Neutral Citation Number: **[2024] EWHC 2307 (Comm)**

Case No: **CL-2023-000005**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN AN ARBITRATION CLAIM

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

Date: 30 August 2024

Before :

The Hon. Mr Justice Bryan

- -

Between :

Madison Pacific Trust Limited	**Claimant**
- and -	
Sergiy Mykolayovch Groza and Volodymyr Serhiyovch Naumenko	**Defendants**

- -
- -

Nathan Pillow KC and Mubarak Waseem (instructed by **Hogan Lovells International LLP**) for the **Claimant**
The Defendants were not represented and did not appear.

Hearing date: **30 August 2024**

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APPROVED JUDGMENT

MR JUSTICE BRYAN:

A. INTRODUCTION

1. There are before me today the hearing of two applications (previously ordered by the Court to be heard on an expedited basis on this date in August 2024):

   (1) The application of Madison Pacific Trust Limited (the "Claimant"), dated 25 June 2024 (the "Contempt Application") to sanction the Defendants, Sergiy Mykolayovch Groza ("D1") and Volodymyr Serhiyovch Naumenko ("D2"), collectively "the Defendants", for contempt of court, namely deliberate non-compliance with, and breach of a Disclosure Order made by, Jacobs J on 19 April 2024 (sealed on 24 April 2024), and endorsed with a penal notice in the usual form (the "Disclosure Order"); and

   (2) The Defendants' (responsive) applications dated 6 August 2024 for a declaration that the Court has no jurisdiction in respect of the Contempt Application because, in particular, permission to serve out of the jurisdiction was not obtained by the Claimant (the "Jurisdiction Application").

2. Pursuant to the direction of the Court, the Defendants' Jurisdiction Application is to be considered first. If successful, the Contempt Application would not, of course, proceed. It is the Claimant's case, however, that the Court does have jurisdiction to determine the Contempt Application and that the Jurisdiction Application should be dismissed.

3. The Contempt Application is made in relation to what the Claimant says are the Defendants' deliberate and contumacious breaches of the Disclosure Order which was made ancillary to a worldwide freezing order ("WFO") granted by His Honour Judge Pelling KC (sitting as a Judge of the High Court) on 13 January 2023. The Disclosure Order was made largely to enforce compliance with the standard form disclosure obligations in the WFO. It required the Defendants to disclose categories of information and documents relating to their assets, including nominee arrangements, the recipients of some US$97 million in dividends, and the identity of lenders to D1's corporate holding vehicle since the granting of the WFO.

4. The Claimant says that the Defendants have not complied with the Disclosure Order in any respect at all; nor have they ever purported to do so. To the contrary, on 13 May 2024 at 4.20 pm (20 minutes after the deadline for compliance had passed), the Defendants wrote (via their representatives in Ukraine) explaining to the Claimant that they would <u>not</u> be complying with the Disclosure Order. That letter enclosed a Draft Application to set aside both the WFO (again a prior application to discharge the WFO having been dismissed by Jacobs J in February 2024) and the Disclosure Order, or to suspend them pending an award in an underlying arbitration (the "Draft Application"). In the event, the Draft Application has never been served or fixed for hearing, and does not fall for determination at this hearing.

B. THE POSITION OF THE DEFENDANTS AT THIS TIME

5. The position of the Defendants at the present time is that they are formally litigants in person. Whilst the evidence before me in the Fourth Affidavit of Oliver Humphrey ("Humphrey 4", filed in support of the Claimant's Contempt Application), and in the Fourth Witness Statement of D2 ("Naumenko 4" - filed in support of the Jurisdiction Application) is that they have had legal assistance, they no longer have English solicitors on the record. They are not represented before me today (nor have they appeared before me today). However, the details provided in their various Notices of Change are relevant to the issues that arise before me in relation to service and they are as follows:

   (1) The Defendants were most recently represented by Hill Dickinson LLP (having originally been represented by Kobre & Kim). They were represented by leading and junior counsel at the hearing before Jacobs J in February 2024 when they applied, unsuccessfully, to discharge the WFO.

   (2) Hill Dickinson purported to come off the record shortly thereafter, on 15 March 2024. However, their Notice of Change was non-compliant in failing to set out an address in the jurisdiction at which the Defendants could be served (see CPR 6.23(3) and PD 42, para 2.4). Instead it gave the address in Kyiv of Pavlenko Legal Group LLC ("Pavlenko"), a Ukrainian law firm.

   (3) Following a series of letters between Hogan Lovells International LLP ("Hogan Lovells") (representing the Claimant) and Hill Dickinson, an updated Notice of Change was filed on 15 April 2024. That Notice properly gave an address for service in the jurisdiction at the UK address of Fortior Law SA ("Fortior"), the Swiss law firm representing the Defendants in the underlying arbitration proceedings – along with the Defendants' personal email addresses.

   (4) The Claimant issued the Contempt Application on 25 June 2024. It is apparent that the Defendants took legal advice in relation to the Contempt Application (and which they were therefore clearly aware of), because a matter of days thereafter on 1 July 2024, Fortior Law UK LLP ("Fortior UK") wrote to the Court noting that it had been instructed to act for the Defendants albeit "... solely for the purposes of challenging the Court's jurisdiction in the committal proceedings and seeking to set aside service of the same." Fortior UK then filed the Defendants' purported Acknowledgments of Service dated 9 July 2024 before a further Notice of Change was served on 11 July 2024, stating that Fortior UK had ceased to act for the Defendants, and again providing an address of Fortior in London (and the Defendants' personal email addresses) for service. That remains the position as at the date of today's hearing.

6. In terms of the evidence before the Court, at least until late yesterday, the Defendants had not served any written evidence dealing with the Contempt Application. On 22 August 2024, D1 sent an email to Hogan Lovells stating that "D2 will be submitting evidence to the Court." It appears therefore that D1 was associating himself with the evidence which it was contemplated would be served by D2 in due course. That is consistent with previous evidence served by D2 with which D1 associated himself. No date was given as to when that evidence would be served and none was received until an eighty-page fifth statement of D2 ("Naumenko 5"), was filed yesterday, to which I will need to return in

due course. The Claimant's solicitors had asked the Defendants whether they intended to give oral evidence at the hearing of the Contempt Application and offer themselves for cross-examination, but no response was received.

7. In an email on 22 August -- that is the one in which D1 sent an email to Hogan Lovells stating D2 will be submitting evidence to the Court -- D1 also stated that he was being admitted to hospital in Switzerland and would be unable to attend the hearing. He asked that Hogan Lovells "invite the Court to postpone the hearing for at least a month to 'allow me an opportunity to respond substantively' ".

8. That email was not accompanied by any application to adjourn, any witness evidence, or any document substantiating D1's alleged hospital admission, the reasons for it, or its timing. Further, D1 did not explain (i) why he was only informing the Claimant of this one week before the hearing and, (ii) why he had not by this point responded substantively to the Contempt Application at all, despite the fact that it had been sent to the Defendants on 25 June 2024, almost 2 months earlier – in response to which the Defendants had in the meantime issued their Jurisdiction Application.

9. In correspondence, the Claimant has repeatedly told the Defendants that they could file their substantive evidence in response to the Contempt Application without prejudice to the Jurisdiction Application, but until Naumenko 5 yesterday they had not filed any evidence. I proceeded to facilitate the hearing on a hybrid basis so that the Defendants could, if they wished, attend by video link. I am satisfied that in advance of the hearing they were provided with details of the hearing to their email addresses and that they have also been provided with a Microsoft Teams link so as to be able to join the hearing.

10. Neither D1, nor D2 has attended by video link this morning.

11. The first substantive issue that arises for determination therefore is whether I should proceed in their absence in relation to either the Jurisdiction Application or the Contempt Application. The applicable principles in relation to those applications are different.

12. So far as the Jurisdiction Application is concerned, the applicable provision of the CPR is CPR23.11, which provides:

> "(1) Where the applicant or any respondent fails to attend the hearing of an application, the Court may proceed in their absence.
>
> (2)Where –
>
> (a) the applicant or any respondent fails to attend the hearing of an application and
>
> (b) the Court makes an order at that hearing the Court may, on an application or of its own initiative, re-list the application."

13. The Jurisdiction Application is, of course, the application of the Defendants themselves, which they have issued and pursued. No reason, still less any good reason, has been given as to why D2 has not attended the hearing today. The most recent correspondence

from D2 was on 29 August, by email at 15.40, in which he says: *"Dear sirs, please see the attached witness statement..."* (which I would add was not attached and in fact was not provided to the Claimant at the time or at any time yesterday). In fact, it was filed under CE-File under the confidential tab with the result that the only person who could see it was the staff in Commercial Court Listing, myself and my clerk.

14. I alerted the Claimant to the fact that that witness statement had been served and, as it appeared that Mr Naumenko wished the Court to consider it, I myself formed the view that the Claimant should be aware of it and, via my clerk last night, shortly after 6 pm, the Claimant was provided with a copy. In fact, it was not until this morning that D2 provided a copy themselves to the Claimant. As at last night, the very substantial exhibits were also filed confidentially and were not available to the Claimant. In fact, even this morning they were not available to the Claimant, although at around the time the hearing commenced, a Google Drive link has been provided by D2 so the Claimant now has them.

15. Returning to the email of 29 August at 15.40, it continues:

> "Mr Groza [D1] cannot come to the hearing on 30.08.24 because of his re-admission to hospital. I cannot come because I am in Ukraine and I do not speak English good enough and I do not have English lawyers to represent me in court.
>
> I ask that the witness statement be taken into account to express our position.
>
> "I did not read Madison's skeleton which was filed late [that's the Claimant's skeleton]. And Mr Groza and I want to comment when we have analysed it.
>
> The [Contempt] Application **should be rejected because of the reasons we mentioned**: notification, jurisdiction, late filing, abuse of process and others." (emphasis added)

16. I pause at this point to pick up a number of points in relation to that email. The actual position is that the Claimant's skeleton was not served late; it was in fact served ahead of the Commercial Court Guide requirement time for what were two separate ordinary applications, and so was in fact filed early. Accordingly, both D1 and D2 had the appropriate time within which they should have responded with a Skeleton Argument of their own and neither of them availed themselves of that opportunity.

17. Secondly, it is clear from that email that D2 was intending and contemplating not only that the Jurisdiction Application would proceed, but also the Contempt Application, given that that witness statement was filed in opposition to that application. Even more fundamentally, and as emphasised above, the final paragraph, where it says, "The [Contempt] Application should be rejected because of the reasons we mentioned", makes clear that the position of D2 was that in fact the Court would proceed, if the jurisdiction challenge did not succeed, to a determination of the Contempt Application on its merits. In other words, the position of D2 immediately before the hearing was not that it should

be adjourned, but that it was contemplated that the Contempt Application would be considered on its merits.

18. Additionally, the fact that D2 is in Ukraine is not a determinative factor because, as I have already identified, the Court facilitated the provision of a hybrid hearing, including links, which I am satisfied were provided to both D1 and D2. So far as not being able to "speak English good enough" is concerned, one has to approach that with a degree of circumspection in circumstances where Mr Naumenko has filed a number of witness statements in English and of considerable length. In any event, and so as to protect the position of D2 and to ensure that there is a fair hearing, I am informed that the Claimant has instructed a Ukrainian interpreter who is present, either in Court or is available on the link, in order to provide interpretation should D2 need it.

19. Finally, in relation to this email, the fact that D2 does not have English lawyers to represent him in Court is to be seen in the context that, as I have already identified, both the Defendants have had English lawyers in the past, and it is clear that they consult English lawyers when they wish to do so, and that they have funds to do so in circumstances where there have been notifications as required under the WFO in relation to payment to lawyers, which is obviously a standard carve-out of a WFO.

20. In any event, in the correspondence to which I have been referred from Hogan Lovells, the Claimant's solicitor, Hogan Lovells have made clear and have urged the Defendants not only of the ability to, but that they should, seek legal advice in England and they have also had identified to them the availability of Legal Aid (in the context of the Contempt Application). As far as the Claimant is aware, no such application has ever been made and it does not appear that either Defendant has chosen to avail themselves, on the record, of services of English lawyers, but that is an option which I am satisfied was available to them if they wished to do so. Rather they have chosen not to avail themselves of the same (either privately funded or via legal aid).

21. Dealing at this stage purely with the Jurisdiction Application, I consider that there is no good reason why the Defendants have not attended before me today to advance their own Jurisdiction Application. I will return in more detail to the position in relation to D1 and any medical condition in relation to him in due course, but so far as D2, I am satisfied that D2 has voluntarily absented himself from an application which he himself is making in awareness that the application was being heard today and he was therefore at risk that it would be determined in his absence. Given that he has filed a witness statement which addresses the substantive Contempt Application, he clearly contemplates that the hurdle of the Jurisdiction Application may be surmounted by the Claimant and that the Contempt Application may go ahead today.

22. Therefore, so far as the position of D2 is concerned, I can see no good reason why the hearing should not proceed on the Jurisdiction Application in his absence.

23. So far as the position of D1 is concerned, and as I shall explain in more detail when addressing the Contempt Application, Mr Groza, D1, has not done any of the things that he would be required to do if he was seeking an adjournment on medical grounds and I am satisfied that in his case too he has chosen to absent himself from these proceedings, and his own Jurisdiction Application (and that of D2). Even on the assumption that he is

currently in a clinic in Switzerland (as I shall come on to), there is no evidence before me whatsoever that he would be unable to participate via video link, nor indeed any actual reason why he should have to be in the clinic now rather than at any other time given the considerable time that has passed since the application was made.

24. Accordingly, and for those reasons, I consider it appropriate to proceed to hear the Jurisdiction Application in the absence of both D1 and D2 set against the backdrop of the fact that they are litigants in person and therefore, as is acknowledged before me and as is correct, counsel for the Claimant have professional obligations to ensure that any legal issues are addressed before me that might be raised on behalf of the Defendants had they had legal representation. I would add that the jurisdiction challenge essentially involves a point of law on which the Claimant has set out in a detailed Skeleton Argument both sides of the argument, as one would expect. It is the Defendants' Jurisdiction Application they are well aware it is to be heard today, they have been provided with the link to attend today, and they are aware it could proceed in their absence which I consider is appropriate in the circumstances that I have identified, and in the furtherance of the overriding objective.

25. Turning then to the Contempt Application, I remind myself of the applicable principles in relation to proceeding in the absence of a defendant. The Court has power to proceed in the absence of a defendant but before doing so should exercise "great caution" (*R v Jones* [2003] 1 AC 1 at [6] *per* Lord Bingham). Proceeding in the absence of Defendants will be an "unusual but by no means exceptional" course (see *Sanchez v Oboz* [2015] EWHC 235 (Fam) ("*Sanchez*")). I do note that in the White Book, Vol 1, paragraph 81.8.3 *Lamb v Lamb* [1984] FLR 278 (CA) is cited in support of the proposition that proceeding with a trial of a contempt application in the absence of a party is "an exceptional course", although, as Mr Nathan Pillow KC on behalf of the Claimant, has pointed out to me, *Lamb* was an *ex parte* committal of which the Defendant had no notice, and so it was itself an exceptional case.

26. In *Sanchez*, Cobb J set out a list of factors to be considered at [5], to which I will return. Where ill health is the principal reason advanced for non-attendance, a party (here D1) is expected to have made an application to adjourn, and to have set out evidence as to his health and in particular that "his physical condition is such that he cannot attend the Court, either in person or more obviously by CVP*"* (see *Nottingham University Hospitals NHS Trust v Bogmer* [2023] EWHC 1724 (KB) at [50]. Such evidence should meet the requirements identified by Mr Justice Norris in *Levy v Ellis-Carr* [2012] EWHC 63 at [36] for an adjournment on medical grounds.

27. D1 has made no application to adjourn and, subject to a very recent letter, which I will come on to, has submitted no supporting medical evidence of (i) his alleged hospital stay and the precise reasons for it (and for the timings of it and when it was arranged), (ii) the nature of his condition and treatment, or (iii) the impact of the same on his ability to prepare for and effectively participate in the proceedings, including by video link today.

28. These matters were the subject of correspondence in advance of the hearing between those acting for the Claimant and the Defendants to which my attention has been drawn, including a letter from Hogan Lovells, dated 23 August, in which they informed Mr Groza of his responsibility to make an application for any adjournment and, secondly, if

he did so, that he should produce specific witness evidence of the medical condition, including documentation from doctors, and he was expressly referred to the decision of Norris J in *Levy* and referred to [36] thereof, which outlined the requirements of medical evidence adjournments. The letter also said, and warned, that unless and until there was a successful adjournment application ordered, the hearing would be going ahead and that he might be found in contempt in his absence.

29. I am satisfied that, in such circumstances, D1 was properly informed of what might happen if he did not attend and he failed to produce any proper application for an adjournment. As I say, he has made no such application with supporting evidence whatsoever.

30. That fact is not to be construed in a vacuum in circumstances where in fact D1 has previously made an application to adjourn a hearing on medical grounds with supporting evidence, which was successful, albeit that, somewhat ironically, on the hearing that then followed thereafter, he did not attend himself. I am satisfied that D1 is well aware of the need to apply for an adjournment and the need to provide supporting evidence and what is required, not only from what he has properly been told by Hogan Lovells on behalf of the Claimant, but also by his own previous experience in this very litigation.

31. The only thing that has been received, and again very late in the day, is an email at 16.48 hours yesterday, 29 August, from D2 with an attachment. The main body of the email is entirely blank, and accordingly nothing at all is said therein. The email attachment is a Pdf letter. That Pdf letter has the heading of a clinic, the "Klinik Hirslanden". It says:

> "**To whom it may concern.**
>
> **Medical certification.**
>
> Zurich, 29.08.2024.
>
> Groza Sergiy 01.03.1959, 52 boulevard Mont Boron, 06300 Nice.
>
> "This is to confirm that Mr Sergiy Groza, following his recent surgeries, is readmitted to our clinic.
>
> We are not permitted to disclose the details of his condition or treatment due to our medical secrecy rules.
>
> We will be able to confirm the length of his treatment once we have conducted all the relevant tests and examinations and determined the appropriate treatment as part of a consilium of Mr Groza's doctors.
>
> Sincerely [and then a signature]
>
> Prof Dr Med Robert Reisch."

32. With a footer with an address in Zurich and below that two medical professionals, Prof. Dr Med Robert Reisch and Prof. Dr of Medicine Nikolai Hopf.

33. Mr Pillow, on behalf of the Claimant, submits, I consider with some force, that that letter is vague in the extreme. There is no attempt to make a formal application for an adjournment, and no attempt is made to produce the evidence of the nature that is contemplated in *Levy* should be provided. No explanation is made as to what happened, and when, in terms of surgery, what that was all about, why D1 has been readmitted, why he has been admitted at this time, and whether or not D1 could attend, even if in the clinic, by video link. There is certainly no suggestion in that letter that he is having performed upon him any form of procedure that requires anaesthesia today or any suggestion that he would be unable to attend by video link today.

34. I consider that the letter in fact could not have been more vague. It does not cover any of the material requirements that are identified in the leading case and I consider that it is wholly inadequate to justify an adjournment.

35. It does not suggest, as I have said, that D1 is having an operation today or that he is unable to prepare, watch and participate if he sees fit, and one of the things that should have been explained is why he could not have participated at any point since the application. There is nothing in that letter suggesting why he needed to be admitted or why he could not have observed what is going on today in circumstances where he had been on notice of the application for some 2 months. Even if there was a need to admit him to the clinic (and even if there was a need to admit him yesterday), there is nothing to suggest that he could not attend remotely, there being no explanation for his silence in the meantime and no explanation in the covering email, which itself came from D2 and was not made by D1.

36. As I say, D1 knows exactly what is required of him because he did make a proper application in the past at the end of October 2023, which resulted in an adjournment (with the Defendants paying indemnity costs) of a hearing of Mrs Justice Dias, which was due to be heard on 9 November.

37. I am satisfied that the Claimant made it clear to D1 that, depending on the evidence that might be served (and as I say all we have got is a letter), the Claimant might invite the Court to proceed with a hearing against him nonetheless and that is the application that has been made before me today by Mr Pillow on behalf of the Claimant.

38. In the event, as I say, neither D1 nor D2 made an adjournment application and neither supplied any evidence other than the letter to which I have just referred.

39. As already foreshadowed, neither D1 nor D2 has attended by Teams video link today despite me being satisfied that they have that link and could avail themselves of that link if they wished to do so.

40. So far as D2 is concerned it is clear from his email, that I have already addressed, that he has voluntarily absented himself, and not only from the Jurisdiction Application but also from the Contempt Application, and contemplates that it will proceed in his absence.

41. Turning then to the position in relation to D1, and applying the principles in *Sanchez* at [5] which states as follows:

> "As neither respondent has attended this hearing, and in view of Mr. Gration's application to proceed in their absence, I have paid careful attention to the factors identified [that he had identified] in [4] above, and, adapting the guidance from *R v Jones; R v Purvis* have considered with care the following specific issues…"

42. I interject at this point that I too have considered those factors and borne the guidance in those cases well in mind.

43. Turning then to the nine issues identified by Mr Justice Cobb at [5] of his judgment which I will address in turn:

"(i) Whether the respondents have been served with the relevant documents including the notice of this hearing;"

44. I am satisfied from the correspondence I have been shown, as is also addressed in Humphrey *5*, in particular at [7] to [9], that the Defendants are well aware of (i) the Contempt Application itself and, (ii) of this hearing and when it is to take place.

45. As to the former, an Acknowledgment of Service has in fact been filed. There has, as I say, also been the jurisdictional challenge at which time English lawyers were involved for the Defendants and clearly the Defendants have received legal advice in relation to the Contempt Application, as a result of which they make the jurisdictional challenge that is the Jurisdiction Application. They clearly are on notice of this hearing, and they have the ability to take legal advice, and attend by themselves or by legal representatives.

46. I am satisfied that they have been served with the relevant documents, including the notice of this hearing. In fact I will address such matters in further detail when considering the Contempt Application itself in circumstances where the service of the application and forms of relief, including alternative service, which are sought by the Claimants, will need to be addressed by me. It suffices to say at this point that I am satisfied that the Defendants have been served with all relevant documents, including notice of this hearing.

"(ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;"

47. I am satisfied they have, and clearly have had sufficient notice. Indeed they have been aware throughout as to the issue of the application, when it was fixed for and how they could attend, and they have been accommodated (lest they were not attending in person), by a hybrid hearing and links which have been provided to them to email addresses that they themselves have used in the recent past to correspond with the Claimant. They have had more than sufficient notice (and time) to enable them properly to prepare for the hearing.

"(iii) Whether any reason has been advanced for their non-appearance;"

48. Again, I have already addressed that. So far as the position of D2 is concerned, there is the email from last night, which I have already addressed in the context of the Jurisdiction Application. I repeat the observations I make in relation to the matters stated in that email. It is clear in such circumstances that D2 has voluntarily absented himself from both of the hearings today.

49. So far as D1 is concerned, I have already addressed the failure to make an application for an adjournment on medical grounds or to address any of the matters that would be necessary in order to justify such an application. Both defendants have had drawn to their attention their ability to take legal advice and to obtain Legal Aid, and have chosen not to do so. Therefore, they have chosen not to be represented here today, either by solicitors or by counsel.

"(iv) Whether by reference to the nature and circumstances of the respondents' behaviour they have waived their right to be present (ie is it reasonable to conclude the respondents knew of or were indifferent to the consequences of the case proceeding in their absence);"

50. That is clearly satisfied, firstly in the case of the D2 in circumstances where he contemplates the matter proceeding in his absence for the reasons that he gave, which I have already addressed, and he clearly knew of or was indifferent to the consequences of the case proceeding in his absence (also having been forewarned of that in correspondence from Hogan Lovells).

51. The same is also true in relation to D1. It appears he left the provision of any evidence to D2 in the communication from D1 that I have already identified. He was aware of what was required in order to seek an adjournment on medical grounds. He neither made that application in the proper form nor did he accompany that at any stage with the appropriate medical evidence and the only document before the Court, provided belatedly by D2, with no covering explanation, at a very late stage yesterday, is vague in the extreme and does not begin to justify the non-attendance of D1.

52. In such circumstances I infer that D1 as well as D2 knew of the consequences of the case proceeding in their absence and also that each of them was indifferent to the case proceeding in their absence. Had that not been the position then one would have expected D1 to make a formal application for an adjournment with the requisite supporting evidence, something which he has done in the past and is therefore well aware of in terms of how to go about it.

"(v) Whether an adjournment would be likely to secure the attendance of the respondents or at least facilitate their representation;"

53. I am satisfied that the answer to that is no. They are aware of the ability to seek Legal Aid, they are aware of the ability to get legal representation, they have had legal representation in the past, and they have paid for legal representation in the past. I am satisfied that the inference to be drawn is that they have chosen not to instruct solicitors or counsel to attend on their behalf today and I do not consider that an adjournment would be likely to secure the attendance of themselves or at least facilitate their representation.

"(vi) The extent of the disadvantage to the respondents in not being able to present their account of events;"

54. I do not consider that the Defendants would be disadvantaged by not being able to present their account of events in circumstances where, firstly, D1 was contemplating that D2 would provide any evidence and D2 has done so belatedly. I am prepared to consider that evidence *de bene esse,* notwithstanding when it was served. Secondly, and in any event, so far as legal issues arise, the point arises once again that the Claimant's counsel have professional obligations to draw to my attention any points which would assist the Defendants legally, and, as Mr Pillow rightly points out, ultimately when one comes to consider the three requirements for contempt, the issues are straightforward in the present case, not least in circumstances where not only has each Defendant not complied with the Disclosure Order, but has consciously chosen not to comply with the order.

55. Accordingly, I do not consider that there will be any or any significant disadvantage to the respondents not being able to present their account of events. In any event to the extent that there is any disadvantage whatsoever, that is at the door of D1 and D2, who could, I am satisfied, have attended at least by video link today.

"(vii) Whether undue prejudice would be caused to the applicant by any delay."

56. I am satisfied that undue prejudice would be caused to the applicant by any delay. This is a Contempt Application. It is important that it be dealt with expeditiously. It is in the context of Disclosure Orders which were made, and allegedly breached, in policing worldwide freezing injunctions which have already been made, and in a case where at least one judge, Jacobs J, has found that there is an exceptionally strong risk of dissipation.

57. I am satisfied that undue prejudice would be caused to the applicant if there was any delay in me hearing the Contempt Application.

"(viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents."

58. I am satisfied that there would not be any prejudice, still less undue prejudice, to the forensic process in circumstances where I have the benefit of leading and junior counsel for the Claimant, a detailed Skeleton Argument from them, and also I have a fifth statement of the second Defendant ("Naumenko 5"), which I will consider *de bene esse*, which raises any points that D2 wishes to advance and, as I say, D1 appears to adopt and envisage that any evidence served on behalf of the Defendants would be served by D2.

59. I also have before me, and no doubt will be addressed upon, matters which are echoed in Naumenko 5, which in fact have been foreshadowed previously, as already addressed in the Claimant's Skeleton Argument.

60. I have had regard to:

> "(ix) The terms of the 'overriding objective' *(rule 1.1)*, including the obligation on the Court to deal with the case *'justly'*, including

> doing so *'expeditiously and fairly' (rule 1.1(2))*, and taking *'any ... step or* [making] *any order for the [purposes] of ... furthering the overriding objective (rule 4.1(3)(o))'*."

61. I would only add that those were the aspects of the overriding objective highlighted by Cobb J. I have had regard to all the aspects of the overriding objective, which of course also extend in CPR1.1(2)(f) to: *"*... enforcing compliance with rules, practice directions and orders"*,* which is of obviously applicability in the context of the Disclosure Order and the Contempt Applications that are made in relation thereto.

62. In such circumstances, I am satisfied that this is one of those unusual cases where, having exercised great caution and having gone through the Cobb J checklist, I am satisfied it is appropriate to proceed on both the Jurisdiction Application, and if that fails the Contempt Application, in the absence of both Defendants and the hearings will proceed accordingly.

C. BACKGROUND FACTS

63. The Defendants are sureties for the debt (now exceeding US$150m) of a Cypriot company, G.N. Terminal Enterprises Limited. The Claimant acts as a Facility Agent and International Security Trustee. The Defendants' suretyship obligations are contained within two materially identical Suretyship Deeds containing London-seated LCIA Arbitration Clauses.

64. On 13 January 2023 HHJ Pelling KC granted the WFO in support of arbitral proceedings commenced pursuant to the Suretyship Deeds on 16 January 2023. The merits hearing in the arbitration took place in June 2024 and an award is awaited. I would add that in the meantime the Defendants have applied to the LCIA Court to remove all three members of the Tribunal for alleged bias and that challenge is now with the LCIA Court for decision.

65. As already noted by an order dated 8 February 2024, Jacobs J refused the Defendants' application (made when represented by Hill Dickinson and counsel) to discharge the WFO and continued it until further order of the Court. In relation to the risk of asset dissipation, and as I have already mentioned, the Judge held that the present case was: "one where the evidence is as strong as any that I have ever seen" (see [2024] EWHC 269 (Comm) at [94]).

66. The Claimant considered that there was a paucity of assets disclosed by the Defendants pursuant to the WFO, and that the Defendants had also adopted an inconsistent and obstructive position in correspondence. In such circumstances, the Claimant applied on 31 October 2023 for further disclosure, seeking narrow and targeted categories of documents and information from the Defendants largely to enforce compliance with their existing obligations under the WFO.

67. The relief sought by the Claimant was substantially granted by Jacobs J following a hearing on 19 April 2024. The Disclosure Order, endorsed with a penal notice, was served on the Defendants both in hard copy by delivery to the Fortior address in London, and by email to the Defendants' addresses, all as set out in the Defendants' Notice of Change dated 15 April 2024 (as to which see Humphrey 4 at [29] to [31]).

68. The Defendants were obliged by the Disclosure Order to comply by 4pm on 13 May 2024 (see [1] and [2]), as well as to pay the Claimant's costs on the indemnity basis, summarily assessed in the amount of US$170,000 ([3]).

69. The Defendants failed, and indeed refused, to provide any of the disclosure ordered. Instead, at 4.20 pm on 13 May 2024 the Defendants wrote to the Court suggesting that the WFO and the Disclosure Order should be set aside and Pavlenko sent the Claimant a signed but unissued Draft Application.

D. THE JURISDICTION APPLICATION

70. The Defendants did not respond substantively to the Contempt Application immediately following its service. Instead:

    (1) On 11 July 2024, in the same email in which they came off the record by serving the further Notice of Change, Fortior UK served purported Acknowledgments of Service (dated and apparently filed on 9 July 2024) stating that the Defendants' intention to challenge the jurisdiction of the Court to determine the Contempt Application; and

    (2) On 6 August 2024 the Defendants purported to serve on the Claimant the Jurisdiction Application (which was at that stage unfiled) claiming that the Claimant was required, but had failed, to obtain permission to serve the Contempt Application on the Defendants out of the jurisdiction. The Jurisdiction Application was not filed until 19 August 2024, and has not in fact been served on the Claimant since being filed.

71. In the meantime, on 23 July 2024, the Claimant had filed its own application for a declaration in respect of the Court's jurisdiction and for directions for the hearing. Whilst that application has now been overtaken by the Jurisdiction Application, the Claimant (if it succeeds on the Jurisdiction Application) has indicated that it will seek its costs of that application as well.

72. The Claimant submits that the Jurisdiction Application should be dismissed.

73. First, the Court had jurisdiction to make the Disclosure Order itself. I note that the Defendants have never suggested otherwise, just as they have never suggested that the Court did not have jurisdiction to make the underlying WFO, to which the Disclosure Order was in turn ancillary in the first place.

74. I am satisfied that the Court did have jurisdiction to make the Disclosure Order. I am satisfied that in such circumstances no permission is required to serve the Defendants out of the jurisdiction with an application seeking to enforce the Disclosure Order.

75. I am satisfied that jurisdiction in respect of the Contempt Application is a necessary incident of the Court's jurisdiction to make the Disclosure Order itself – see, in this regard what was said by Teare J in *Deutsche Bank AG v Sebastian Holdings (No 2)* [2017] 1 WLR 3056 ("*Deutsche Bank*") at [6] to [7]:

> "6. As a matter of principle where jurisdiction in respect of a claim or an order is established over a person the jurisdiction which is

> established must include, in my judgment, jurisdiction in respect of matters which are incidental to that claim or order. […] The question in the present case is whether an order for committal is incidental to the Part 71 order.
>
> 7. An order of a court must carry with it the means to enforce that order. If it did not there would be no utility in the order for it could be disobeyed without the threat of sanction. The means to enforce an order are therefore a necessary incident of the order. An order for committal is one of the means by which court orders are enforced. For that reason an order for committal is, in my judgment, a necessary incident of a court order. That is clearly demonstrated by the presence of a penal notice at the beginning of the Part 71 order. I therefore consider that in circumstances where the court has jurisdiction to make the Part 71 order against Mr Vik the court also has jurisdiction to make a committal order against him. Permission to serve the application to commit Mr Vik for contempt out of the jurisdiction is not required because he is already subject to the jurisdiction of this court in respect of the Part 71 order and all matters which are incidents of that order, one of which is an order for committal for contempt of the Part 71 order. […]"

76. I note, in this regard that the decision of Teare J in *Deutsche Bank* was upheld on appeal – see *Vik v Deutsche Bank AG* [2019] 1 WLR 1737 at [55]: "To my mind, the judge's reasoning was impeccable", and at [56]: "It is difficult to read the [penal] notice as anything other than an assertion of jurisdiction over Mr Vik to enforce the CPR Pt 71 order, in the event that he failed to comply with it." See also *Marketmaker Technology Limited & Ors v CMC Group Plc & Ors* [2008] EWHC 1556 (QB) at [26] to [27] (Teare J) and *Grant & Mumford* (eds.) *Civil Fraud* (1st ed.) at paragraph 35-070(2).

77. It appears that the Defendants seek to rely (I assume on the basis of advice from Fortior UK) on an earlier decision of the Court of Appeal in *Dar Al Arkan Real Estate Developments Co v Refai* [2015] 1 WLR 135 ("*Dar Al Arkan*").

78. In that case, the second defendant sought to bring committal proceeding against the managing director of the claimant, who was at that point a non-party resident outside the jurisdiction. It was in that context that the Court decided that initiating committal proceedings against him amounted to the ″commencement of proceedings″ and thus that Part 23 application notice was a "claim form" for that purpose: see [55] and [57]).

79. I am satisfied that the position of the Defendants in this case, who are existing parties to the substantive (arbitration) claim, and are already subject to the Court's jurisdiction including in respect of the WFO (and the Disclosure Order, made ancillary to the WFO) is different.

80. I note that the argument now raised by the Defendants by reference to *Dar Al Arkan* was made in *Deutsche Bank* and was rejected by both Teare J (at [8] to [12]) and by the Court of Appeal. In this regard Gross LJ stated as follows at [70]:

> "[…] Secondly, the key distinction between the *Dar Al Arkan* case and the present case is that in the *Dar Al Arkan* case jurisdiction had not already been established against the managing director, whereas it has here in respect of Mr Vik […] Thirdly, like Teare J (in the passage at para 11…), I can see no reason why committal applications cannot both be "new" or "separate" but yet still incidental to "an order… validly made against a person whilst he was within the jurisdiction of the court and in respect of which it is said that he has acted in contempt". All must depend on the factual context. For my part, it simply does not follow from the decision in the *Dar Al Arkan* case (on markedly different facts) that the committal application on the facts of the present case cannot be and was not incidental to the CPR Pt 71 order."

81. See also what is said in the White Book (2024), Vol 1, at paragraph 81.5.1.

82. I am satisfied that this reasoning applies here. The Court already has jurisdiction over the Defendants in this claim, which derives from its supervisory jurisdiction over the London-seated arbitration. As is clear from the evidence in Humphrey 4 at [44], the arbitration Claim Form was validly served on the Defendants and the Defendants have never suggested otherwise. Yet further, the Defendants themselves have invoked the jurisdiction of the Court when applying to set aside the WFO, as well as making further applications which have been withdrawn and/or were unsuccessful (specifically the Defendants' set aside application), the Defendants' application to replace the WFO with undertakings, and the Defendants' application for disclosure. I also note that at the time of the making of the Disclosure Order Jacobs J (rightly) specifically confirmed the Court's jurisdiction over the Defendants under s.44 of the Arbitration Act 1996.

83. Whilst the real gravamen of the Jurisdictional Application is the assertion that the Court does not have jurisdiction over the Defendants (which is unfounded for the reasons I have addressed above) four assertions can be discerned in the Jurisdiction Application, namely:

    (1) The Disclosure Order was not served on the Defendants in person – this is not a jurisdictional requirement, but rather relates to dispensing with service in person, which I consider is appropriate, and for the reasons that I address as part of the Contempt Application in due course below. It is not relevant to jurisdiction itself.

    (2) The Defendants are not residents within the Court's jurisdiction – I have already dealt with that above. It matters not that the Defendants are not resident within the jurisdiction as they are amenable to the jurisdiction, and there is no need for permission to serve out for the reasons I have given.

    (3) The Contempt Application was not properly served as a claim form, which it is said is a procedural requirement for initiating a case – that is not a requirement where the defendant to a contempt application is already a defendant in the action, and it is clear in any event under the new CPR81.3 that the proper process is to issue a Part 23 application, whether or not the respondent is a party already, as is set out in CPR81.3(1).

(4) There was no permission requested or granted by that Court to serve the documents outside the jurisdiction, which is necessary when parties are located in different legal territories – This is simply another way of putting the Defendants' assertion in relation to jurisdiction, which I have already addressed above. There is no necessity for permission to serve out of the jurisdiction in the present case.

84. Accordingly, I am satisfied that in such circumstances no permission to serve the Contempt Application out of the jurisdiction was necessary and nor do any of the other grounds identified in the Jurisdiction Application apply. Accordingly, the Jurisdiction Application stands to be dismissed, and I dismiss it.

85. In such circumstances the Contempt Application will now proceed before the Court today.

E. THE CONTEMPT APPLICATION

E.1. THE APPLICABLE LEGAL PRINCIPLES

86. The elements of contempt were set out in the decision of Miles J in *Business Mortgage Finance 4 plc and others v Rizwan Hussain* [2024] 4 All E.R. 170 ("*Business Mortgage"*) at [39], (as derived from *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm) at [150]) namely, that:

(1) Defendants knew of the terms of the Disclosure Order;

(2) The Defendants acted (or failed to act) in a manner which involved breach of the Disclosure Order; and

(3) The Defendants knew the facts which made their conduct a breach.

87. See also *Navigator Equities Limited v Deripaska* [2024] EWCA (Civ) 268 at [47] and *FW Farnsworth Limited v Lacy* [2013] EWHC 3487 (Ch) per Proudman J at [20]:

> "(a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order."

88. I remind myself that the applicable standard of proof is the criminal standard: the Claimant must establish breach beyond reasonable doubt (see *Arlidge, Eady & Smith on Contempt* at paragraph 3-267). Whilst each of the above elements has to be proved to the criminal standard, this "does not mean that every fact or piece of evidence relating to each element must itself be proved beyond reasonable doubt" (see *Business Mortgage*, supra at [40]).

89. All the findings I make as to the aforesaid elements in what follows are made to the criminal standard, that is I am satisfied beyond reasonable doubt (so that I am sure, as juries are directed).

90. It is well-established that whilst the required omission (here, the failure to give disclosure), must be deliberate, an intention to commit a breach is not necessary (see, for example, *Kea Investments Ltd v Eric Watson* [2020] EWHC 2599 (Ch) ("*Kea Investments*") at [26]).

91. As such, and as is stated in *Civil Fraud* at paragraphs 35-025 and 25-029 (footnotes omitted):

> "The fact that the respondent may have (however reasonably) believed that he was not acting in breach of the court order, or that he was acting on legal advice, is therefore no defence to a charge of contempt, but bears on sentence.
>
> …
>
> There is no principle of "reasonable excuse" available to a respondent. Hence, for example, if the respondent is ordered by the English court to do a particular thing in unconditional terms and fails to do so, his failure to comply with the order is not excused if compliance with it would (or might) constitute a breach of the order of a foreign court."

92. See also *Halsbury's Laws of England, Contempt of Court* (vol 24, (2019)) at [66]:

> "Contempt may be committed in the absence of wilful disobedience on the part of the contemnor". As Lewison LJ said in *Atkinson v Varma* [2021] Ch 180 at [54]: "once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach".

93. Further, as was said in *Cuciurean v Secretary of State for Transport; High Speed Two (HS2) Limited* [2021] EWCA (Civ) 357 at [9(5)]:

> "a person accused of contempt by disobedience to an order may not seek to revisit the merits of the original [order] as a means of securing an acquittal, although these matters may in some cases be relevant to sanction."

94. However, whilst irrelevant to the question of whether or not there has been a contempt, the contumaciousness of D's conduct, if proven, is highly relevant to sanction (see *Business Mortgage,* supra at [39]; *Kea Investments*, supra at [27]; and see also *Gee on Commercial Injunctions* (7th ed) at paragraph 19-005).

95. There are a range of procedural safeguards and requirements for contempt applications set out in CPR 81.4 to which I have had regard. It will be necessary for me to address those in relation to service. I bear in mind there must, in general, be a heightened standard of procedural fairness throughout (as to which see *Navigator Equities Limited v Deripaska* [2024] EWCA (Civ) 268 at [47]).

96. As to evidence, I bear in mind that the Defendants have the right to remain silent, and it is the duty of the Court to ensure Defendants are aware of that right and of the consequences that adverse inferences may be drawn from the exercise of it. I am satisfied that the Defendants are aware of such matters in this case. These matters were set out expressly (as they are required to be by CPR 81.4(2)), on the face of the Contempt Application, to which the Claimant specifically referred the Defendants to in correspondence, which also reiterated, as I have already identified, the Defendants' right to obtain Legal Aid and they were encouraged to seek legal advice (see the letters dated 25 June 2024 to each of D1 and D2 and the letter of 8 August 2024 to both Defendants).

E.2. SERVICE

E.2.1. SERVICE OF THE DISCLOSURE ORDER

97. CPR 81.4(2)(c) requires that the Disclosure Order was ″personally served ... unless the Court or parties dispensed with personal service″. While the word ″dispensed″ is in the past tense, it is well-established that the Court has the power retrospectively to dispense with the requirement for personal service of the Disclosure Order (see *Business Mortgage Finance 4 Plc and others v Hussain* [2023] 1 WLR 396 (“*Business Mortgage CA*”) at [7] to [73] per Nugee LJ).

98. As is addressed in the evidence before me (in Humphrey 5 at [16]), the Claimant did not serve the Disclosure Order on the Defendants personally but instead by the methods and at the place identified in the relevant Notice of Change (namely by physical copy at Fortior's address in London, and electronically to the email addresses given for each Defendant).

99. In such circumstances, the Claimant applies for an order retrospectively dispense with the requirement for personal service, and has done so as part of the Contempt Application itself, as envisaged by the Court of Appeal in *Business Mortgage CA*. As Nugee LJ noted in that case (at [81]), applying separately for retrospectively dispensing with personal service would "... lead to unnecessary duplication and extra cost with no apparent benefit to anyone."

100. The relevant test is the same under the revised CPR Part 81 as it was under the previous iteration of Part 81: whether any injustice has been caused to the Defendants by reason of the Claimant's failure to effect personal service on them (*Business Mortgage* at [57]). The “key question” is whether the Court is satisfied to the criminal standard that the material terms of the order were effectively communicated to the Defendants and the Defendants had actual knowledge of its terms (see *MBR Acres Limited v Maher and another* [2023] (QB) 186 (“*MBR Acres*”) at [117]; and *Business Mortgage CA,* supra at [79]).

101. Although it is suggested in *MBR Acres* that the Court may only dispense with service *"exceptionally"*, there is no requirement of *"exceptional circumstances"* (see *Khawaja v Popat* [2016] (Civ) 362 at [40]).

102. As is also said in the White Book commentary to CPR6.2(8) ("Power to dispense with service of a document other than the Claim Form"), at paragraph 6.28.1:

> "there are good reasons why dispensing with service of originating process, such as a claim form, should require exceptional circumstances to be established and a lesser standard should apply to documents served in the course of proceedings".

103. I also agree with what is said in *Gee on Commercial Injunctions* (7th ed) at paragraph 19-041 that the Court:

> "should be willing to dispense with service, and to do so to enable an order of committal to be made, if the respondent was aware of the terms of the injunction [and…] the lack of formal service has not caused him prejudice or unfairness […]".

104. In this regard, and as was said in *Group Seven Ltd v Allied Investment Corpn Ltd* [2014] 1 WLR 735 at [37], the overriding objective would not be served by requiring personal service of the Disclosure Order "*purely as a matter of form*".

105. I am satisfied that in this case personal service of the Disclosure Order should be dispensed with retrospectively. As a preliminary point, and as set out in Humphrey 4 at [43], the Claimant was not aware, and is still not aware, of the Defendants' actual physical locations overseas, with the result that personal service could not realistically have been effected on them in any event, as I will address further in due course.

106. In any event, I am satisfied, so that I am sure, that the Defendants were fully aware of the Disclosure Order and the material terms of that order (indeed all of its terms) very soon after it was made, the same having been effectively communicated to the Defendants, and the Defendants had actual knowledge of its terms. In this regard:

(1) The Defendants were on full notice of the hearing on 19 April 2024 at which the Disclosure Order was made. Provision was made by the Court for them to attend by video link should they have wished to do so (as evidenced by the correspondence attaching an email from the clerk to Jacobs J providing a remote link, and see also the transcript of the hearing at page 4, line 6 to page 5, line 17). Whilst it would appear that they do not appear to have availed themselves of that opportunity, they nonetheless made written representations by way of a nine-page letter to the Court dated 18 April 2024.

(2) On 24 April 2024 the sealed Disclosure Order was sent from the clerk to Jacobs J to the Claimant's counsel (leading and junior) and copied to the Defendants at their email addresses (which I will not repeat in an open judgment).

(3) On 24 April 2024, the sealed Disclosure Order was sent by Hogan Lovells to the Defendants at those email addresses, and a hard copy physically served on them by delivery to the London address of Fortior, in each case as set out in the relevant Notice of Change (as addressed in Humphrey 5 at [16]).

(4) At 4.20pm on 13 May 2024 (and as I have already noted), the Defendants wrote to the Commercial Court in the following terms, which I am satisfied made clear beyond peradventure that they were in receipt of the Disclosure Order and had both read it and understood its terms:

> "We are writing… with regard to the Order of Mr Justice Jacobs dated 24 April 2024 ("Order"), by which we were, inter alia, ordered to make a further disclosure in relation to our assets by 4 PM on 13 May 2024, to secure compliance of the [WFO]
>
> …
>
> We are respectfully requesting the Court to vary to the Order and the WFO so that […] (ii) the accompanying disclosure Order be discharged or, alternatively, suspended pending the outcome of the respective arbitrations […] or, alternatively, (iii) the deadline for compliance with the disclosure Order be extended until such time as the Claimant complies with its own disclosure obligations as ordered by the Tribunal in the underlying arbitration – because the Claimant is currently in breach of those orders…"

107. I am satisfied that, in all the circumstances, the Defendants have suffered no prejudice from the absence of personal service, and I am satisfied that it is clear beyond reasonable doubt that the Disclosure Order and its terms have come to their attention (and indeed the Defendants have been able to take legal advice on them), including by service in the jurisdiction at the address the Defendants themselves have supplied. Accordingly, it is appropriate to dispense with personal service of the Disclosure Order and I so order.

E.2.2. SERVICE OF THE CONTEMPT APPLICATION

108. The Claimant did not serve the Contempt Application on the Defendants personally (CPR 81.5 provides "unless the Court directs otherwise and in accordance with Part 6 and except as provided in paragraph 2, a contempt application and evidence in support must be served on the Defendant personally"). Rather, the Claimant adopted the same approach to service as with the Disclosure Order itself -- namely by hand-delivering the Contempt Application to the Fortior London address and emailing it to the Defendants' respective personal email addresses, in each case as set out in the Defendants' relevant Notice of Change (as addressed in Humphrey 5 at [7] to [9]). The evidence before me is that it was also sent to the Defendants by WhatsApp and Signal (as the WFO had been).

109. I am satisfied that the Defendants are on full notice of the Contempt Application and of the hearing, not least because the Defendants' own Jurisdiction Application challenging jurisdiction in respect of it, as already addressed, was listed to be heard at the same time,

and immediately before it, with a view to "knocking out" the Contempt Application before it could be heard on its merits (a challenge that has failed).

110. For completeness, I would also confirm that I am also satisfied, so that I am sure, that each Defendant is aware of, having been given proper prior notice of, the hearing of the Contempt Application itself, including the date and time thereof, in particular by reference to Hogan Lovells' letter of 19 July 2024 to which the Defendants responded on 23 July 2024, and equally I am satisfied, so that I am sure, that via correspondence sent by my clerk, the Defendants were aware of the hybrid nature of this hearing, and their ability to join remotely using the Microsoft Teams link provided to them.

111. In such circumstances, the Claimants seek an order retrospectively dispensing with the requirement of personal service and (if necessary) providing for one or more of the alternative methods in fact used to stand as good service of the Contempt Application.

112. The Claimants say "if necessary" in circumstances where if personal service is dispensed with, hard copy service at the Fortior London address given in the relevant Notice of Change was or would be valid service pursuant to CPR 6.20(1)(c), 6.23(3) and CPR6.23(4).

113. I consider that it is just and appropriate to dispense with requirement for personal services retrospectively in the circumstances identified, as requiring personal service would have served no purpose on the facts of this case given the Defendants' full awareness of the Contempt Application and its terms, and I so order.

114. I am also satisfied that hard copy service at the Fortior London address given in the relevant Notice of Change was or would be valid service pursuant to CPR 6.20(1)(c), 6.23(3) and CPR6.23(4).

E.2.2.1. DISPENSING WITH PERSONAL SERVICE AND ALTERNATIVE SERVICE

115. The requirement for personal service is expressly subject to the Court directing otherwise in accordance with CPR Part 6. CPR81.5(1) ("Unless the Court directs otherwise"). Although published before the revised CPR Part 81, the statement of the law in *Arlidge, Eady & Smith on Contempt* (5th ed) at paragraph 12.40 has been approved as remaining correct under the current Part 81 (see *Field v Vecchio* [2022] EHWC 1118 (Ch) at [22]:

> "Where committal is sought, personal service will generally be insisted upon, although the court has power to dispense with service of the claim form or notice of application (as the case may be), where it considers it just to do so, or order service by an alternative method or place. It was recognised that personal service would generally be insisted upon unless there was clear evidence of evasion. It was in the nineteenth century held that the attendance of the alleged contemnor at the hearing does not per se waive the need for service. The need for service also applies to a notice of an adjourned hearing date. **Today the focus is upon what justice**

requires in the circumstances of the particular case, rather than upon any hard and fast rule." (emphasis added).

116. As is noted in the White Book at Vol. 1, paragraph 81.5.1, personal service is: "likely to be dispensed with in those situations where the court is satisfied that the defendant is deliberately taking steps to evade service **or where they have full knowledge of the contempt proceedings**" (emphasis added). As further addressed below, I consider that the latter is applicable in the present case.

117. I consider that this is an obvious case where it is just and appropriate to dispense with personal service, and I have so ordered. However, if an order for alternative service is required (in addition to an order dispensing with personal service, the general principles that apply are as follows:

(1) The test for the application of CPR 6.27 (which refers back to CPR 6.15) is that there is "good reason to authorise service" by a method not otherwise permitted. This is essentially a matter of fact (see *Abela v Baadarani* [2013] 1WLR 2042 ("*Abela*") at [33], and *Société Générale v Goldas* [2017] EWHC 667 (Comm) ("*Goldas*") at [49(2)]).

(2) It is recognised that a critical factor is whether the Defendants have learnt of the existence and content of the document (see *Abela* at [38]). This factor will be strongest "where it has occurred through what the Defendant knows to be an attempt of formal service", and weaker or non-existent where "the contents of the claim form becomes known through other means", e.g., being sent for information only (see *Goldas* at [49(3)]). The mere fact the Defendants have learned of the existence and the content of document is not in and of itself good reason (see *Abela* [36] and *Goldas* at [49 (4)]).

118. Whilst I do not consider that an order for alternative service is necessary, I am in any event satisfied that it is appropriate to make such an order lest it transpire it was necessary.

119. I am satisfied that there is good reason to order alternative service if required (indeed, if further necessary, exceptional circumstances to do so or to dispense with service). First, as already noted, it is clear the Defendants have full knowledge of the Contempt Application and that the methods employed by the Claimant (including non-personal service at the Fortior London address given by the Defendants themselves) have sufficiently brought the Contempt Application to their attention, including to enable them to have taken legal advice on it.

120. In this regard:

(1) A week following service by the various methods already described above, Fortior UK sent a letter to the Commercial Court stating the Defendants' intention to bring the Jurisdiction Application. It follows that, for that very purpose, Fortior UK must have been supplied by the Defendants themselves with the Contempt Application itself (and whilst it did not seek to serve on the Defendants' solicitors

for the short period while they were acting, the fact that the Defendants' solicitors received a copy of the Contempt Application is, in my view, of relevance).

(2) Fortior UK, when still acting for the Defendants, then filed purported Acknowledgments of Service on their behalf, as I have already noted, and the Defendants subsequently prepared and sent, and later filed, the Jurisdiction Application itself, as I have already noted.

(3) The supporting evidence for the Jurisdiction Application (i.e. Naumenko 4) itself makes express reference (at [7]) to the Claimant's evidence in support of the Contempt Application (i.e. Humphrey 4 at [31]).

(4) Indeed in Naumenko 4, at [3], D2 states that: "[u]pon receipt of the committal application, **I was also advised by Fortior Law**, who no longer act for me in these committal proceedings" (emphasis added).

(5) The email addresses for the Defendants are known by the Claimant to be those used by the Defendants (which was considered to be a relevant factor in *Smith v Kirkegaard aka Engman* [2024] EWCA (Civ) 698 at [31]), because the Defendants have corresponded, and are continuing to correspond with Hogan Lovells regarding the Contempt Application, from those addresses. As addressed in Humphrey 5 at [11], the Defendants have personally sent (through D1) six such emails to Hogan Lovells including emails relating to the Contempt Application itself as well as other correspondence, including attaching a letter in which the Defendants argued for the determination of their (as then unissued) Jurisdiction Application before the Contempt Application, with a seventh email on 22 August 2024 in which D1 invited the Claimant to adjourn the hearing.

121. I have already referred to yet further subsequent correspondence, including from those email addresses, as well as additional email addresses, which have also since been used by the Claimant (out of an abundance of caution) in correspondence with the Defendants.

122. It is clear that such methods of communication were utilised in circumstances where the Claimant did not (and does not) know the exact physical location(s) where the Defendants might be found at any particular time so as to effect personal service, as is addressed in Humphrey 5 at [14] to [17].

123. The Defendants have given (in their witness evidence) addresses in Dubai and Ukraine respectively, and have suggested the Claimants should have obtained permission to effect service on them in those jurisdictions. However, for the reasons identified by Mr Humphrey in his evidence, I am satisfied that there are good reasons to question whether the Defendants are actually present at those addresses:

(1) Firstly, the Defendants have never given those addresses for service in any Notice of Change (including their initial one on 15 March 2024, which gave a Ukrainian law firm address).

(2) Secondly, those addresses were not included in their asset disclosure and their connection to them is unknown to the Claimant.

(3) Thirdly, D1 has attended previous hearings by video from France.

(4) Fourthly, the IP addresses from which D1 has recently sent correspondence also suggests he was located in France.

(5) Fifthly, and as already addressed, D1 has recently said he will be in Switzerland for a medical procedure, and the latest letter from a clinic in Switzerland suggests he is now in Zurich in Switzerland (that email bearing an address for him in France).

124. In respect of D2, the only property disclosed in his asset disclosure is a house in Cyprus, though it is fair to say that D2 may have an address in Ukraine, and he has a BMW M8 vehicle registered in Odessa in his name.

125. In any event, what is clear is that the Defendants have never indicated that they can and will be found in person at a particular (practically accessible) place at any particular time and date so that the formality of personal service could be effected.

126. Given their physical presence outside the jurisdiction and the position the Defendants have taken in the Jurisdiction Application, the Claimant has properly drawn to my attention that the Defendants may or might seek to pray in aid the authorities discussing the need for *"exceptional circumstances"* for service otherwise than in accordance with the terms of any exclusive treaty, such as The Hague Convention or a bilateral service treaty.

127. I will address the points for completeness but I am satisfied that they do not bear examination, or assist the Defendants.

128. Firstly, the Claimants have served the Contempt Application on the Defendants within the jurisdiction (albeit not personally) at the office of Fortior in London given by the Defendants themselves in their Notice of Change. The question whether it is appropriate for the Court to exercise jurisdiction over the Defendants (who are abroad somewhere) is a separate and distinct question from the question whether a method of service involves service out of the jurisdiction (see *Marashen v Kenvett* [2017] EWHC 1706 (Ch) ("Marashen") at [33]).

129. I consider it appropriate to direct that service at the Fortior address in London was good service. That does not involve the "transmit[ting] of a judicial or extra-judicial document **for service abroad**" (emphasis added) (Article 1 of the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965) ("*Hague Convention*")) and accordingly no question would arise of subverting the terms of, for example, the Hague Convention. In this regard, see *Von Pezold v Border Timbers Ltd (in Judicial Management in Zimbabwe)* [2021] 2 All E.R. (Comm) ("*Von Pezold*") at [67] and *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2012] 1 Lloyd's Reports at 61 in which it was stated (rightly in my view), at [116] that:

"I do not think that questions of the legality of service under foreign law arise if the court exercises power to order service on a foreign defendant in England".

130. Secondly, and in any event, I am satisfied that exceptional circumstances do exist. In this context "exceptional circumstances" means "some factor good enough to constitute good reason notwithstanding the significance which is to be attached to the Article 10 HSC reservation" (*M v N* [2021] EWHC 360 (Comm) at [8(v)]).

(1) In this regard, and addressing the two jurisdictions in which the Defendants appear to invite service, namely Ukraine and Dubai, the evidence before me is that:

(a) Ukraine has entered a reservation to Article 10 of the Hague Service Convention, such that service can only be performed through its relevant central authority which, on the evidence, will take more than a year (see Humphrey 5 at [18(a)]). However, in relation to Ukraine, it has also been held that Ukraine's 9 March 2022 declaration in relation to the Russian invasion "is a recognition of the risk that [Ukraine] may not be able to" fulfil its obligations under the Hague Service Convention in any event (see *Olympic Council of Asia v Novans Jets LLP* [2022] EWHC 2910 (Comm) ("*Olympic*") at [19(3)]). In that case Butcher J held that exceptional circumstances for service of a committal application by alternative means therefore existed.

(b) The evidence, as set out in Humphrey 5 at [18(c)], as to the Claimant's understanding, is that service of English legal proceedings in Dubai must also be done through diplomatic channels, in a process that typically takes at least six months, plus the FPS processing time of 2 to 3 months. There are some authorities that suggest that other methods can be employed (see, for example, *Marashen* at [56] and *Cesfin Ventures LLC v Qubaisi* [2021] EWHC 3311 (Ch) at [26]), but there are other authorities that are consistent with the Claimant's understanding (see, for example, *Integral Petroleum SA v Petrogat FZA* [2021] EWHC 1365 (Comm) at [32]). In such circumstances where there is at least some doubt about what amounts to valid alternative methods of service in Dubai, and a likelihood that service would take some considerable time, these factors themselves amount to exceptional circumstances.

131. This Court has already recognised the urgency of this matter by directing this contempt hearing to come on during the Vacation. Whilst in an ordinary case mere delay, without more, will not be a good reason (see *M v N* at [8(iii)]), I am satisfied that in the circumstances pertaining in this case, the validation of the methods of service/notice already employed is necessary to achieve the required expedition which can constitute good reasons (see *M v N,* supra at [8(iii)]) particularly in light of the litigation prejudice (see *Marashen* at [57(ii)]) that I am satisfied would be suffered by the Claimant if it were required to attempt service through the relevant Convention (or indeed through personal service) in various possible locations abroad.

132. In any event, and as is well-established (see *Olympic* at [9(1)]), applications to commit for contempt should be dealt with expeditiously to ensure compliance with, and to uphold the authority of, Orders of the Court. In one sense this is an a *fortiori* case, as the application is made to coerce compliance with an order seeking to ensure the efficacy of an existing

WFO, in a case where a judge has already held that the risk of dissipation is, as I have noted, "one where the evidence is as strong as any that I have ever seen".

133. I am satisfied that the expeditious enforcement of the Defendants' compliance with their asset disclosure obligations in these exceptional circumstances constitutes good reason for permitting service otherwise than personally and/or through diplomatic channels, notwithstanding any service convention or treaty issue which might conceivably arise.

134. Finally, in this regard, I also note that the evidence that is before me (see Humphrey 5 at [19]) is that service by electronic means, even if it were properly to be considered to involve some step taken outside the jurisdiction, is not prohibited by the local rules in Cyprus, the UAE, France or Ukraine.

E.3. SUBSTANCE OF CONTEMPT APPLICATION

135. The alleged contempt is as set out in the Claimant's N600 application notice and is as follows:

> "1. On 19 April 2024, Jacobs J made an order (the [Disclosure] Order) which required the Defendants to disclose certain specified information and documentation to the Claimant by 4pm on 13 May 2024. The Order is annexed to this application."
>
> 2. The Defendants failed to comply with that order by 4pm on 13 May 2024 or at all.
>
> 3. Instead, at 4.20pm on 13 May 2024 Mr Gregory Pavlenko, a Partner at the Ukrainian law firm Pavlenko Legal Group (which the Claimant understands to be the Defendants' legal representative in Ukraine), sent to Hogan Lovells International LLP: (a) an application notice (signed by the Defendants but not issued) seeking an order (amongst other things) discharging or suspending the [Disclosure] Order and discharging the worldwide freezing order granted on 13 January 2023 by HHJ Pelling KC and continued (inter alia) on 8 February 2024 by Jacobs J until further order of the Court; (b) a draft order; and (c) an accompanying letter to the Court. That application has not been issued.
>
> 4. The Defendants' letter of 13 May 2024 in support of the threatened application makes clear that the Defendants have deliberately chosen not to comply with the [Disclosure] Order and do not intend to do so."

E.3.1. NAUMENKO 5

136. As I have already noted and referred to, prior to yesterday no evidence was served in opposition to the Contempt Application, notwithstanding a very considerable period of time since the application was made accompanied by its supporting evidence. It is not necessary for me to go through that correspondence in detail.

137. For the record, it is set out in what I am satisfied is accurate terms, in [6] of the Claimant's Written Submissions addressing the position of Mr Naumenko, which were served by the Claimants this morning following receipt via the Court yesterday evening of Naumenko 5.

138. For the reasons that I have already given, I consider it appropriate to have regard to Naumenko 5 *de bene esse* for the purpose of the issues under consideration, and whether or not it is strictly admissible in evidence or otherwise stands to be excluded having regard to the timing of its service and/or the failure of D2 to attend to be cross-examined (including in relation to the contents of Naumenko 5).

139. The Claimant submits that Naumenko 5 should be given little, if any, weight as untested evidence. But its overarching submission, and position before me, is that there is nothing in Naumenko 5 which even begins to provide any defence to the Contempt Application in circumstances where all the points made, it is said, are either manifestly irrelevant to the issues of the Defendants' alleged contempt, or are clearly of no legal or other merit.

140. In such circumstances I have had regard to Naumenko 5 and considered whether or not it assists the Defendants in any way in their defence of the Contempt Application.

141. Naumenko 5 is a very lengthy document, which contains a mixture of evidence, legal submissions and general argument, that is unfocused and untethered to the requirements for committal, or any defence in relation thereto. I have therefore considered Naumenko 5 carefully on more than one occasion in order to determine and discern whether or not there is anything within Naumenko 5 which would provide a defence to the Contempt Application or would suggest that there is or may be a defence to the Contempt Application. For the reasons that I am going to come on to, I am satisfied that there is nothing in Naumenko 5 which has such effect.

142. I will take each section of Naumenko 5 in turn. Naumenko 5 states, at the outset at [3], the following:

> "I respectfully submit that the Application should be dismissed for the following reasons:
>
> 1) There exist contradictory orders issued by Mr Justice Foxton and Mr Justice Jacobs, which render the nature of these orders ambiguous.
>
> 2) The enforcement of the order in question contravenes the principles of legal professional privilege.
>
> 3) Disclosure of information and documents pursuant to the orders risks breaching our privilege against self-incrimination, given the pending criminal proceedings in Cyprus and Ukraine, in respect of which the Claimant has not been providing us full access and explanation.

> 4) The debt, which is the primary subject of the dispute, has already been discharged. This issue is subject to an unrelated LCIA arbitration.
>
> 5) There are pending proceedings initiated by Defendants seeking to discharge WFO. It is an abuse of process to seek our committal when the orders of which it is said they are in contempt are being challenged."

143. As shall be seen, those points emerge as themes during the course of Naumenko 5. I will return to these five points having considered the detail of Naumenko 5.

144. The first section of Naumenko 5 is in the form of an introduction and factual background between [5] and [65]. I am satisfied that this section is of no legal relevance to the Contempt Application. It is clear enough that what is sought to be done is to advance the merits of the case in the LCIA Arbitration. It restates the Defendants' case and the background to it on the merits, referencing the progress of, and points taken or not taken in, the underlying LCIA Arbitration. That can be seen in particular from [42] to [48], [50] and [58] - including what the Claimant says are unfounded complaints by the Defendants as to the Claimant's disclosure in that reference, and points to the valuation of assets and the appropriate credit to be given for them, as can be seen, for example, at [41] and [49] to [65].

145. I am satisfied that these are all matters for the underlying arbitration in which the final merits hearing has recently taken place in June and an Award is awaited. That is, of course, subject to the Defendants' application to the LCIA Court to remove all three arbitrators on the grounds of supposed bias. I would only note that one of their reasons for doing so is because it is said the arbitrators dismissed some of the Defendants' disclosure complaints to which Mr Naumenko now refers.

146. I am satisfied that the merits of the substantive case against the Defendants is irrelevant to the question of whether they breached a Disclosure Order.

147. As already addressed, non-compliance with a Court order cannot be excused by re-opening the merits of the order that was breached, which the Defendants did not appeal. It follows that it is irrelevant to seek to re-argue the merits of the underlying causes of action that justified the freezing and disclosure relief in the first place (as to which Jacobs J found that the "good arguable case" threshold had been passed "by some margin" at [9]).

148. All those points raised, if at any stage relevant, would be relevant on any discharge application of the WFO. However, no such application is before me for determination, and it is not a matter for today as to the merits (or otherwise) of any such application.

149. In the meantime, at the time the Disclosure Order were made, they had to be complied with and as at today those orders still remain extant and should have been complied with. I am satisfied there is nothing in the introduction and factual background section that is of any legal relevance to the Contempt Application.

150. Secondly, the procedural history, which is addressed at [66] to [126] of Naumenko 5. This includes a consideration of the LCIA proceedings, in particular at [67] to [72]. It is clear that all the matters there raised and sought to be relied upon by Mr Naumenko, such as the enforceability of the surety, the extent and value of any recoveries by the Claimant, whether the Claimant had "*seized*" valuable assets so as to discharge the Defendants' debts and the like, are all matters which would be for the various tribunals and those matters would not, I am satisfied, be for this Court, still less for the purposes of the present Contempt Application.

151. I do not consider that any of those points in any way even begins to undermine the basis for the Disclosure Order which was made in aid of the WFO, which in turn was made in aid of the Claimant's causes of action, and in relation to which two judges of this Court have already held the Claimant to have at least a good arguable claim.

152. The LCIA proceedings are not relevant to the alleged breach of the Disclosure Order, nor do they undermine the basis for the Disclosure Order in relation to the WFO.

153. D2 then addresses matters in Cyprus, UAE and Switzerland at [73] to [87] of Naumenko 5. Again, I do not consider any of those matters are relevant to the Contempt Application. What, if anything, those sections highlight are the lengths to which the Defendants have gone to fight and, the Claimants would say, seek to frustrate, the Claimant's debt enforcement steps around the world. This is the "fierce resistance" to which Jacobs J referred at [97] to [98] of his judgment on the Defendants' application to set aside the WFO, holding that the Defendants' case, repeated now by D2, that the Claimant has sufficient other security provided "no reason in justice or convenience" why the Claimant should not obtain a WFO. None of this is relevant to a breach of the Disclosure Order, or undermines the basis for the disclosure in relation to the WFO.

154. D2 then addresses the question of the WFO and contempt at [88] to [126]. This section amounts to a chronological account of proceedings which has no apparent relevance to the substantive issue of contempt. However, [121] refers to a "Draft Application notice seeking to discharge the worldwide freezing order and the associated Disclosure Order". I have already made passing reference to this, which is the draft application that was foreshadowed by the Defendants. It was provided under cover of a letter to the Commercial Court of 13 May 2024 by the Defendants' Ukrainian lawyers. It attached a draft application notice, albeit signed, but did not provide any time estimate in the time estimate box. It is dated 13 May and it is accompanied by a signed statement of truth from the applicants on 13 May.

155. Hogan Lovells, on behalf of the Claimant, corresponded with the Defendants, setting out in some very considerable detail what the Defendants would need to do in order to file such an application. Clearly, it was not the role of Hogan Lovells, or the Claimant, to themselves file an application on behalf of the Defendants, but I am satisfied that they did all (indeed more) that they could properly be required to do, in order to draw attention to the Defendants how they would go about issuing any such application.

156. However, time passed by and no such application was issued or served upon the Claimant, and that led Hogan Lovells, on 5 June 2024, to write to the Defendants asking where the application was and why there had not been any application pursued. No response has

ever been received to this letter and certainly no application has ever been served, still less has any hearing date been applied for or fixed.

157. However, yesterday in Naumenko 5, D2 referred to this application in terms which suggested that it had in fact been issued when he refers to the "pending application", in circumstances where I am told the position of the Claimant was that they had assumed that nothing had happened and indeed in fact that that application has been abandoned. Certainly, they could find nothing on CE-File in relation to it.

158. However, one of the exhibits CE-Filed last night, but in fact not accessible by the Claimants at the time (or indeed until sometime this morning), was an exhibit at the end of which was a document, which seems to be a screenshot of the HM Courts and Tribunal's e-filing service that contains an entry "Filings Commercial Court KBD"; this case number; a filing number, and then, "Filing. Application for a judge. Application to judiciary on paper (on notice)", with a fee and a date of 4 June.

159. As the Claimant points out, there are some oddities about this. There does not appear to be any filing on that date on the CE-Filing system. The Claimants therefore can only speculate on what this document is in the absence of any further information from D2. They hypothesise it is possible that any application that was made on that day was rejected because it suggests it was an application to the judiciary on paper on notice when, of course, the procedure for any such application was not followed. That is a possibility because the Court Service does reject filings if they do not follow the correct procedure.

160. It is also suggested that it might have been filed inappropriately under a confidential tab, but from the perusal of the Court file under the CE-Filing that does not seem to be the case because there is no entry on the CE-File that day.

161. This matter was brought to my attention by Mr Pillow KC essentially as part of ensuring that any points that could be taken by a litigant in person were properly brought before the Court, for which I am grateful. However, ultimately his submission was, and I agree, that even if there had been such a CE-Filing, it would be irrelevant for any number of reasons.

162. Firstly, even if it had been filed, it has never been served, nor has it been progressed, nor has any hearing been fixed, still less has there been any hearing when the merits of any such application have been opined upon.

163. There is also the oddity that this supposed filing pre-dates by a day Hogan Lovells' letter and yet there has never been any response to that letter saying that the filing had just taken place.

164. In any event, even if the Defendants were to pursue that application hereafter, the current position is that the Disclosure Order was made long ago, they were, and are, subject to the Disclosure Order and they were obliged to comply with it at the time, and within the time specified (and they did not do so). It was, and remains, an extant order to be complied with, and whatever happens hereafter, it is said (rightly in my view), that the Defendants would still be in contempt, and that contempt cannot be expunged in relation to past events whatever the position might be in the future going forward.

165. Accordingly, I am satisfied that there is nothing in relation to the Draft Application itself which impinges upon or gives rise to any defence in relation to the Contempt Application. I pick up further in due course below certain points that were raised in the application, which are also picked up in Naumenko 5, some of which were anticipated by the Claimant, and dealt with in the Claimant's initial Skeleton Argument, in any event.

166. The next point which is addressed in Naumenko 5 is an allegation that there were contradictory orders and ambiguity between the order of Foxton J in February 2023 and the subsequent Disclosure Order of Jacobs J. D2 now says, for the first time, that there is a "direct conflict" between the orders of Foxton J in February 2023 and the subsequent Disclosure Order of Jacobs J.

167. I am satisfied that there is no merit whatsoever in this point, and it does not bear upon the Defendants' obligations under the Disclosure Order or the alleged contempt in relation thereto. It is right, as D2 notes at [138], that Foxton J held in February 2023 that the standard form WFO did not itself require the Defendants to disclose the amount of spending on legal expenses "because it does not expressly say so" (see *CRO v REC & Anor* [2023] EWHC 189 (Comm) at [6]).

168. That is clear and was clear at the time. However, the Disclosure Order was made subsequently and says something quite different and again does so quite clearly. There is no conflict and no ambiguity. There is no conflict between the two orders and nor is there any ambiguity in Jacobs J's Disclosure Order. The Disclosure Order simply and clearly imposes new, different and separately justified, obligations on the Defendants to provide information, a point which Mr Naumenko himself acknowledges at [148] of Naumenko 5.

169. I note that at [148] Mr Naumenko suggests that it "extends far beyond the typical requirements of a freezing order". It is unnecessary to express any view about that, but the position is that it was submitted by the Claimant that that order was required, the matter was argued before Jacobs J, and Jacobs J who considered it appropriate to make the order he did. Jacobs J having done so, the obligation was upon the Defendants to comply with its terms. Had the Defendants wished to challenge any of its terms then the correct approach would have been to appeal that order, and absent a stay, of course, in the meantime they would have been obliged to comply with that order.

170. Another assertion that is made in Naumenko 5 is that the disclosure of the identities of those lending funds to Waylink "seems to intrude significantly into our legal defence preparations". If that was a point to be raised at all at any stage, it is an argument that could, and should, have been deployed to resist the Disclosure Order in the first place. No such submission was made notwithstanding the fact that the Defendants did make detailed written submissions. In any event I am satisfied it is irrelevant to the Contempt Application. No question of legal professional privilege arises and there is no "undue invasion of privacy" or "unnecessary burden" as alleged in [143].

171. It is clear that Jacobs J was satisfied, I would add rightly in my view, that the circumstances obtaining at the time of the hearing before him, which was of course some 14 months after the Foxton J judgment, justified the Disclosure Order. Again even if Jacobs J had been arguably wrong, which I do not consider him to have been, the

Defendants' remedy would have lain in an appeal, not a failure to comply with the Disclosure Order because the Defendants did not like the terms of that order.

172. It is suggested by D2 in [151] that there is "a principle of specificity" required which required an "explicit reconciling" of the Disclosure Order with the Foxton J order. I am satisfied that such argument is misconceived as a matter of law. The two orders determined different issues, at different times, and in different circumstances. I have had careful regard to the Disclosure Order, and I am satisfied that it is highly specific, unambiguous and entirely orthodox in its terms.

173. The suggestion in [156] that the Defendants "are being asked to comply with two judicial directions that cannot be fully reconciled" is without foundation, if not disingenuous, as I am satisfied is the assertion at [157] that the Defendants:

> "…consistently made genuine efforts to comply with the court's orders. However, the inconsistencies between these judicial directions have made complete compliance nearly impossible."

174. First, there is no evidence that the Defendants have sought to comply with the Disclosure Order **at all.** Indeed, they have consciously chosen not to respond to the Disclosure Order and, secondly, the Disclosure Order is an entirely separate order from that of Foxton J, and is to be obeyed on its own terms.

175. The next point relied upon by the Defendants is the privilege against self-incrimination addressed at [163] and [189], which perhaps even more clearly than other aspects of Naumenko 5 shows that, behind the scenes, D2 has been receiving advice in relation to the law of England and Wales which, at least to an extent, accurately identifies the English law of the privilege against self-incrimination. D2 rightly notes in that regard that the privilege as such only exists in relation to criminal offences under English law and even then it has been statutorily abrogated to a very significant degree.

176. D2 himself mentions intellectual property and theft cases but does not mention the abrogation of the privilege under the Fraud Act 2006 in relation to any offence under that act or any other offence involving any form of fraudulent conduct or purpose. He also cites *BTA v Ablyazov* [2009] EWCA (Civ) 1125 where he recognises that incrimination in foreign proceedings does not give rise to a privilege but merely to a discretion on the part of a judge considering ordering disclosure and presented with evidence of the same (see [17] of the Court of Appeal decision in that case).

177. Once again, the Defendants would have had an opportunity to make any such submissions before Jacobs J, and in fact they did make written submissions to him through the Ukrainian law team, but at that stage the Defendants did not make any suggestion of any risk of incrimination in any jurisdiction, still less in Ukraine or Cyprus. That was, in my view, a point that could and should, if it had any merit, have been taken before the Disclosure Order was made, but was not (I have to say in my view rightly) because it would not appear to be a point of any merit.

178. In this regard there is no asserted or logical connection between the information required to be disclosed and the criminal allegations being made against the Defendants in those

countries, which are said to concern missing grain and illicitly transferred assets, completely unrelated to those mentioned in the Disclosure Order.

179. In any event, of course, any "privilege" claim would have had to have been supported by actual evidence of a concrete risk that complying with a specific aspect of the Disclosure Order gave rise to a real and not fanciful grounds justifying a fear that the information sought would tend to incriminate the Defendants in relation to some specific crime (see *BTA Bank v Ablyazov* [2010], 1 WLR 976 (CA) at [5]).

180. In his witness statement D2 does not even purport to provide such evidence. At most he claims that he is "in a difficult position" and that he is "deeply concerned that complying with this order could result in information being used against [him] in future criminal proceedings". Even were this true, and it is certainly something that is not accepted by the Claimant, and amounts to no more than bare assertion, I am satisfied that that would not be sufficient to invoke the privilege or, even if relevant, to suggest that Jacobs J wrongly exercised his discretion in making the Disclosure Order. Still less would it provide any defence in relation to the Contempt Application itself, or justify not answering what was required in the Disclosure Order, on the facts that are before me.

181. Again, of course if there was any aspect of the Jacobs J order in relation to disclosure with which the Defendants were dissatisfied, they could have appealed that order or, at the time of the hearing itself, in relation to which they did put in written submissions, they could have sought to persuade Jacobs J, in the exercise of his discretion, not to make the order sought. It is also relevant to bear in mind, even if there had been any risk in that regard, which I do not consider to have been made out, that it would be resolved by the Claimant's usual undertaking not to use information obtained as a result of the WFO for the purposes of other proceedings, including any foreign criminal proceedings. I am satisfied that there is nothing in this point which assists the Defendants or begins to provide any defence.

182. The next matter raised is in relation to legal professional privilege at [190] to [201]. I am satisfied that the suggestion at [194] that the Disclosure Order infringes on legal advice privilege does not bear examination, and is unfounded. As is well-established, there is no legal advice privilege in anything other than the content of communications between a lawyer and client (or their respective agents). The identity of those who are lending money to a third-party company, which the Defendants have themselves disclosed, is being used as a source of payment to their lawyers, does not, I am satisfied, arguably engage such privilege. It is not relevant as a matter of law that the Disclosure Order requires the revelation of "details about the financial arrangements support [D's] legal defence" (see [196]).

183. Indeed, it is because of the Claimant's concerns, which are both evidenced and legitimate, as found by Jacobs J, that the Defendants are using undisclosed assets in breach of the WFO to finance their legal defences through purported "loans" to and from Waylink that led to the disclosure application, and that, no doubt, led Jacobs J to order the disclosure in the first place. I am satisfied that there is no information here that is "traditionally safeguarded by legal privilege", a further matter alleged by D2 at [196]. I also note that this point was not taken before Jacobs J and it was never suggested in the written submissions that were put in before him.

184. The next point referred to is an alleged risk of criminal liability under Ukrainian law. As to that, I am satisfied there is no sufficient evidence, factually or legally, of any such risk in Ukraine and, in any event, even if such matters arose that would not amount to a defence to the allegations of contempt. This is a matter that was raised in the letter of the Defendants to the Court on 13 May which accompanied the Draft Application. It was suggested that compliance with the Disclosure Order might infringe Ukrainian sovereignty and/or be offensive to public policy and/or result in criminal sanctions for the Defendants, which is a variation of the point now being advanced at [202] to [218] of Naumenko 5.

185. Quite apart from the fact that if such points were to be advanced they would need to be supported by evidence, including expert evidence as to Ukrainian law and related issues (none of which has been adduced), the same would not be a defence to the allegation of contempt. As I have already addressed, there is no requirement of intent to breach the Disclosure Order, nor any defence of "reasonable excuse". Thus, as the authors of *Civil Fraud* specifically identify at paragraph 35-029:

> "If the respondent is ordered by the English Court to do a particular thing in unconditional terms and fails to do so, his failure to comply with the order is not excused if compliance with it would (or might) constitute a breach of the order of a foreign Court."

186. A similar argument was raised and rejected in *Masri v Consolidated Contractors International SAL* [2011] EWHC 1024 (Comm) at [156] and [257] to [258]:

> "156. The judgment debtors do not contend, as I understand it, that they lacked the necessary intent. What they say is that they had a reasonable excuse for what they failed to do because of the constraints imposed upon them by the orders of the Lebanese Court. I address this contention in more detail hereafter. Dealing with the matter in general terms, I do not accept that where D is ordered by the English Court to do X in unconditional terms and fails to do so, his failure to comply with the order is excused if compliance with it would (or might) constitute a breach of the order of a foreign court. What course the Court takes if the existence of such an order is the reason for non compliance is a different question…
>
> …
>
> 257. Firstly, in making its order the Court will have exercised a jurisdiction which it is entitled to exercise (and to which, in the present case, the defendants have submitted) and made an order which it required to be obeyed. Save in circumstances for which the order provides it is to be obeyed. In making it the court may have taken into account (in the exercise of the flexible discretion) the possibility of conflict with a foreign law or the order of a foreign court. Even if it has not (because the possibility was not apparent or

> no order had been obtained) the English order must be obeyed. If the addressee of the order thinks that the order may cause him difficulties under the law of some foreign state it must seek to persuade the English court not to make it in the terms sought, or, if it has already been made, to vary it. If an order is made and has been broken the Court should not be deprived of its powers of enforcement over a person properly subject to its jurisdiction, whether or not he is also subject to some other jurisdiction.
>
> 258. Secondly, the approach contended for has the potential for unacceptable consequences. Litigants in this and other courts are often incorporated in foreign states. In many cases their business activities have no real connection with their place of incorporation which has been chosen so as to save tax or avoid the need to produce information or file accounts or for other reasons not all of which may be creditable. The jurisdiction is a jurisdiction of convenience. It is not difficult to think of circumstances in which an English court thinks it right to make orders (e.g. for the production of information) which would expose the company to a charge of breach of the criminal or civil law of the state in question or where a blocking order is readily obtainable. If the proposition argued for is correct there could be no sanction for contempt unless the company had agreed to the exclusive jurisdiction of the English court, even if the prospect of anybody doing anything about any breach of the foreign law obligation was unreal."

187. In such circumstances, therefore, there is no sufficient evidence factually or legally, of a risk in Ukraine, but in any event, even if there were, that would not amount to a defence for the reasons identified in the cases referred to above.

188. I would only add for completeness that this point about the risk of criminal liability under Ukrainian law would appear to be a rehash of the point (that I have identified) that was identified in the 13 May letter and the unissued Draft Application, which derived from an allegation that the Claimant was somehow in cahoots with Russian interests in seeking to take the Defendants' Ukrainian grain terminal businesses and hand them over to the Russians. That is contrary to the evidence that is before me from Mr Humphrey (see Humphrey at [36] to [42]).

189. In any event, that argument itself, even had it been factually true, does not attempt to explain how providing the information that is required could "assist entities linked to the Russian interests" or result in the Defendants "disclosing sensitive information that could be exploited by Russian linked entities", and even if such evidence had been adduced, it would not be legally relevant to the Defendants' obligation to comply with the Disclosure Order for the reasons which have been addressed.

190. Yet further, the suggestion that compliance with the Disclosure Order would risk the Defendants "being charged with treason or a similar felony under Ukrainian law" (an assertion made at [216]), is wholly unsupported by any evidence before me.

191. The next point raised in Naumenko 5 is the alleged breaches by the Claimant of disclosure orders as addressed at [219] to [240]. As is readily apparent, this complaint is a complaint about the Claimant's disclosure in the underlying arbitration, which is, of course, a matter for the tribunal and which I understand the Defendants have failed to demonstrate in any complaint that has been made by them.

192. Essentially, the Defendant is seeking to re-ventilate complaints which have not been found to be made out. On any view, however, such complaints cannot conceivably be relevant to, still less justify or excuse, the Defendants' own failure to comply with the Disclosure Order. Such matters, even if they were true, and even if they were made out, could not impinge upon the question of whether the Disclosure Order ought to be obeyed at the time it was made and the Defendants were obliged to respond to the same.

193. The next point that is raised is in relation to an assertion that the debts have been repaid (see [241] to [266]). Again it appears that this is a repetition of the Defendants' case on the merits in the underlying arbitration, where it was argued at great length at the recent final hearing and will be no doubt be a matter that will shortly be decided by the tribunal.

194. The Claimant's position is that it is factually and legally wrong, as the Claimant sets out in its own submissions and evidence to the tribunal, including by reference to the contractual interpretation of various complex security agreements between the parties, including the Suretyship Deeds themselves and a Security Trust and Inter-credit Deed, which, it is said, regulate the appropriation of any final and other recoveries by the Claimant to repayment of the debt.

195. In any event I am satisfied that such matters are irrelevant to the granting of the WFO itself since the Defendants' arguments in this regard do not undermine the existence of the Claimant's good arguable case to the contrary and *a fortiori* to the Disclosure Order that was made in aid of the WFO.

196. This all has echoes of the letter of 13 May 2024, where the Defendants asserted that they had not complied with the Disclosure Order on the basis that, "the Claimant has now seized our assets worth more than the value of its claim"; and/or that, "the deadline for compliance with the Disclosure Order [should] be extended until such time as the complainant complies with its own disclosure obligations as ordered by the Tribunal."

197. As I have already noted, the Claimant's position is that it is not accepted that it has recovered assets worth more than the value of the claim or indeed, in fact, any assets of any material value at all (see Humphrey 5 at [21]) and the evidence before me is that it is also not correct that the Claimant has failed to comply with any disclosure obligations in the underlying arbitration, although, of course, as I have already noted, that will be a matter for the Tribunal in any event. In addition, and as already addressed, on established principles, even if such allegations were true they would provide no excuse for breach of the Disclosure Order, nor any defence to the allegation of contempt.

198. The next section of Naumenko 5 addresses the application to discharge the freezing orders at [267] to [282]. I have already addressed such matters when addressing the history of the Draft Application to discharge, commencing with the letter of 13 May, the subsequent correspondence between Hogan Lovells and the Defendants, and the recent exhibiting

yesterday of some CE-Filing contacts between the Defendants and Commercial Court Listing. Ultimately, and as I have already identified, none of that has led to service of any such application, still less the fixing or hearing of any such application, and in the meantime the Defendants were obliged to comply with the terms of the Disclosure Order. Accordingly, such matters are irrelevant and do not provide a defence to the Contempt Application.

199. The final matter addressed at [283] of Naumenko 5 is a somewhat surprising and disingenuous assertion on D2's part. D2 suggests that the Defendants have shown "a diligent and proactive approach" to complying with the Disclosure Order and that "allegations of non-compliance are unfounded". Quite how D2 feels able to so opine is not clear in circumstances where the evidence before me is unequivocal that far from adopting a diligent and proactive approach, and far from the allegations of non-compliance being unfounded, the Defendants have demonstrably and expressly failed to comply in any way with the Disclosure Order and indeed made clear their position that they would not do so immediately after the time for disclosure had expired.

200. Whilst I have considered Naumenko 5 *de bene esse,* and have had careful regard to its contents so as to ensure it does not reveal any arguable defence, it might be thought that such assertions, which are demonstrably untrue, rather undermine the weight to be attached to Naumenko 5. In any event, and even treating Naumenko 5 at face value, I am satisfied that there there is nothing in it which would assist the Defendants, or provide any defence, in relation to the Contempt Application.

201. Mr Naumenko's attempt to suggest that the Defendants have complied with the Disclosure Order, which, of course, is dated 19 April 2024, is based on steps which the Defendant had taken **prior** to the order ever being made. Thus, he refers to nominees in [285] (the date of that being 1 February 2023; and in [286] to 1 April 2023 and 20 June 2023; and [287] to 30 July 2023; reference to dividends at [289] (dated 1 December 2023); and Waylink at [293] to [295] (with dates 1 April 2023, 20 June 2023 and 30 July 2023). All such matters obviously pre-date the order of Jacobs J and, as Mr Pillow KC submitted in the course of his oral submissions, were indeed the very foundations for what led Jacobs J to consider that it was necessary to make the Disclosure Order in the first place. None of these matters can amount to compliance with a Disclosure Order that had not yet even been made, and the Defendants have done nothing to comply with the Disclosure Order since it was made.

202. I have addressed each of the areas addressed in Naumenko 5 at some length to ensure that there is nothing therein which assist the Defendants, or provides any defence to the Contempt Application. Having done so, I return to the outset of Naumenko 5 and the points that were submitted by Mr Naumenko at [3]. I will repeat those and interject my findings in relation to them as I do so.

203. It will be recalled that Mr Naumenko submitted that the Contempt Application should be dismissed for the following reasons:

(1) There exist contradictory orders issued by Foxton J and Jacobs J which render the nature of these orders ambiguous. For the reasons that I have given I am satisfied that there is no contradiction between the orders and there is no ambiguity in the orders.

In particular, the order of Jacobs J is clear, unequivocal and should have been complied with.

(2) Secondly, it is said the enforcement of the order in question contravenes the principles of legal professional privilege. As already addressed in detail, it does not do so and there is no proper evidential basis for that assertion, as I have already addressed.

(3) Thirdly, it is said that disclosure of information and documents pursuant to the order are privilege against self-incrimination given the pending criminal proceedings in Cyprus and Ukraine in respect of which the Claimant has not been providing us with full access and explanation. Again, those would be, as I have already addressed, matters going to the discretion to make the order in the first place, they could have been, but were not, raised at the time, and in any event the obligation is upon the Defendants to comply with the Disclosure Order as made. There is also a complete lack of any evidence that compliance would put either Defendant at risk of self-incrimination in any part of the world. I have already addressed the nature of the allegations in Cyprus and Ukraine and the reasons why the points made by D2 in Naumenko 5 do not assist him in relation to the defence of the Contempt Application.

(4) The fourth point is the debt which is the primary subject of the dispute has already been discharged, and this issue is subject to an unrelated LCIA Arbitration. First, D2 expressly thereby recognises that this issue is subject to an unrelated LCIA Arbitration and, in any event, and as I have already addressed, such matters, as raised in the LCIA Arbitration are irrelevant in relation to compliance with the Disclosure Order. In any event, and as already addressed, the evidence before me is that the debt has not been discharged, and in any event the Disclosure Order remains extant and should have been obeyed.

(5) Fifthly, it is said there are pending proceedings initiated by the Defendants seeking to discharge the WFO and it is an abuse of process to seek our committal when the orders of which you have said they are in contempt are being challenged. Again, I have addressed this at length. In this regard whilst the Claimants have been provided with an unissued application, the evidence as to whether or not that has been filed is less than clear, but in any event any such application has not been served, still less fixed for hearing, still less heard, and it is not an abuse of process to seek the committal of the Defendants for a failure to comply with the extant Disclosure Order. Even if there had been such a challenge, then pending the outcome of any such challenge, the Defendants were, and remain, obliged to comply with the Disclosure Order. I am satisfied there is no abuse of process and there is no matter there raised which would amount to a defence to the charge of contempt which is advanced.

E.3.2. THE REQUIREMENTS

204. Turning then to the requirements in relation to contempt, in relation to each of which I must be satisfied so that I am sure (beyond reasonable doubt).

(1) **The Defendants' awareness of the Disclosure Order** - As I have already addressed in relation to service, the Defendants had full awareness of the Disclosure Order and knowledge of its terms and of this hearing and how they could attend this hearing, and

I am satisfied, so that I am sure, that the Defendants had full awareness of the Disclosure Order and knowledge of its terms and I so find.

(2) **The Defendants acted or failed to act in a manner which involved breach of the Disclosure Order** – The starting point is that the Defendants did not give the required disclosure. This is undisputed. Accordingly, this is not a case where the quality of the Defendants' compliance is at issue, save, I suppose, for the assertions made by D2 in Naumenko 5, which I have already addressed and which, for the reasons I have given, do not bear examination and in any event appear to relate to events even before the Disclosure Order was made.

The position is that neither Defendant has alleged otherwise, save for such bare assertion from D2 that they have complied with their obligations under the Disclosure Order, and indeed the documentary record is that they have not done so and have chosen not to do so.

D1 has never himself given any explanation or justification for the non-compliance save to the extent that he envisaged that any evidence that would be supplied by D2 would be relied upon him as well, and I assume in his favour that he adopts any points made by D2.

As already noted, the day before this hearing the D2 served Naumenko 5 in support of his submission that the application should be dismissed for the reasons there identified. For the reasons I have given, both in relation to those five reasons and in relation to Naumenko 5 as a whole, there is nothing in that statement which gives rise to any defence or which would cast into doubt that the Defendants acted or failed to act in a manner which involved breach of the Disclosure Order.

I am satisfied so that I am sure that none of the matters raised by D2 means that D1 or D2 was not in breach of the Disclosure Order or provides a defence, or means that the Defendants did not act, or fail to act, in a manner which involved a breach of the Disclosure Order. I am satisfied so that I am sure that the second requirement is satisfied in circumstances where the Defendants' failure to give the Disclosure Ordered amounted to them thereby acting and failing to act in a manner which did involve a breach of the Disclosure Order.

(3) **The Defendants knew the facts which made their conduct a breach** – I am satisfied so that I am sure that the Defendants knew that they were failing to disclose the required documents and information and that they intentionally chose not to make that disclosure. As already addressed, it is irrelevant whether the Defendants also knew that their conduct was in breach of the Disclosure Order, although I am satisfied so that I am sure that they did.

In any event I am satisfied so that I am sure that the Defendants knew the facts, namely their omission to provide the disclosure, and that such omission made their conduct a breach of the Disclosure Order. I have already addressed their letter to the Court on 13 May and the contents of Naumenko 5. I am satisfied that there is nothing in either of those documents which would amount to a defence or which would impinge upon the third requirement.

I am satisfied so that I am sure that each of the Defendants knew the facts which made their conduct a breach in circumstances where they knew they were failing to disclose the required documents and information and intentionally chose not to do so in circumstances which provided no excuse for breach of the Disclosure Order, nor any defence to the allegation of contempt.

E.3.3. CONCLUSION

205. I am accordingly satisfied, so that I am sure, that all of the required elements of the alleged contempt are clearly established beyond reasonable doubt and declare that D1 and D2 have committed a Contempt of Court by failing to obey the Disclosure Order. An Order will be drawn up accordingly.

206. I adjourn sentence to 4 October 2024 so as to provide the Defendants with an opportunity to provide any mitigation that they may wish to advance, and I will give consequential directions in relation to that, and the sentencing hearing, hereafter.