to attend the Further Examination, with the sentence remaining suspended in the meantime. At the very least, that was the express basis on both parties' applications to the court in May 2023, leading to the Bryan J order, and all the communications between the parties in that regard; and the basis on which the Further Examination was listed.

139. In addition, as explained in the evidence of Mr Robinson (7th witness statement §§ 30-32), on 24 March 2023 Mr Vik issued an application to vary the Suspended Committal Order by extending his time for disclosure. The parties agreed that the variation application would be dealt with at the conclusion of the Further Examination. In return, DB undertook not to seek to have Mr Vik's custodial sentence activated in the meantime based on his failure to comply with the disclosure condition on time. The Further Examination had by this time already been listed, by agreement between the parties, for September 2023 i.e. after the expiry of the 6-month period specified in the Suspended Committal Order. The arrangement regarding the variation application made sense only on the basis of a shared understanding that the suspended sentence would remain extant until at least the end of the Further Examination hearing and variation application hearing. (It makes no difference in that regard that junior counsel when discussing the draft order back in July 2022 had referred to the timetable for the conditions as being separate from the period of suspension: an application to activate the sentence based on late disclosure could not be made unless the sentence remained extant, and by the time of the discussion about the variation application it was clear that the Suspended Committal Order conditions would not be fulfilled within the 6-month period.)

140. Mr Robinson's evidence is that DB relied on the shared understanding by giving its undertaking and by refraining from making an application to activate the sentence based on breaches of the disclosure condition (being lateness and also alleged substantive breaches set out in a letter from Freshfields dated 25 May 2023). Mr Vik complains that Mr Robinson does not explain how DB originally understood the terms of the Suspended Committal Order or whether it later came to misunderstand them. However, that does not in my view detract from the plausible evidence that, at least by mid 2023, DB was relying on a shared understanding. Nor does it undermine DB's case that it would be unconscionable for Mr Vik to depart from it.

141. The question of unconscionability would, though, have been a difficult one. There would be force in the view that it would be unjust to permit Mr Vik to depart from the shared understanding, with the result that DB lost the opportunity to persuade the court to activate the sentence based on disclosure breaches, and the opportunity further to examine Mr Vik pursuant to the conditions of the Suspended Committal Order. On the other hand, I find it hard to envisage a shared understanding being a basis on which it could really be considered unconscionable to advance an argument to the effect that a suspended custodial sentence had expired.

142. Equally difficult would have been the question of whether DB was seeking to use estoppel as a 'sword' rather than a 'shield'. As pointed out by Chitty in the context of contracts, the metaphor is apt to mislead: the essential point is that the doctrine excuses (at least temporarily) the performance of the original obligation; and such an excuse may benefit a claimant no less than a defendant (*Chitty on Contracts*, 34th ed., § 6-108). In the present case, one view of the matter would be that the shared understanding resulted in DB being temporarily relieved of the requirement under § 2 of the Suspended Committal Order to make any activation application before the end of the 6-month period. Under the terms of § 2 the effect of a timely application by DB would have been, in substance, to keep the suspended sentence extant, at least as regards any breaches of condition that already occurred during the 6-month period. However, as indicated in section (H) below, I do not consider that a timely application by DB would have had the wider effect of extending the 6-month period for all purposes, such that the conditions of the Suspended Committal Order (including the Further Examination condition) continued to apply beyond the 6-month period. Accordingly, DB would be seeking to use the estoppel, not merely for excusing a late application by itself, but also to extend the time for which Mr Vik remained subject to the conditions set out in the Suspended Committal Order. I doubt that estoppel could be used to increase the substantive requirements imposed on Mr Vik in that way.

143. Accordingly, had estoppel been available, I would on balance nonetheless have found that it did not preclude Mr Vik from advancing his present contention.

## (H) AGREEMENT TO VARY THE COMMITAL ORDER

144. DB points out that under CPR 3.8(3)-(4), parties are able by prior written agreement to extend for up to 28 days the deadline for taking some specific step required by a court order where the consequences of a failure to comply are also specified by the order. The rule states:

> "(3) Where a rule, practice direction or court order –

> (a) requires a party to do something within a specified time, and
>
> (b) specifies the consequence of failure to comply,
>
> the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).
>
> (4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

145. In *Thomas v Home Office* [2007] 1 WLR 230, Neuberger LJ held that, for the purposes of the analogous requirement in CPR 2.11 (concerning variation of time limits in a rule or Order) of a "*written agreement of the parties"*, it was sufficient to show a "*document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement*" (§ 28).

146. DB argues that the listing of the Further Examination, and the exchange of letters in relation to the listing of Mr Vik's variation application and DB's undertaking not to seek activation pending the Further Examination, comprised a written agreement by the parties to extend the date for DB to make any application to activate the sentence until the conclusion of the Further Examination. The extension agreed was less than 28 days (24 August to 20 September 2023).

147. I do not accept that submission. First, the last clause of § 2 of the Suspended Committal Order did not 'require' DB to do something, specifying the consequences of 'failure to comply'. Rather, it gave DB the opportunity to preserve the chance of activation of the sentence, following a breach within the 6-month period, by making an application within that period.

148. Secondly, as a matter of principle only the court can in my view impose or vary a custodial sentence, whether in a criminal or a civil context. Further, as discussed earlier, binding authority holds that the court cannot vary a sentence other than in a way that clearly ameliorates.

149. Thirdly, in order to achieve DB's objective, the variation would need to do more than extend the period within which DB could make an application to activate the custodial sentence. That would not in itself extend the period of time during which Mr Vik was subject to the conditions of suspension: it would only extend the period within which DB could ask the court to activate the sentence by reason of a breach of condition within the 6-month period. An agreement to extend the period during which the conditions operated, including the requirement to hold the Further Examination, would go beyond that and would fall outside the scope of CPR 3.8(3)-(4) in any event.

## (I) EFFECT OF BRYAN J ORDER

150. DB invites the court to declare that the effect of the Bryan J order was that Mr Vik was required to attend the present hearing in person, regardless of the status of his

suspension. DB refers to the terms of Bryan J's order, providing that "...*[Mr Vik] must attend in person*", and his accompanying judgment which confirms that "*Mr Vik's attendance at the Further Examination is to be in person*". DB submits that Bryan J's order was not stated to be linked in any way to the suspension continuing or not, was made in the exercise of his case management discretion under CPR 3.1(2)(c), and is a freestanding obligation on Mr Vik (albeit not one directly engaging the question of committal, given that Bryan J's order did not contain a penal notice and may not have been personally served on Mr Vik).

151. Mr Vik contends that Bryan J's order did not require him to attend the Further Examination regardless of the status of the Suspended Committal Order: it simply concerned the means (in person or remote) by which Mr Vik must attend the Further Examination hearing that had been listed to take place pursuant to a condition of suspension set out in the Suspended Committal Order. Bryan J cannot be regarded as having exercised some unspecified power to require foreign contemnors to submit to examination before the court. Had Bryan J thought that he was being asked to make a freestanding order which of itself imposed an obligation upon a non-UK resident to come into the jurisdiction and submit to examination, then one might have expected some discussion of the source or nature of the court's powers or jurisdiction to make such an order, and some reference to authority in relation to such important issues. Mr Vik disputes that CPR 3.1(2)(c) affords such a novel jurisdiction: CPR Part 3 deals with "*the Court's case management powers*" and Bryan J stated in § 1 of his judgment that he was asked to give case management directions; yet on DB's case this is not an order for case management but (in effect) an injunction or fresh CPR Part 71 order.

152. The question of whether Bryan J had the power to make an order for further examination of Mr Vik, wholly independently of the Suspended Committal Order, was not argued in any detail before me. Since (for the reasons set out below) I do not consider that he made any such order, it is not strictly necessary for me to attempt to resolve that issue. I confine myself to two observations.

153. First, I would be inclined to doubt that CPR 3.1(2)(c) could be the source of any such power. As a case management power, it seems apt to cover a situation where a hearing has been listed in the ordinary course of litigation, and in that context to empower the court to require attendance. It is unlikely to provide a freestanding power to make an order to attend to provide information, paralleling the express power in CPR 71.2 (exercised by Teare J in the present case) but omitting the specific procedural provisions set out in the latter rule.

154. Secondly, however, it is not immediately obvious why a fresh order could not have been made against Mr Vik pursuant to CPR 71.2. On the basis that the information he provided at the original hearing, held pursuant to Teare J's order, has been found to be wholly inadequate, it might be considered logical and just that a further examination be ordered. I do not at present see why the fact that a further examination was made a condition of the Suspended Committal Order, but became ineffective because no such examination was listing during the period of that Order, would make it unjust or abusive for a further CPR 71.2 order to be made.

155. However, I do not consider that Bryan J was asked to, or did, make a fresh order of that kind. In my view, the matters before him arising from both parties' applications,

and which he resolved, related to (a) whether the terms of the Suspended Committal Order in themselves required personal attendance, and, if so, should be varied; and (b) whether an order should in any event be made for Mr Vik to attend in person the Further Examination that was due to occur pursuant to a condition of the Suspended Committal Order. Broadly speaking, those issues reflected the substance of Mr Vik's application and DB's application respectively.

156. Hence the order that Bryan J made, reflecting the applications before him, was that, *"[f]or the avoidance of any doubt"*, Mr Vik was required to in person "*the Vik Examination Hearing*". That expression was defined in Bryan J's order to mean the hearing that Mr Vik was required to attend pursuant to the condition set out in Schedule B to the Suspended Committal Order:-

> "**UPON** the Court having found Mr Alexander Vik ("**Mr Vik**") guilty of contempt of Court … and having sentenced Mr Vik to a term of committal of 20 months by paragraph 1 of the Order of Moulder J dated 29 July 2022 (the "**Committal Order**") suspended pursuant to paragraph 2 of the Committal Order and subject to Mr Vik's compliance with the conditions set out in Schedule B to the Committal Order ("**Schedule B**")
>
> **AND UPON** Mr Vik being required under paragraph 1 of Schedule B [to the Suspended Committal Order] to attend Court on a date or dates to be fixed to be examined by the Claimant on the matters listed in paragraph 3 of Schedule B (the "**Vik Examination Hearing**") …"

157. Accordingly, I do not read the application, Bryan's judgment or Bryan's J's order as relating to attendance at a hearing regardless of whether the Suspended Committal Order remained in force: there was no consideration of any such question. On the contrary, it was a premise of Bryan J's reasons for granting DB's application that *"[t]he circumstances are that the Further Examination forms part of a detailed set of conditions imposed by the existing Committal Order by which Mr Vik's term of committal was suspended"* (Bryan J judgment § 98, quoted in § 50. above).

158. As a result, I do not construe Bryan J's order as being a freestanding direction, independent of the Suspended Committal Order, for attendance at a further examination.

## (J) CONCLUSION

159. For these reasons, I am unable to accede to DB's application. I shall hear argument on the consequences of this judgment.

160. I am grateful to all counsel for their clear and cogent written and oral submissions.