Neutral Citation Number: [2024] EWHC 2587 (Ch)

Claim No. BL-2023-001460

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

11th October 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

HADCLIFFE PROPERTIES LIMITED

Claimant

and

(1) THE RIND FOUNDATION
(2) IAN JONATHAN FENTON

Defendants

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Suleman Ahmed (instructed by RWK Goodman LLP) for the Claimant
Joseph Sullivan (instructed by Quastels LLP) for the Defendants

Hearing dates: 25th and 26th July 2024

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 11.00am on Friday 11th October 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. On 2nd November 2023 Penelope Reid KC, sitting as a Deputy Judge of the High Court, made a freezing order (**"the Freezing Order"**) against the First Defendant and a search order (**"the Search Order"**) against the Second Defendant, on the without notice application of the Claimant.

2. By paragraph 10(1) of the Freezing Order the Deputy Judge ordered the First Defendant to provide the following information:

> *"(1) Unless paragraph (2) applies, the First Respondent must by 4.30pm on the next working day after service of this order and to the best of its ability inform the Applicant's solicitors of all its assets in England and Wales exceeding £1,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets."*

3. By paragraph 11 of the Freezing Order the Deputy Judge ordered the First Defendant to confirm this information by a sworn affidavit:

> *"11. Within five working days after being served with this order, the First Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information."*

4. It is common ground that these obligations fell to be complied with by the Second Defendant, as sole trustee of the First Defendant.

5. It is also common ground that the Freezing Order was served on the First Defendant on 3rd November 2023. As such, the Second Defendant was required:
   (1) to provide the information specified in paragraph 10(1) of the Freezing Order by 4.30pm on the next working day, which was 6th November 2023, and
   (2) to provide the affidavit specified in paragraph 11 of the Freezing Order by 10th November 2023.

6. The Second Defendant provided the required information on 10th November 2023.

7. The Second Defendant provided the required affidavit confirming this information on 16th November 2023.

8. On 15th November 2023 the Claimant issued a contempt application (**"the Contempt Application"**) against the Second Defendant, on the basis that the Second Defendant was in contempt of court by virtue of his failure to comply with paragraphs 10(1) and 11 of the Freezing Order.

9. On 26th February 2024 the First Defendant issued an application (**"the Strike Out Application"**) to strike out the Contempt Application, pursuant to CPR 3.4(2)(b) or alternatively pursuant to the inherent jurisdiction of the court, on the basis that the Contempt Application is an abuse of the process of the court.

10. It is these two applications (**"the Applications"**) which have come before me for decision. In theory, the Strike Out Application fell to be heard and determined prior to the Contempt Application. For reasons which I shall explain, this was not a feasible

course to take in the present case. Instead, I heard the evidence and submissions on the Applications together. This is therefore my reserved judgment on the Strike Out Application and, subject to the outcome of the Strike Out Application, the Contempt Application.

11. On the hearing of the Applications the Claimant was represented by Suleman Ahmed, counsel. The Defendants were represented by Joseph Sullivan, counsel. I am grateful to both counsel for their assistance, by their written and oral submissions, in my consideration of the Applications.

12. The hearing of the Applications involved my hearing the oral evidence of witnesses. This oral evidence occupied the bulk of the first day of the hearing. In these circumstances, and given that it seemed inevitable that I was going to have to reserve my judgment, I was concerned that there was no transcriber at the hearing, and thus no available transcript of the hearing. At my request however, and following the hearing, I was provided with a note of the hearing made by a member or members of each party's legal team. These notes were immensely useful to me, in my preparation of this judgment, in recalling the detail of the oral evidence. I am most grateful for the hard work done, on each side, by those who produced the notes.

The conventions of this judgment

13. I will refer to the hearing before Penelope Reed KC on 2nd November 2023, when the Freezing Order and the Search Order were made, as **"the Initial Hearing"**. I will refer to the judge herself as **"the Deputy Judge"**. Other definitions are as established in the course of this judgment. References to Paragraphs (without more) are, unless otherwise indicated, references to the paragraphs of the Freezing Order. Italics have been added to quotations in this judgment. Where emails are referred to, the time of each email is given, using a 24 hour clock.

The parties

14. The Claimant is a property development and investment company which was established by Mrs Sylvia Rind. Her son, Alan Rind (**"Mr Rind"**), was a director of the Claimant from 1971 until his death in November 2022.

15. The First Defendant is described as The Rind Foundation. The Rind Foundation is a charitable trust which was established by Mrs Rind in 1978. Mr Rind was a trustee of the First Defendant until his death. The First Defendant has a 20.5% shareholding in the Claimant.

16. The remainder (79.5%) of the shares in the Claimant are owned by a company, originally incorporated in the British Virgin Islands and subsequently moved to the Isle of Man, called Lone Star State Land Company Limited (**"Lone Star"**). Lone Star is wholly owned by the Phi Settlement, a discretionary settlement created in 1986.

17. The Second Defendant, Ian Fenton, is a qualified chartered accountant. The Second Defendant was previously a director of the Claimant, from 7th December 2015 to 8th September 2023. The Second Defendant was a trustee of the First Defendant, with Mr Rind and, following the death of Mr Rind, became the sole trustee of the First Defendant. I was told by Mr Sullivan, at the hearing, that a new trustee had now been appointed, as joint trustee with the Second Defendant.

Disclosure

18. In the course of pre-reading for the hearing of the Applications, I recalled that I had, when in practice some years ago, advised the Claimant in relation to the enfranchisement of a leasehold property. I believe that the advice was given at least ten years ago, or possibly longer, and was confined to a single advice. I disclosed this recollection to the parties, prior to the commencement of the parties, and invited the parties to make submissions on the question of whether I should recuse myself. Neither party objected to my hearing the Applications. This was not necessarily decisive. I still had to be satisfied that it was appropriate for me to hear the Applications.

19. In this context, the following factors seemed to me to be important. First, the advice was given many years ago. Second, the advice was concerned with a subject matter having no conceivable connection with the subject matter of the Applications. Third, I had only very limited recollection of the case and my advice, and no recollection of anything which might compromise my ability to make an impartial decision on the Applications. Fourth, the parties would have been put to additional expense and delay, in a case where there has already been a considerable delay in the hearing of the Contempt Application, if I had to recuse myself. Fifth, the parties did not object to my hearing the Applications.

20. Putting all of these factors together, I was satisfied that it was neither necessary nor appropriate for me to recuse myself from hearing the Applications.

The claims in the action

21. I need give only a very brief summary of the claims in the action. The primary claim in the action is that the Second Defendant, in breach of his duties as a director of the Claimant, procured the transfer to the First Defendant from the Claimant of sums amounting to £9,102,450. So far as the First Defendant is concerned, the Claimant's case is that the First Defendant is liable to account for these sums on the grounds of knowing receipt and/or as money had and received. In terms of relief, a claim for an account is made against both Defendants. Damages and equitable compensation are claimed against both Defendants, in addition to a claim, against the First Defendant, for money had and received.

22. There is also a claim that the Second Defendant has wrongfully removed to his home address and retained documents belonging to the Claimant. The Claimant's case is that the documents should have been returned to the Claimant when the Second Defendant resigned as a director of the Claimant. In terms of relief the Claimant seeks a declaration that the Second Defendant holds the relevant documents on trust for the Claimant, orders for the return of the documents to the Claimant, all necessary accounts and inquiries required for the purposes of tracing the documents and, in the alternative to an order for the restitution of the documents, damages for conversion.

23. Each of the Defendants has filed a Defence, denying the claims made against them in the action.

The identity of the Defendants

24. The identification of the Defendants in the action, as the action is currently constituted, seems to me to be, at the least, unsatisfactory, and, at the worst, inaccurate and wrong. In order to avoid aggravating this confusion, in what I am about to say, I will adopt the

following course. I will refer to the charitable trust known as The Rind Foundation, identified as the First Defendant in the action, as **"TRF"**. I will refer to Ian Jonathan Fenton, identified as the Second Defendant in the action, as **"Mr Fenton"**.

25. Although the statements of case in the action are somewhat opaque on this point, the Claimant's position, as I understand it, is that TRF does not have legal personality. This did not appear to be disputed by Mr Sullivan, for the Defendants. Assuming, which appears to be the case, that TRF does not have legal personality, it seems to me that TRF is not correctly identified as the First Defendant in this action. The correct defendant or defendants to the claims made in the action against TRF is the person or persons who were trustees of TRF at the relevant time and/or are now trustees of TRF. Given the time period engaged by the Claimant's claims, those relevant persons would appear to be the late Mr Rind and Mr Fenton, when they were joint trustees of TRF, Mr Fenton, in respect of the period when he was sole trustee of TRF and, as matters now stand, Mr Fenton and the new co-trustee of TRF (if Mr Sullivan was correct in telling me that a new trustee has been appointed as joint trustee with the Second Defendant).

26. This confusion may result, or may partly result from the fact that, as it seems to me, Mr Fenton is being sued in two capacities in this action. Leaving aside questions of joint trusteeship, the claims against TRF in the action seem to me to be claims against Mr Fenton in his capacity as trustee of TRF. As I have already noted however, the primary claim in the action is a claim against Mr Fenton, in his capacity as a former director of the Claimant, for alleged breaches of his duties as a director. As I understand the Amended Particulars of Claim in the action, the claim based on the alleged wrongful removal and retention of documents, which was the subject of the Search Order, is also a claim made against Mr Fenton in his capacity as a former director of the Claimant. I note that the Search Order was expressed to be made against Mr Fenton. This seems to me to have been correct, given that the Search Order was made, as I understand the position, against Mr Fenton in his capacity as a former director of the Claimant.

27. Turning to the Freezing Order, it was expressed to have been made against TRF; see Paragraph 1. Given that Mr Fenton was the sole trustee of TRF at the time when the Freezing Order was made, it seems to me that the Freezing Order should have identified the person subject to the Freezing Order as Mr Fenton, in his capacity as sole trustee of TRF. I should also mention, in case I am thought to be criticising the Deputy Judge, that I have read the transcript of the Initial Hearing, the approved transcript of the judgment given by the Deputy Judge on the application for the Freezing Order, and the evidence put before the Deputy Judge in support of that application. It is not clear to me that it was explained (or at least clearly explained) to the Deputy Judge that TRF did not have legal personality.

28. The position is not quite the same in relation to the Contempt Application as in relation to the Freezing Order. Mr Fenton is identified as the respondent to the Contempt Application. Mr Fenton is not identified in the title to the Contempt Application as respondent in his capacity as sole trustee of TRF. The particulars of breach in box 7 of the application notice identify Mr Fenton as sole trustee of TRF, although those particulars do also refer to TRF as the (apparently separate) person against whom the Freezing Order was granted. A similar confusion appears in the Strike Out Application, where the application notice is expressed to have been issued on behalf of the First Defendant; that is to say TRF.

29. Fortunately, it seems to me that this confusion in the identity of the Defendants does not affect what I have to decide. It is, as I have said, common ground that the obligations in Paragraphs 10(1) and 11 fell to be complied with by Mr Fenton in his capacity as sole trustee of TRF. No point has been taken on the identification of the parties to the Applications. No point has been taken on the fact that the Freezing Order was expressed to be made against TRF, while the Contempt Application has been made against Mr Fenton. In these circumstances I can proceed on what seems to me to be the correct basis; namely (i) that the respondent to the Contempt Application is Mr Fenton, in his capacity as sole trustee of TRF at the time when the Freezing Order was made and fell to be complied with, and (ii) that the applicant in the Strike Out Application is Mr Fenton, again in his capacity as sole trustee of TRF at the time when the Freezing Order was made and fell to be complied with.

30. I will however continue to refer to The Rind Foundation as TRF. I will also continue to refer to Mr Fenton, rather than the Defendants. Given that I am concerned with the Contempt Application and the Strike Out Application, references to Mr Fenton mean, unless the context otherwise requires, Mr Fenton in his capacity as former sole trustee of TRF.

The evidence

31. In addition to the documents in the hearing bundle, both parties relied on witness evidence.

32. The Claimant adduced evidence from the following witnesses, in support of the Contempt Application and in response to the Strike Out Application:
    (1) Daniel Dodman is a solicitor and a partner in RWK Goodman LLP (**"RWK"**), the Claimant's solicitors. Mr Dodman is the leader of the legal team within RWK which acted for the Claimant in relation to the obtaining of the Freezing Order and the Search Order and in relation to the chain of events subsequent to the obtaining of those orders (**"the Orders"**). Mr Dodman made two affidavits in relation to the Applications, on which he was cross examined. The first of these affidavits (Mr Dodman's second affidavit in the action) was sworn on 15th November 2023, in support of the Contempt Application. The second of these affidavits (Mr Dodman's third affidavit in the action) was sworn on 26th March 2024, in further support of the Contempt Application and in response to the Strike Out Application.
    (2) Jack Pestill is a solicitor and a senior associate in RWK. Mr Pestill was a member of the legal team acting for the Claimant in relation to the obtaining of the Orders and in relation to the subsequent chain of events. Mr Pestill made an affidavit (his first in the action) sworn on 15th November 2023 in support of the Contempt Application. Mr Pestill was not required to be cross examined on this affidavit. Accordingly, his evidence in the affidavit is not challenged.
    (3) Nigel Rotheroe was appointed as a director of the Claimant on 8th September 2023. He is also a director of Odin Directors Limited, which is the sole director of Lone Star, the majority shareholder in the Claimant. Mr Rotheroe made an affidavit (his second in the action) sworn on 12th June 2024 in support of the Contempt Application and in response to the Strike Out Application. Mr Rotheroe was cross examined on his affidavit.

33. Mr Fenton adduced evidence from the following witnesses, in support of the Strike Out Application and in response to the Contempt Application:
    (1) Luke Turtle is a solicitor and a senior associate in Teacher Stern LLP (**"TS"**), who acted for Mr Fenton, in his capacity as trustee of TRF, in relation to the events subsequent to the Claimant obtaining the Orders. Mr Turtle made a witness statement, dated 26th February 2024, in support of the Strike Out Application. Mr Turtle was cross examined on his witness statement.
    (2) Mr Fenton also made a witness statement, dated 23rd May 2024, in response to the Contempt Application. Mr Fenton was cross examined on his witness statement.

34. For reasons which I shall explain, neither of the Applications raises any acute conflict of evidence. As a general rule, this is not a case where I have to decide between competing accounts of events given by the witnesses. The cross examination of the witnesses did involve some challenges to their evidence, but the cross examination was relatively short, largely because (i) the chain of relevant events can substantially be seen from the inter-solicitor correspondence which followed the Initial Hearing, and (ii) the inferences and conclusions to be drawn from the correspondence were principally a matter for submissions rather than the cross examination of witnesses of fact.

35. In these circumstances my assessment of the witnesses is less important than it might be in other cases. I should however say that I am satisfied that all the witnesses who gave oral evidence were honest in their evidence and, so far as they were able to do so, were doing their best to assist me with their recollection of the relevant events. As I have recorded, Mr Pestill's evidence was not challenged. So far as the remaining witnesses are concerned and unless otherwise indicated, I accept their evidence, so far as it deals with matters of fact. I include this latter qualification because some of the evidence and some of the cross examination on that evidence strayed into matters of submission rather than fact.

36. Notwithstanding the above position on the evidence, I remind myself that the Contempt Application is an application by which the Claimant seeks to establish that Mr Fenton was in contempt of court. As such, and subject to the outcome of the Strike Out Application, the burden is upon the Claimant to establish the alleged contempt of court, and the standard of proof is the criminal standard of proof.

<u>The structure of the remainder of this judgment</u>

37. It is convenient at this point to explain the reasons why I decided to hear the evidence and submissions on the Applications together. It is not now disputed that Mr Fenton did breach Paragraph 10(1), by providing the required information on 10th November 2023 rather than 6th November 2023. Equally, it is not now disputed that Mr Fenton did breach Paragraph 11, by providing the required affidavit on 16th November 2023 rather than 10th November 2023.

38. The real argument between the parties is as to whether I should find Mr Fenton to have been in contempt of court, by reason of these breaches of the Freezing Order, or whether the Contempt Application should be struck out as an abuse of process. In order to resolve this argument, and to make a decision on the Applications, it is necessary to consider the chain of events which occurred in the aftermath of the Initial Hearing and the making of the Orders. It follows that it is not possible to separate out the events relevant to the Strike Out Application from the events relevant to the Contempt Application. The same

chain of events needs to be considered. In these circumstances it seemed to me that the sensible course was to hear all of the evidence and submissions in the Applications together.

39. So far as the remainder of this judgment is concerned, the structure is as follows:
    (1) I start by saying something about the burden of proof in relation to the Applications, which is complicated by the fact that I am not dealing with the Contempt Application on its own.
    (2) I must then set out, in a certain amount of detail, the chain of events which followed the Initial Hearing and the making of the Orders.
    (3) I must then deal with the Claimant's allegation that Mr Fenton was in knowing and wilful breach of the Freezing Order, which is conveniently dealt with separately to my account of the relevant chain of events.
    (4) I will then consider the Strike Out Application.
    (5) I will then, subject to the outcome of the Strike Out Application, consider the Contempt Application.

The burden of proof

40. In setting out the relevant chain of events, there is a potentially complicating factor. Where it is necessary to make a particular finding of fact, who has the burden of proof, and what is the standard of proof? These questions arise because the same chain of events is being considered, both in relation to the Contempt Application and the Strike Out Application. In general terms, the position seems to me to be this. So far as the Contempt Application is concerned, the burden is upon the Claimant to prove, to the criminal standard of proof, the facts relied upon to establish the alleged contempt. So far as the Strike Out Application is concerned, the burden is upon Mr Fenton to prove, on the balance of probabilities, the facts relied upon to contend that the Contempt Application constitutes an abuse of process. I understood both counsel to accept that this was the correct analysis of the position, when I put this particular point to them in the course of their submissions.

41. In theory, this renders the making of findings of fact in relation to the Applications a difficult process, given the absence of a clear line of division between facts relied upon in support of the Contempt Application and the facts relied upon in relation to the Strike Out Application. In reality, I do not think that this is as much a problem as might first appear, for the following reasons.

42. First, and as I have already noted, neither of the Applications raises any acute conflict of evidence. As I have said, and as a general rule, this is not a case where I have to decide between competing accounts of events given by the witnesses. Where there is uncertainty in the evidence, my task is more concerned with assessing the available evidence, as opposed to resolving conflicts of evidence.

43. Second, and so far as the Strike Out Application is concerned, Mr Fenton's case essentially depends upon the dealings between the parties between 3rd November 2023, when the Search Order was executed and the Freezing Order was served, and 20th November 2023, when the Contempt Application was served upon Mr Fenton. The relevant facts in relation to these dealings can largely be discerned from the communications between the solicitors acting for the parties during this period and the

report of the supervising solicitor in relation to the execution of the Search Order on 3rd November 2023.

44. Third, and turning to the Contempt Application, the essential position is a relatively simple one. It is not now in dispute that Mr Fenton was in breach of Paragraphs 10(1) and 11, to the extent set out earlier in this judgment. As Mr Ahmed pointed out in his submissions, the Claimant does not have to prove that the breaches of the Freezing Order were deliberate on the part of Mr Fenton, in order to establish contempt, or that Mr Fenton had actual knowledge that he was breaching the Freezing Order, at the time when the breaches occurred. Given that it is now conceded that Mr Fenton was served with the Freezing Order on 3rd November 2023, Mr Fenton is deemed to have been fixed with knowledge of the terms of the Freezing Order on that date; see the judgment of Rose J (as she then was) in *Reynolds v Long* [2018] EWHC 3535 (Ch) at [45]-[47]. On this basis, and subject to the Strike Out Application, it seems to me that it is sufficient, at least in principle, in order to establish contempt, for the Claimant to demonstrate that Mr Fenton did not comply with Paragraphs 10(1) and 11 by the due dates; such non-compliance now being admitted; see the judgment of Rose LJ (as she then was) in *Varma v Atkinson* [2020] EWCA Civ 1602 [2021] 2 WLR 536 at [54]-[55].

45. The consequence of what I have said in my previous paragraph is that it seems to me, as a matter of general approach to the burden of proof, that the burden is upon Mr Fenton to establish matters of fact, in relation to the relevant chain of events and so far as the same are not admitted, upon which Mr Fenton wishes to rely in support of the Strike Out Application. As a general rule therefore, my analysis of the relevant chain of events proceeds on the basis that the burden of proof is upon Mr Fenton to establish, to the civil standard of proof (ie. on the balance of probabilities), facts which are not admitted and upon which Mr Fenton wishes to rely in support of the Strike Out Application.

46. I say this subject to one potentially important exception. In its own case in the Applications the Claimant does seek to go further than the facts which, as it seems to me and at least in principle, the Claimant needs to prove in order to establish contempt. The Claimant does seek to establish that Mr Fenton was in knowing and wilful breach of the Freezing Order; in other words that he knew that he was breaching the Freezing Order, and was acting wilfully, when the breaches occurred. I can see that this allegation of knowing and wilful breach is capable of being relevant in the Strike Out Application and, subject to the Strike Out Application, would be relevant in relation to the question of sentencing, if contempt is established. In terms of the burden of proof however the position seems to me to be as follows. It seems to me that it is for the Claimant to demonstrate to the criminal standard of proof, if it can, that Mr Fenton was in knowing and wilful breach of the Freezing Order. Given the nature of this allegation and its potential relevance to the question of sentence, it seems to me that the burden must be on the Claimant to prove this allegation, to the criminal standard of proof. This however does not seem to me to raise complicated problems, in terms of the overlap between the Contempt Application and the Strike Out Application. This seems to me to be a distinct allegation, which the Claimant must prove.

<u>The relevant chain of events following the Initial Hearing</u>

47. The Orders were made, at the Initial Hearing on 2nd November 2023, by the Deputy Judge. Both of the Orders were made on the without notice application of the Claimant. The first that Mr Fenton knew of these events was when the Search Order came to be

executed, at his home address, in the early morning of 3rd November 2023, which was a Friday.

48. The supervising solicitor in respect of the Search Order was a Ms Colston, a partner at Brown Rudnick LLP, assisted by a Ms Curtis, a solicitor in the litigation team at Brown Rudnick. I have the benefit of a detailed report of the events of 3rd November 2023 in relation to the Search Order, prepared by Ms Colston and dated 7th November 2023. I have read this report. Ms Colston did not give evidence at the hearing of the Applications but, so far as I could see, there did not appear to be any material dispute over the content of Ms Colston's report, at least for the purposes of the Applications.

49. The team of solicitors from RWK who attended at Mr Fenton's home address for the purposes of the execution of the Search Order comprised Mr Dodman, Ms May-Beshir and Mr Pestill. Ms May-Beshir had to leave at around lunchtime, and was replaced by Mr Webb. The evidence of Mr Dodman and Mr Pestill included evidence in relation to the execution of the Search Order. Mr Fenton's evidence also included evidence in relation to the execution of the Search Order.

50. It is not necessary to go through the events of 3rd November 2023 in detail. The Search Order was executed, and it has not been suggested that Mr Fenton failed to comply with the Search Order. I note the following points in relation to the events of 3rd November 2023:
    (1) The process of execution of the Search Order commenced at just after 7.00am, when Ms Colston and Ms Curtis attended at Mr Fenton's home. Ms Colston served Mr Fenton with the Search Order and associated documents, and explained the terms of the Search Order.
    (2) Shortly after the arrival of Ms Colston and Ms Curtis at Mr Fenton's home, Mr Fenton contacted Mr Summerfield, a solicitor at Solomon Taylor Shaw LLP (**"STS"**). Mr Summerfield attended at Mr Fenton's home to assist and advise Mr Fenton in relation to the execution of the Search Order. Mr Summerfield arrived shortly after 7.30am, and was present and involved (assisting and advising Mr Fenton) for the remainder of the process of execution, save for a brief absence to collect his laptop computer.
    (3) Mr Summerfield took the advice of counsel (Alec McCluskey), on behalf of Mr Fenton. It appears from Ms Colston's report that Mr Summerfield first consulted Mr McCluskey at or shortly after 9.00am, and that counsel had further input during the process of execution of the Search Order.
    (4) The RWK team entered Mr Fenton's house at 9.32am. The actual search process commenced shortly thereafter.
    (5) The process of execution of the Search Order lasted all day. It is not entirely clear from Ms Colston's report when the different parts of the process came to an end. Mr Webb of RWK is recorded as having left Mr Fenton's home, with five boxes of documents, at around 5.30pm. Ms Colston left the premises at 7.35pm.

51. There are three other matters relating to the events of 3rd November 2023 and the execution of the Search Order which I should mention.

52. The first matter is that at around 12.30pm Mr Dodman provided to Mr Fenton a box of papers containing the Freezing Order, a covering letter from RWK and various associated documents. A copy of what I understand to be this covering letter is included in the

hearing bundle. The covering letter was dated 3rd November 2023 and was addressed to Mr Fenton in person, without identification of his capacity as trustee of TRF. The letter was expressed to be delivered by hand and stated that the documents enclosed with the letter, which were listed in the letter and included the Freezing Order, were being provided *"by way of service"*. In paragraph 20 of his third affidavit Mr Dodman says as follows:

> *"I handed the box to Mr Fenton telling him that the documents inside related to the Freezing Injunction. Mr Fenton looked concerned at being given more documents and Mr Summerfield addressed him and said something similar to that it was fine and he would explain the consequences of the order in due course but, for the moment, Mr Fenton needed to focus on complying with the Search Order. That seemed eminently sensible to me but the inference in Mr Turtle's statement that Mr Fenton was provided with a host of boxes which had the Freezing Injunction hidden amongst them is entirely inaccurate."*

53. In paragraph 5.24 of her report Ms Colston deals with this incident fairly shortly, saying that Mr Dodman served court documents on Mr Fenton at about 12.30pm with Mr Summerfield present, and that her understanding was that these were freezing orders, although she was not provided with copies of the same.

54. Mr Dodman's account of his provision of the box of documents to Mr Fenton, in paragraph 20 of his third affidavit, was not challenged in cross examination. I accept Mr Dodman's account of what was said and done, as set out in the extract from paragraph 20 of his third affidavit which I have quoted above. As I have previously explained, it is now accepted that the provision of the box of documents to Mr Fenton at around 12.30pm on 3rd November 2023 did constitute service of the Freezing Order on Mr Fenton. The actual knowledge and understanding of Mr Fenton and those advising him, on and after 3rd November 2023, in relation to the question of service of the Freezing Order, is a matter to which I will need to return.

55. The second matter is that Mr Fenton gave evidence, both in his witness statement and in his oral evidence, that the events of 3rd November 2023 were an extremely stressful and traumatic experience for him. In his witness statement he says that he had had no previous experience of litigation of this kind, that he was completely overwhelmed and that he felt under immense pressure. His stress was increased by the fact that, as an observant member of the Jewish faith, he had to leave for the synagogue in the afternoon, as it was the Sabbath. He says that subsequently, on 15th November 2023, he was signed off work with stress-related symptoms. Subject to one minor qualification I accept all this evidence. A search order is a highly intrusive form of order for a court to make. Not only that, but it is in the nature of a search order that the respondent, as a general rule, has no prior knowledge that the search will take place. The first notice is, more or less literally, the knock on the door. I would expect the process of executing a search order in a respondent's home to be a stressful experience for any respondent, independent of the fact that a respondent served with an order such as a freezing order or a search order will normally be required, as a result of the making of the order, to instruct lawyers and to engage in a good deal of activity within a very short space of time.

56. The only minor qualification to what I have just said is that it was apparent from the evidence that Mr Fenton did have some limited experience of previous litigation, in the sense that there appear to have been proceedings commenced in the Isle of Man

concerning certain Manx trusts and companies said to have been associated with Mr Rind. I know little about these proceedings, or in what capacity or to what extent Mr Fenton has been involved in those proceedings, but I do note that a property freezing order was obtained in the Isle of Man on 27th April 2023, in respect of which an unsuccessful contempt application was made against Mr Fenton by Odin Directors Limited (mentioned above as the sole director of Lone Star), of which Mr Rotheroe is a director. It may be therefore that the Isle of Man proceedings gave Mr Fenton some limited experience of litigation of a similar kind, prior to 3rd November 2023, although there is the obvious point that that litigation did not involve an unexpected search of Mr Fenton's home. In cross examination Mr Ahmed also put it to Mr Fenton that he had been involved in litigation in Jersey in the 1990s. Mr Fenton said however that this litigation did not involve him having to go to court.

57. The third matter is that, as Mr Fenton explained in cross examination and as I accept, Mr Summerfield was instructed by him in his personal capacity, and not in his capacity as sole trustee of TRF. This is consistent both with subsequent events, when TS were acting for Mr Fenton in his capacity as trustee of TRF and with the fact that the events of 3rd November 2023 were almost exclusively concerned with the execution of the Search Order, which had been made against Mr Fenton in his personal capacity; that is to say as a former director of the Claimant. This does not mean that Mr Summerfield had no dealings with the Freezing Order. On 5th November 2023 (09:10) Mr Summerfield emailed Mr Webb asking Mr Webb to email to him *"the Freezing Order documents that Dan handed to Ian in hard copy on Friday"*. I note that Mr Webb emailed the requested documents to Mr Summerfield on the same day (12:16). There is also Mr Dodman's evidence, which I have accepted, that Mr Summerfield said words to the effect that he would explain the consequences of the Freezing Order in due course. The relevant point however is this. It is clear, on the evidence, and I so find, that the focus of the attention of Mr Fenton and Mr Summerfield, on 3rd November 2023, was on the Search Order and its execution.

58. Returning to the narrative, on 7th November 2023 RWK sent a letter to Mr Fenton. This letter, dated 7th November 2023, was addressed *"FAO Ian Fenton (Trustee)"* and, on the next line, *"The Rind Foundation"*. The address was Mr Fenton's home address. The content of the letter is of some importance, and I quote its terms in full:

> ***"SERVICE OF COURT ORDER AND CLAIM – BL-2023-001460***
> ***FREEZING ORDER***
>
> *We act for Hadcliffe Properties Limited in the above referenced proceedings against yourselves and Mr Ian Jonathan Fenton*
>
> *We have obtained a freezing injunction that restrains the first respondent listed in the enclosed order from dealing with your/their assets. We enclose a bundle of documents which contains all of the documents put before the Court at a without notice hearing on 2 November 2023, at which the freezing injunction was granted, plus a note of that hearing.*
>
> *You should read all the documents carefully. We suggest that you obtain legal advice immediately on their contents. Please note the warning on pages 1 and 2 of*

the Order. Breach of the orders is a contempt of court, for which you may be imprisoned, fined or have your assets seized.

The court will review the freezing order at a further hearing that has been fixed for 16 November 2023. We further enclose a draft Claim Form for our client's claim against you which will be issued at Court shortly."

59. In paragraph 16 of his second affidavit Mr Dodman explains what he refers to as the additional steps which were taken to serve TRF and Mr Fenton with the Freezing Order *"so there could be no dispute that all measures had been taken by Hadcliffe to bring the Freezing Injunction and related documents to their attention"*. These additional steps included the provision of the Freezing Order and associated documents to Mr Summerfield on 5th November 2023, as described above, and the despatch of the Freezing Order and associated documents, by courier, to Mr Fenton at three separate addresses, one of which was his home address. The letter which I have quoted above and which is in the hearing bundle, is, I assume, the covering letter which was couriered to Mr Fenton at his home address on 7th November 2023, together with the Freezing Order and associated documents. The letter was expressed to be sent *"By Post"*, but I assume that this was an error, given Mr Dodman's evidence that the Freezing Order and associated documents were sent by courier to Mr Fenton's home address on 7th November 2023. It did occur to me that the explanation for this apparent error might have been that the Freezing Order was couriered to Mr Fenton at his home address on 7th November 2023 (under cover of a separate letter which expressed as being sent by courier), but that the Freezing Order was also sent by post, under cover of the letter, expressed to be sent by post, a copy of which I have seen and which I have quoted. I was not however directed to any evidence which supports such an explanation, and my finding is that the letter of 7th November 2023, although delivered by courier with its enclosures to Mr Fenton's home address on 7th November 2023, was inaccurately described as having been sent by post.

60. It will also be noted that the letter of 7th November 2023, which I have quoted above, was addressed to Mr Fenton in his capacity as trustee of TRF, and was expressed as effecting service of the Freezing Order. The letter did not state that which is now common ground between the parties; namely that personal service of the Freezing Order had already been effected on Mr Fenton by Mr Dodman on 3rd November 2023, when Mr Dodman provided the box of documents to Mr Fenton. Nor did the letter contain any statement of the kind which appears in paragraph 16 of Mr Dodman's second affidavit, to the effect that service of the Freezing Order had already been effected, and that this was simply an additional step taken by the Claimant. I was not taken to the covering letters which were despatched to the two other addresses on 7th November 2023, and I have not seen those letters. I assume however that they would have been in similar terms to the letter of 7th November 2023 sent to Mr Fenton's home address.

61. On 8th November 2023 TS came on the scene when Mr Turtle emailed Ms May-Beshir at RWK (15:47). The email was headed *"without prejudice save as to costs"*, but Mr Sullivan's position was that this and other emails with this heading were not in fact subject to without prejudice privilege and could be treated as open communications. I did not understand Mr Ahmed to dispute this analysis. The submissions of counsel, in referring to the inter-solicitor communications, made no distinction between communications with and without this heading. Accordingly, I treat this email and other

similarly headed communications as open communications. Again, this email is of some importance, and I quote it in full:

> *"I called to speak with you earlier today and left a voicemail.*
> *We are in the process of being instructed by The Rind Foundation ("TRF") concerning the above matter and the freezing injunction dated 2 November 2023 (the "Order"), served under cover of your letter dated 7 November 2023. We understand that the Order, inter alia, requires TRF to provide information and an affidavit by deadlines relative to the date of service, with a return date of 16 November 2023.*
> *Mr Fenton, as trustee of TRF, is unable to access the bank account detailed in the Order, possibly due to the Order having been served on the bank by your client. As such, TRF is unable to provide the information required or to fund reasonable legal expenses for legal advice and representation, as provided for in the Order. We also understand that TRF documents are also contained at your client's premises, which TRF will need returned to them. In order to allow TRF sufficient time to resolve the issues with accessing funds and to obtain legal advice and representation, we would propose the following be agreed:*
> *1. The deadline in paragraph 10(1) of the Order be extended to 29 November;*
> *2. The deadline in paragraph 11 of the Order be extended to 6 December; and*
> *3. The return date be listed at the first available date after 13 December 2023.*
> *In the circumstances described above, we do not see that the above short extension causes your client any prejudice. The stauts quo would be maintained. In contrast, TRF would be unable to obtain legal advice and representation in the event an extension is not agreed. On the basis that this is agreed, please provide an order by return for signature by TRF directly (in circumstances where we not formally instructed).*
> *For the avoidance of any doubt, we are not instructed to accept service for and on behalf of TRF."*

62. As can be seen TS were operating on the basis that service of the Freezing Order had been effected on Mr Fenton by the letter dated 7th November 2023, and sought extensions of time for compliance with Paragraphs 10(1) and 11 on that basis. TS also identified themselves as in the process of being instructed by TRF. As I understand the position STS continued to act for Mr Fenton, in his personal capacity, following execution of the Search Order. TS acted for Mr Fenton in his capacity as trustee of TRF.

63. Ms May-Beshir responded by email (12:44) the next day, 9th November 2023:

> *"In principle we have no objections to your proposal. However, as you will no doubt agree it would be logical and definitely time and cost effective for both applications to be heard on the same Return Date.*
> *As such we are currently liaising with Mr Fenton's legal representatives, and we will revert in due course.*
> *Nevertheless, we should note that Mr Fenton as the sole trustee of The Rind Foundation should be able to comply with paragraph 10(1) of the Freezing Injunction as this information should be readily available to him. If your client contends that he is not able to do so, please explain fully why.*
> *Separately, further to your call with Dan Dodman, we attach the letter sent to Barclays."*

64. The reference to the same return date was a reference to the fact that the return dates provided for in the Freezing Order and the Search Order were both 16th November 2023.

65. On the same day, 9th November 2023, Mr Fenton, acting by STS applied for an order to extend the time for compliance by Mr Fenton with certain of his obligations in the Search Order. This application came before Mellor J, as an urgent application, on 10th November 2023. The parties were given time by the Judge to seek to agree a consent order, with the consequence that the parties and their legal teams spent most of the day in the court building, but outside the courtroom, negotiating the terms of a consent order.

66. For present purposes the relevance of these events is that, in the course of the early afternoon, Mr Harris, who was Mr Fenton's solicitor from STS, approached Mr Webb and Mr Pestill (both RWK) to say that STS were acting for Mr Fenton in a personal capacity and not on behalf of TRF, but that Mr Fenton wanted to make a few comments to them, with Mr Harris simply keeping a record of what was said. Mr Fenton then came over and joined them. According to Mr Pestill, who gives an account of this meeting in his affidavit and whose evidence was not challenged, Mr Fenton said that he had to file an affidavit by 4.30pm that day referring to the assets of TRF above £1,000, but that he was unable to do so because he was in court. Mr Fenton also said that he did not have access to TRF's account with Barclays to assist him. Mr Fenton said that he wanted to let Mr Pestill and Mr Webb know what he knew about TRF's assets. At this point Mr Harris and Mr Webb, with the consent of Mr Fenton, began to record what Mr Fenton said. The information given by Mr Fenton, which I assume is given verbatim (from Mr Webb's recording) by Mr Pestill in his affidavit, was as follows:

> *"The assets of the Rind Foundation are to the best of my knowledge the Barclays Bank account – I don't have the account number in front of me – which has about £980,000 in it – I don't have a bank statement present – and the shares in Hadcliffe Properties Limited. That's it; there are no other assets as far as I am aware."*

67. According to Mr Pestill, Mr Fenton then confirmed that he had finished, and the conversation ended. So far as Mr Fenton's application in relation to the Search Order was concerned, the terms of a consent order were agreed between the parties which provided, amongst other matters, for the return date for the Search Order, set for 16th November 2023, to be put back to a later one day hearing.

68. There was considerable dispute between the parties as to what Mr Fenton meant by his reference to an affidavit being due by 4.30pm on 10th November 2023. I will come back to this dispute, and to my findings in respect of that dispute, later in this judgment. For present purposes it is sufficient to say that I accept that the circumstances of the conversation with Mr Fenton and the content of the conversation were as reported by Mr Pestill in his affidavit. Mr Pestill's evidence is unchallenged and, in his own evidence, Mr Fenton was not able to contradict Mr Pestill's evidence.

69. Email correspondence between TS and RWK resumed on 13th November 2023 when Mr Turtle emailed Ms May-Beshir (12:17), in response to her email sent on 9th November 2023, in the following terms:

> *"Thank you for your below email.*
> *We understand that at the hearing on Friday 10 November it was agreed by consent that the Return Date for the Search Order be vacated to a date convenient to the parties and counsel in Hilary Term 2024 with a time estimate of one day. We also*

understand that Mr Fenton, as trustee of TRF, spoke with you on Friday 10 November to comply with paragraph 10(1) of the Freezing Injunction.
At present, our understanding is that the deadline in paragraph 11 of the Freezing Injunction is 16 November. In the light of this deadline, the continued circumstances where TRF is unable to access its bank account in order to obtain legal advice, and the timetable agreed relating to the Search Order, we should be grateful to hear from you with a draft order to extend the deadline, vacate the return date relating to the Freezing Injunction, and align the timetables, as referred to in your email below.
Please may we hear from you with a draft order (executable by TRF directly) as soon as possible and before close today."

70. The next email on 13th November 2023 was sent by Mr Pestill to Mr Turtle (14:38). In common with the remainder of the emails passing between the solicitors on 13th November 2023, this email was not addressed personally, but was addressed as an email between RWK and TS. The email called upon TS to *"confirm urgently by return (i) what you believe are the relevant dates for compliance with paragraphs 10(1) and 11 of the Freezing Injunction dated 2 November 2023, and (ii) how your calculate those dates."*, and set a deadline of 4.00pm for a response from TS. Mr Turtle replied the same day by an email (15:54), also expressed as an email from TS to RWK, in the following terms:

"We are currently in the process of being instructed by The Rind Foundation ("TRF"), which has been delayed by TRF's ability to access its bank account as detailed within the Freezing Injunction dated 2 November 2023. We anticipate this is due to service of the order on Barclays Bank Plc by your firm.
Notwithstanding the above, we understand that the Freezing Injunction was served under cover of your attached letter dated 7 November 2023, marked as sent by post, with deemed service being 9 November 2023. It therefore follows that the deadline in paragraph 10(1) is 10 November (which we understand has been complied with), and the deadline in paragraph 11 is 16 November 2023.
In circumstances where the return date for the Search Order has been vacated to next year by consent, and the continued circumstances where TRF is unable to access its bank account in order to obtain legal advice, we should be grateful to hear from you with a draft order to extend the 16 November 2023 deadline in the Freezing Injunction, vacate the return date relating to the Freezing Injunction, and align the timetables. Any draft order will need to be executable by TRF directly pending our instruction.
Please may we hear from you with a draft order as soon as possible and before close today."

71. Mr Turtle's analysis of the position was disputed by RWK. In a further email that day (19:33) Mr Pestill set out RWK's case that service of the Freezing Order had been effected on 3rd November 2023:

"Thank you for your email of today's date where you have set out your belief that the deemed date of service of the Freezing Injunction is 9 November 2023.
It would appear that you are not aware service of the Freezing Injunction was effected on The Rind Foundation ("TRF") by personally serving its sole trustee, Mr Ian J Fenton, at his home address (20 Thornton Way, Golders Green, London, NW11 6SD) at 1230 hours on 3 November 2023. The deemed date of service for the Freezing Injunction is therefore 3 November 2023.

The address for TRF as per the Charities Commission's records is still listed as 37 Upper Brook Street, London. However, those premises belong to Our Client, and we are aware that Mr Fenton (and/or TRF) no longer uses that address. Accordingly, service at that address would serve no purpose. We were of the view that given that Mr Fenton is its sole trustee, that any business of TRF is being conducted from 20 Thornton Way. For the avoidance of doubt, service at any other address is just to ensure we have taken a belt-and-braces approach to the matter. That approach is wholly compliant with the Civil Procedure Rules.

It is our position that by personally serving Mr Fenton with the Freezing Injunction on 3 November 2023, our obligation to serve TRF was discharged. TRF was obliged to therefore provide the relevant information pursuant to Paragraphs 10(1) of the Freezing Injunction by Monday 6 November 2023, and the affidavit pursuant to Paragraph 11 by Friday 10 November 2023.

As your client has failed to provide the relevant information on time or at all, and is therefore in breach of the Freezing Injunction, we are not minded to agree to a variation of the Return Date."

72. So far as I am aware, Mr Pestill's email sent at 19:33 on 13th November 2023 was the first occasion on which RWK stated to TS and thereby to Mr Fenton, that their position was that service of the Freezing Order was effected on 3rd November 2023. I will come back later to the question of what Mr Fenton and TS actually understood or should have understood, in relation to service of the Freezing Order and the timetable in Paragraphs 10(1) and 11, prior to the receipt by TS of this email.

73. Later the same evening (21:02) Mr Turtle responded, disputing RWK's analysis of the position:

"You say that service on TRF was effected via personal service on Mr Fenton at his address of 20 Thorton Way at 1230 hours on 3 November. However, the attached letter, which is dated 7 November, addressed to TRF at the same address and marked "by post", explains that the letter is effecting "service of court order…freezing order". Please particularise by return the supposed steps taken to effect service on TRF on 3 November 2023, and on what basis the attached letter from your firm is not representative of the manner in which service was effected. Please provide a copy of any certificate of service filed.

Whilst you say that TRF has failed to provide the relevant information at all, that is not correct. Mr Fenton complied with paragraph 10(1) of the Freezing Injunction by informing your firm on 10 November 2023 of those matters required by paragraph 10(1) of the Freezing Injunction.

We note that your client is not minded to agree a variation to the Return Date. We do not see that as a reasonable position to take, not least in circumstances where TRF has been unable to access its bank account to finance legal advice and representation. Maintaining the status quo to afford TRF time to seek legal advice and representation (as provided for in the Freezing Injunction), causes no prejudice to your client yet obvious and significant prejudice to TRF.

In the circumstances, we invite your client to reconsider its position. In the event that your client maintains its position and proceeds to the Return Date, we expect your client to put before the court: (1) this open correspondence; (2) your correspondence with Barclays Bank concerning the Freezing Injunction obtained (and explanation of the terms of the same, if applicable); and (3) copies of the

without prejudice save as to costs correspondence that we have exchanged (following determination of your client's application at the Return Date).
Finally, you refer in your email to TRF as our "client". As we have explained, we are not as yet formally instructed due to service of the Freeing Injunction on TRF's bank, and the consequent inability of TRF to access its bank account.
Having considered the above, please confirm your client's position urgently by return."

74. This was, I believe, the last communication on 13th November 2023. The correspondence resumed on 14th November 2023. On 14th November 2023 Mr Pestill sent an email to TS (15:34) which thanked TS for their email, and said that RWK were taking instructions and would revert shortly. I believe that this email was sent in response to Mr Turtle's email of 13th November 2023 (21:02).

75. Later on 14th November 2023 (20:20) Mr Turtle emailed RWK complaining that TS had not received the clarifications requested in the email sent at 21:02 on 13th November 2023. Mr Turtle's email further requested the Claimant to agree the extensions of time sought and the vacation of the return date hearing. Mr Turtle said that unless an order was agreed, vacating the hearing, by 9.00am the next morning, TS would commence preparations for the hearing, including the incurring of brief fees.

76. The next email was sent by Mr Webb to TS on 14th November 2023 (20:35). This email enclosed a formal letter from RWK, setting out the conditions subject to which the Claimant would agree to the vacation of the return date for the Freezing Order; scheduled for 16th November 2023. Mr Turtle responded by an email sent at 20:57 on 14th November 2023. In that email Mr Turtle asked to be provided with a draft of the consent order proposed by the Claimant, following which Mr Turtle said that TS would seek instructions on the same.

77. The next day, 15th November 2023 saw a considerable exchange of emails between solicitors. At 11.11 Mr Dodman emailed Mr Summerfield, who was acting for Mr Fenton in his personal capacity, to confirm that the return date hearing was effective against *"the First Respondent only"*, which I take to be a reference to TRF. Mr Dodman said that RWK were in discussion with TRF as to whether the hearing could be vacated completely. At 11.43 Mr Pestill emailed Mr Dodman and Mr Summerfield with a copy of a consent order which he said RWK were in the process of agreeing with TS. Mr Summerfield responded (12:03) to say that he would be prepared to sign the consent order once its terms were agreed between RWK and TS. Mr Summerfield included TS in this email and, according to Mr Turtle's evidence, the email included the draft consent order sent by Mr Dodman to Mr Summerfield earlier that day. TS thereby became aware of the terms of the draft consent order prepared by RWK.

78. So far as agreement between RWK and TS was concerned, Mr Turtle emailed Mr Pestill on 15th November 2023 (12:19) attaching the consent order (which had been sent to TS by Mr Summerfield) with what were described as *"minor amendments from us, which should be self-explan*[a]*tory and should not be contentious"*. Mr Pestill responded at 13:09 to say that RWK were taking instructions and would respond shortly. At 15:47 Mr Turtle chased Mr Pestill for a response, pointing out that if the order could not be agreed by 4.30pm, then TRF would have to attend the return date hearing the next day.

79. Mr Pestill replied substantively at 16:29 on 15th November 2023, by an email addressed to TS from RWK. So far as the consent order was concerned, I need only quote the first two paragraphs of this email:

> *"Your proposed amendments are not acceptable. We do not believe paragraphs 10(1) and/or 11 of the Freezing Injunction have been complied with in time, or at all.*
>
> *We reattach our earlier draft order and invite TRF to agree this, failing which our client's attendance at the hearing tomorrow will be required."*

80. Unfortunately, the copies of the emails which I have seen do not have attachments. As a result, and when going through these emails, I have not been able to see the rival drafts of the consent order. I have only seen the consent order as it was ultimately agreed, and made on 16th November 2023. As I understand the position however, from the email exchange on 15th November 2023, the sticking point identified by Mr Pestill, in his email above, was an attempt by TS to introduce a provision into the draft consent order which recited that TRF was not in breach of the Freezing Order.

81. This email resulted in Ms Toomer, a partner in TS, making a telephone call to Mr Dodman in the late afternoon of 15th November 2023. It is not necessary to go into the detail of the telephone call, because the call was followed by an exchange of emails between Ms Toomer and Mr Dodman, which set out their rival positions. I start with Ms Toomer's email (17:15), which was sent shortly after the call. Mr Dodman says in his third affidavit, and I accept that the telephone call took place at around 5.00pm. So far as Ms Toomer's email is concerned, it is easiest to set it out in full:

> *"I refer to our telephone call a moment ago.*
>
> *Please see the email below from Ms May-Beshir to which you were copied. It reads "In principle we have no objection to your proposal." Our proposal included extensions to paragraphs 10(1) and 11 of the Freezing Injunction as well as to vacate the return date.*
>
> *There was no mention in that email (or other correspondence since) that your client's position was that TRF was in breach. Indeed and on the contrary, Ms May-Beshir's email goes on to say: "Nevertheless, we should note that Mr Fenton as the sole trustee of The Rind Foundation should be able to comply with paragraph 10(1) of the Freezing Injunction as this information should be readily available to him. If your client contends that he is not able to do so, please explain fully why." You have also offered no explanation as to why your cover letter is marked "by post" and dated 7 November.*
>
> *If the court agrees that service was effected on 3 November (which TRF does not accept for the reasons we have set out), we suspect the court is likely to have sympathy with Mr Fenton given the circumstance of that day, the fact that he has provided the information required by paragraph 10(1) and that we anticipate he will have provided an affidavit pursuant to paragraph 11 by the time any contempt application is heard. It must follow therefore that any such application would be doomed to fail.*
>
> *Your client's (change in) position is not understood, especially given (1) it will be better placed by the terms of the consent order as regards notice of any set aside application and (2) its risk as to costs.*
>
> *We invite your client to reconsider and confirm its position by 6pm."*

82. Mr Dodman responded at 18:05, by a lengthy email. The email is too lengthy to set out in full, but for the present purposes the material parts of the email are as follows. Mr Dodman commenced by disputing Ms Toomer's characterisation of the position, in relation to compliance with the Freezing Order:

> *"With respect, the position you set out below represents a very small (without prejudice) proportion of the correspondence over the last few days. In particular:*
>
> *1. On 13 November 2023, this firm wrote to yours asking for confirmation on an open basis as to what dates you considered TRF needed to meet.*
>
> *2. A reply was given by Luke at 3:54pm on the same day setting out that your firm believed the dates to be 9 November 2023 and 16 November 2023.*
>
> *3. That was responded to (again on an open basis) on 13 November at 7:33pm with the unequivocal statement that "as your client has failed to provide the relevant information on time or at all, and is therefore in breach of the Freezing Injunction, we are not minded to a variation of the Return Date."*
>
> *4. Further correspondence developed which ended with our client stating in a letter on 14 November 2023 that it was prepared to vacate the Return Date "but only on the following conditions". None of those following conditions included an acceptance on the part of our client that TRF was not in breach of the Freezing Order or allowing for a convoluted timeframe for compliance with the order."*

83. Mr Dodman went on to make the point that the amendments to the draft consent order proposed by TS, although described by TS as non-contentious, were contentious because they required agreement to the vacation of the return date hearing on the basis of an acceptance by the Claimant that the Freezing Order had not been breached. Mr Dodman then went on to review the merits of the situation, so far as an application for contempt of court was concerned, and listed the ways in which the Freezing Order had been brought to the attention of Mr Fenton, including the personal service (as now accepted) of the Freezing Order on Mr Fenton on 3rd November 2023. Mr Dodman also made the point that the Freezing Order had been couriered to Mr Fenton's home on 7th November 2023, so that the deemed date of service was 7th November 2023, even if the personal service on 3rd November 2023 was ignored for this purpose. As such, and on that hypothesis, compliance with Paragraph 10(1) had still been required by 8th November 2023. Mr Dodman concluded his email of 15th November 2023 (18:05) in the following terms:

> *"In addition to the above, our position is further corroborated by Mr Fenton's conduct on 10 November 2023. When he approached our firm's Mr Jack Pestill outside Court to say that he was obliged to serve an affidavit on Our Client by 4.30pm that day but was unable to do so as he was in Court. Accordingly, that he wished to provide that information orally. That information was duly provided by him, but for the avoidance of doubt, it was not in lieu of the affidavit he was supposed to provide, and no indication to that effect was made to him whatsoever. If he were not obliged to provide the affidavit on that date, he would not have said so. His conduct therefore proves that he was obliged to provide the affidavit by 4.30pm on 10 November 2023, and he knew that to be the case.*
>
> *It therefore follows that as TRF was deemed served on 3 November 2023, failing which deemed service took place on 7 November 2023, TRF and Mr Fenton were in contempt of court by 4.30pm on either 6 November or 8 November 2023 in respect of Paragraph 10(1), and by 4.30pm on either 10 November or 14 November 2023 in respect of Paragraph 11.*

Notwithstanding the above, as we have set out previously, our client is prepared to vacate the Return Date on the basis previously set out in the order attached. That would significantly reduce costs for all the parties involved and would allow us to debate the contempt issue in due course.
We reiterate our position as set out and invite you to agree the attached."

84. It will be noted that, in this exchange of emails, reference was made to a contempt application. This was raised by Mr Dodman in the telephone call which preceded the exchange of emails. In paragraph 37 of his third affidavit Mr Dodman says that he remembers telling Ms Toomer, in the telephone conversation, that the Claimant *"would be issuing a contempt application"*. I accept this evidence, which is consistent with the subsequent email exchange between Mr Dodman and Ms Toomer.

85. Following this email it appears that TS abandoned their attempt to amend the draft consent order. I say this because there is an email from Mr Turtle to RWK, sent at 18:59 on 15th November 2023, to which was attached a signed copy of the draft consent order *"as originally provided"*.

86. The consent order was then made on 16th November 2023. In summary, it provided for the return date hearing to be vacated and for the Freezing Order to be continued until trial or further order of the court. With one exception, I need not deal with the remaining provisions of the consent order, save to note that the terms of the consent order were expressed as not prejudicing the Claimant's rights and remedies in the proceedings or to bring any claim whatever against the Defendants. The exception is that in paragraph 21 of his witness statement Mr Fenton says that this consent order dispensed with the requirement for him to provide a second affidavit which, by paragraph 16.5 of the Search Order (as the Search Order was varied by an earlier consent order agreed between the parties on 3rd November 2023), was due to be provided by 4.30pm on 10th November 2023. It is not entirely clear to me, looking at the consent order which was made on 10th November 2023, which provision of the consent order dispensed with the requirement for this second affidavit to be provided. I assume that this dispensation was achieved by paragraph 4 of the consent order, which refers to Mr Fenton not being obliged to make any further affidavit, pending disclosure in the action.

87. In the meantime the Contempt Application had been issued. The Contempt Application is stamped as having been issued on 15th November 2023. I therefore assume that the Contempt Application was sealed for issue within court office hours on 15th November 2023. I do not know if the Contempt Application was filed with the court, for issue, on the same day or earlier. In their evidence Mr Dodman and Mr Rotheroe were vague on the question of when instructions were given to prepare the Contempt Application and when instructions were given actually to issue the Contempt Application. I draw this distinction between preparation and issue of the Contempt Application because Mr Ahmed submitted to me that it was an important distinction to draw.

88. Mr Dodman's evidence in re-examination was that he was working at home on 15th November 2023. Mr Dodman's second affidavit, which was the original affidavit in support of the Contempt Application, was sworn on 15th November 2023 before a solicitor in Reading. In answer to some questions from me, Mr Dodman thought that he had attended before the solicitor at some point in the mid to late afternoon of 15th November 2023. Mr Dodman thought that it would have taken a day or two to prepare

his affidavit and that the decision to proceed with the Contempt Application would have been taken on 14th or 15th November 2023. Mr Dodman did also make the point that, when he spoke to Ms Toomer, he did not know whether the Contempt Application had actually been filed with the court because he was not in the office and the actual filing of the Contempt Application with the court was being dealt with by members of his team at RWK. I accept all this evidence from Mr Dodman although, as I have said, Mr Dodman could not be precise on when the decisions were made to prepare the Contempt Application and to make the Contempt Application. So far as Mr Rotheroe was concerned, his evidence in cross examination was that he gave instructions for the Contempt Application at some point in the week commencing 6th November 2023. Mr Rotheroe did not, in his evidence, draw the distinction between the preparation of the Contempt Application and the making of the Contempt Application which Mr Ahmed pressed upon me.

89. At the beginning of the second day of the hearing Mr Ahmed informed me, on instructions, that instructions were given by Mr Rotheroe to RWK to start preparing the Contempt Application on 13th November 2023. What Mr Ahmed told me on instructions was not, of course, evidence, and did not extend to identifying the date or time on which instructions were given actually to make the Contempt Application. This leaves the position somewhat opaque. Fortunately, I do not think that the precise dates or times are critical in this respect. While this may be considered to be somewhat generous to the Claimant, given the state of its evidence, I am content to proceed on the basis that instructions were given to prepare the Contempt Application on 13th November 2023, and that instructions actually to make the Contempt Application were given, at the latest, at some point prior to whatever time the Contempt Application was filed with the court for issue. I therefore assume that the decision actually to make the Contempt Application would have been made, and instructions to that effect would have been given, at the latest, at some point within court office hours on 15th November 2023.

90. The Contempt Application was served on Mr Fenton at his home address by a process server on 20th November 2023. So far as I am aware this was the first occasion on which Mr Fenton or TS would have been made aware that the Contempt Application had been issued. Prior to that date, their only knowledge of the possibility of a contempt application being made would have been Mr Dodman informing Ms Toomer, in their telephone conversation in the late afternoon of 15th November 2023, that the Claimant would be issuing a contempt application. Given that the telephone conversation took place shortly before Ms Toomer sent her email at 17:15, at around 5.00pm, it seems to me inevitable that the Contempt Application would actually have been filed and issued by the time of the telephone conversation. I accept however Mr Dodman's evidence that, because he was working remotely, he did not know whether the Contempt Application had actually been filed for issue when he spoke to Ms Toomer.

91. So far as the relevant chain of events is concerned it is not necessary to set out the correspondence and dealings between the parties beyond 20th November 2023. I can make reference to these subsequent events, so far as necessary, when I come to my analysis.

<u>Was Mr Fenton in knowing and wilful breach of the Freezing Order?</u>

92. In his third affidavit, made in response to the Strike Out Application, Mr Dodman does not pull his punches. Although this seems to me to be a matter for submission, rather

than evidence, Mr Dodman asserts, in paragraph 41 of his third affidavit, that Mr Fenton's breaches of Paragraphs 10(1) and 11, which are now admitted, were *"knowing and wilful"*. In making this allegation Mr Dodman was repeating allegations of knowing and wilful breach of the Freezing Order made against Mr Fenton by RWK in the correspondence following the making of the Contempt Application; see in particular the letter from RWK to TS dated 19th February 2024. For his part Mr Ahmed contended, in his submissions, that this was not, on the evidence, a case of inadvertent or technical breach. Mr Ahmed submitted that Mr Fenton must have known, following personal service of the Freezing Order on him on 3rd November 2023, what was required of him by Paragraphs 10(1) and 11 and by what dates. The implication of Mr Ahmed's submission was that Mr Fenton actually knew that he was breaching the terms of the Freezing Order, by failing to comply with Paragraphs 10(1) and 11 by the due dates, as opposed to being fixed with knowledge of the terms of the Freezing Order by virtue of the service of the Freezing Order on 3rd November 2023.

93. In support of this case, Mr Ahmed and, for that matter, Mr Dodman relied upon three matters in particular, as follows:
    (1) When Mr Dodman gave Mr Fenton the box of documents, in the course of the execution of the Search Order on 3rd November 2023, Mr Dodman specifically told Mr Fenton, in the presence of Mr Summerfield, that the documents inside the box related to the Freezing Order. This was confirmed by the report of Ms Colston, as supervising solicitor in respect of the Search Order.
    (2) Mr Summerfield asked for and was provided with the Freezing Order documents on 5th November 2023.
    (3) On 10th November 2023, when the parties were outside the courtroom, Mr Fenton stated that he had to file an affidavit by 4.30pm that day referring to the assets of TRF above £1,000, but was unable to do so because he was in court. Mr Fenton then proceeded to provide the information about the assets of TRF which is recorded in Mr Pestill's affidavit. All of this is consistent, and only consistent, so it was submitted, with Mr Fenton having been well aware that Paragraph 11 required him to file an affidavit that day, 10th November 2023, confirming the information which he should already have provided, in relation to TRF's assets.

94. I am unable to accept that Mr Fenton was in knowing, or deliberate, or wilful breach of the Freezing Order, or knowingly flouted the terms of the Freezing Order. I say this for the following reasons.

95. As a matter of general impression, Mr Fenton did not strike as the kind of person who would knowingly, or wilfully, or deliberately breach, or flout the terms of a court order. I have read and heard the evidence of Mr Fenton. My impression of him was that he was a responsible professional person who would respect orders of the court, even in the situation in which Mr Fenton found himself on 3rd November 2023 and in the two weeks thereafter, when he was suddenly put under immense and unexpected pressure as he sought to deal with his respective obligations under the Search Order and the Freezing Order.

96. Turning to the events of 3rd November 2023 and thereafter, I do not accept that Mr Fenton knew or understood, either on 3rd November 2023 or for some time thereafter, that the time limits for compliance with Paragraphs 10(1) and 11 either had started to run from

3rd November 2023, or alternatively might have started run from 3rd November 2023. In this context, my analysis of the evidence is as follows.

97. I start with the events of 3rd November 2023. Mr Fenton's evidence was that the events of that day were something of a blur, given the number of things happening. Mr Fenton was not able to recall what happened at around 12.30pm, when Mr Dodman provided to Mr Fenton the box of documents containing the Freezing Order and associated documents. I have already accepted Mr Dodman's account of what occurred. What is however clear from Mr Fenton's evidence is that he did not appreciate, at the time, that this constituted personal service of the Freezing Order on him. In cross examination Mr Fenton said that he was not sure, on 3rd November 2023, what he had been served with. I accept this evidence. Given the events of that day, and the stress which Mr Fenton was under, I do not find it surprising that Mr Fenton did not then understand that he had been served with the Freezing Order.

98. In this context I also note the words used by Mr Dodman when he provided the box of documents to Mr Fenton. Mr Dodman did not say that he was serving the Freezing Order on Mr Fenton. Mr Dodman said that the documents inside the box related to the Freezing Order. It is now accepted that what occurred was sufficient to constitute personal service of the Freezing Order on Mr Fenton on 3rd November 2023. If however one is addressing the separate, and different question of what Mr Fenton actually knew and understood, in the context of service of the Freezing Order on 3rd November 2023, the words used by Mr Dodman were not words which I would have expected to alert Mr Fenton to the fact, as now conceded, that personal service of the Freezing Order was being effected upon him. Nor do I find that these words did alert Mr Fenton to the fact, as now conceded, that he was being served with the Freezing Order.

99. This is corroborated by Mr Fenton's evidence (which was not challenged in cross examination) that, when he first met with TS, he provided TS with various papers, which included a copy of the letter from RWK dated 7th November 2023. I have quoted the terms of this letter earlier in this judgment. The purpose of the letter was identified as the service on Mr Fenton, by post, of the Freezing Order. Mr Fenton's evidence was that he understood that service by post was effective two days later and that, on this basis, he was required to inform RWK, to the best of his ability, of all assets of TRF by 4.30pm on 10th November 2023 and then to provide this information in an affidavit by 16th November 2023. Mr Fenton says that when he first met with TS he either did not know or did not recall that there was a copy of the Freezing Order in one of the boxes which he was given on 3rd November 2023, separate from the service effected by this letter.

100. I accept all this evidence of Mr Fenton in relation to the events of 3rd November 2023 and thereafter. This evidence is consistent with Mr Fenton having received and read the letter of 7th November 2023 and having assumed that it was by this letter that he was being served with the Freezing Order. This evidence is also consistent with what TS said in their communications with RWK following their first meeting with Mr Fenton. The initial email from Mr Turtle to Ms May-Beshir, sent on 8th November 2023 (15:47), proceeded on the basis that service of the Freezing Order had been effected under cover of the letter of 7th November 2023. Mr Turtle's email of 13th November 2023 (12:17) proceeded on the same basis, and stated in terms that Mr Fenton had complied with Paragraph 10(1) by providing the required information at court on 10th November 2023. When RWK asked TS, by their email of 13th November 2023 (14:38), to confirm what

TS said were the dates for compliance with Paragraphs 10(1) and 11, TS identified those dates as, respectively, 10th November 2023 and 16th November 2023; with each date calculated from 9th November 2023 as the deemed date of service; see the email of TS sent on 13th November 2023 (15:54).

101. Mr Fenton has not waived privilege in relation to his dealings with STS and TS. It seems to me however to be quite clear (and I so find) that TS, on the basis of their initial instructions from Mr Fenton, were proceeding on the basis that the Freezing Order had been served on Mr Fenton by post, under cover of the letter of 7th November 2023, and that the deemed date of service was 9th November 2023. If, on the Claimant's case, Mr Fenton in fact knew that he had been personally served with the Freezing Order on 3rd November 2023, the only explanation for the stance taken by TS on service is either that Mr Fenton decided to conceal the fact of personal service from TS when he first instructed them, or that TS were aware of the fact of personal service, and sought to carry out an exercise of bluffing RWK into accepting that service had only been effected on 9th November 2023. No such suggestion was put to Mr Fenton or Mr Turtle in cross examination, and I regard both such explanations as untenable.

102. I have not overlooked, in the above analysis, that the evidence is that Mr Fenton received the letter and Freezing Order and associated documents by courier on 7th November 2023, not by post. The letter of 7th November 2023 was however expressed to have been sent by post, and it is easy to see how, when Mr Fenton provided the letter to TS, he overlooked that it had been sent by courier and/or failed (albeit not deliberately) to communicate this information to TS. I find that this was what occurred.

103. It is convenient to remind myself, at this point, that my references to Mr Fenton instructing TS require a qualification. In their communications with RWK, as described in the previous section of this judgment, TS were careful to point out that they were still in the process of being instructed by TRF and that TRF was not yet their client. The reason for this appears to have been the problems which Mr Fenton was having obtaining access to TRF's bank account, in order to obtain the funds which, I assume, were required to be put in place before Mr Fenton's instruction of TS could be put on to a formal footing. I do not think that this point is material to my consideration of the evidence. TS were clearly acting for Mr Fenton, as trustee of TRF, on an informal basis on and after the first meeting on 8th November 2023. It is convenient, in this judgment, to continue to refer to Mr Fenton instructing TS. All such references should however be read subject to the qualification that, at that time, problems with access to TRF's bank account were delaying the formal instruction of TS.

104. Returning to the allegation of knowing and wilful breach of the Freezing Order, and turning to the provision of Freezing Order and associated documents to Mr Summerfield on 5th November 2023, I do not accept that it can be inferred that Mr Fenton must, as a result of this event, have known either that he had been served with Freezing Order on 3rd November 2023 or that the time limits in Paragraphs 10 and 11(1) ran from that date. I say this for the following reasons.

105. First, the drawing of such an inference would be inconsistent with the position taken by TS on the question of service, in their initial communications with RWK and following their being instructed by Mr Fenton. For the reasons which I have already set out, the only credible explanation for the stance taken by TS is that Mr Fenton believed, when he

first instructed TS, that he had been served with the Freezing Order on 9th November 2023 and believed that the time limits in Paragraphs 10(1) and 11 ran from that date.

106. Second, and although Mr Fenton has not waived privilege in relation to his dealings with STS I do not see the situation as one where I am either bound to infer or should infer that Mr Fenton understood, as from 5th November 2023 and as a result of advice given by STS, that he had been personally served with the Freezing Order on 3rd November 2023. I do not know and I am not entitled to know what, if any advice, STS gave to Mr Fenton in relation to the Freezing Order. What I do know is that STS were instructed to deal with the Search Order and that their focus, and indeed the focus of Mr Fenton would have been on the Search Order and its requirements in the aftermath of 3rd November 2023. Those requirements were onerous. Some idea of this can be gathered from the evidence in paragraph 19 of Mr Fenton's witness statement, where he deals with the work which was required to produce the second affidavit required by the Search Order. As he explains, by the evening of 9th November 2023 he and his legal team (comprising both STS and four counsel) had reviewed 1,900 out of 4,530 documents, with 10,277 documents which had been identified, but had not been uploaded to the electronic review platform. Given the extent of the obligations imposed upon Mr Fenton by the Search Order, and given the events of 3rd November 2023, I do not think that it is appropriate to draw any inference, from the exchange between Mr Summerfield and RWK on 5th November 2023, that Mr Fenton knew or understood, at that time, either that he had been served with Freezing Order on 3rd November 2023 or that the time limits in Paragraphs 10 and 11(1) ran from that date.

107. Moving on to the events of 10th November 2023, as relied upon by the Claimant, it is not in dispute that the information provided by Mr Fenton on that date constituted the information required by Paragraph 10(1), subject to the point, as now conceded, that this information was provided late. The evidence of Mr Fenton in cross examination was that he thought that he was providing the right information at the right time. This evidence is entirely consistent with the communications between TS and RWK to which I have referred above, but the evidence appears to be in conflict with Mr Fenton's statement that he had to file an affidavit by 4.30pm that day referring to the assets of TRF above £1,000, but was unable to do so because he was in court. On the basis of that statement, and although this was not how I understood the limited cross examination of Mr Fenton on this point, one would naturally infer that Mr Fenton's understanding of the position was that the deadline for the provision of the affidavit required by Paragraph 11 was 10th November 2023, from which one would also infer that Mr Fenton understood that he had been served with the Freezing Order on 3rd November 2023, given that 10th November 2023 was the following Friday; five working days after 3rd November 2023.

108. The evidence of Mr Fenton is that he cannot recall what he said in the conversation on 10th November 2023. What he also says is that if he did say what he is reported as saying about the affidavit being due by 4.30pm that day, he may have been confused as to the position. This evidence is, in my judgment, entirely plausible. I say this essentially for two reasons.

109. I can state the first reason very shortly, because it is a point I have already made. If Mr Fenton's understanding of the position was that he was required by Paragraph 11 to provide the affidavit by 4.30pm on 10th November 2023, that understanding would not have been consistent with what TS were saying on his behalf as to the date of service of

the Freezing Order and the deadlines in Paragraphs 10(1) and 11. I do not think that such an understanding on the part of Mr Fenton can stand with what TS were saying on his behalf. The better explanation is that Mr Fenton was indeed confused as to the position.

110. Second, the detail of the Freezing Order is important here, as is the Search Order which, for obvious reasons, was not the focus at the hearing of the Applications.

111. So far as the Freezing Order was concerned, Paragraph 11 did require the provision of an affidavit confirming the information about the assets of TRF, but there was no 4.30pm deadline in Paragraph 11. The information simply had to be provided within five working days of service of the Freezing Order on Mr Fenton. By contrast, Paragraph 10(1) did require the information about the assets of TRF to be provided by 4.30pm. If therefore Mr Fenton's understanding of the position, at the time, was that he had been served with the Freezing Order on 9th November 2023, his reference to 4.30pm was correct. What he got wrong, on the basis of service having taken place on 9th November 2023, was the means by which the information had to be provided. An affidavit was not required if service had taken place on 9th November 2023.

112. Turning to the Search Order, this originally required the provision of two affidavits. Paragraph 16.3 of the Search Order required an affidavit to be provided by 4.30pm on the next working day after service of the Search Order on Mr Fenton, giving information about documents. Paragraph 18 then required the provision of a further affidavit, giving information about documents, within seven working days after service of the Search Order on Mr Fenton. Mr Fenton's evidence in his witness statement is that the timetable was varied on 3rd November 2023 to 4.30pm on 6th November 2023 for the first of these affidavits, and 4.30pm on 10th November 2023 for the second of these affidavits. This variation was achieved by a consent order, the terms of which were agreed on 3rd November 2023 and which took effect on 3rd November 2023, although this first consent order was not sealed until 10th November 2023. Although Mr Fenton was not challenged on this part of his evidence, his evidence in this respect does not appear to me to be quite accurate. This first consent order, which took effect from 3rd November 2023, varied paragraph 16 of the Search Order in various respects. This first consent order was not expressed, at least in terms, to vary paragraph 18 of the Search Order.

113. The important point for present purposes is however that the variations to paragraph 16 of the Search Order, effected by this first consent order, included the introduction of a new paragraph 16.5, which required Mr Fenton to provide a second affidavit by 4.30pm on 10th November 2023. Mr Fenton's evidence, as I have noted earlier in this judgment, is that the requirement to produce this second affidavit was ultimately dispensed with by the consent order made on 10th November 2023. Mr Fenton's evidence, which I accept, is however that this dispensation had not been achieved at the time when he had his conversation with Mr Harris, Mr Webb and Mr Pestill outside the courtroom on 10th November 2023. It follows that, when Mr Fenton had this conversation, there was a deadline, in the Search Order as varied, for Mr Fenton to provide an affidavit by 4.30pm on 10th November 2023. While I assume that this deadline was under negotiation on 10th November 2023, there is no evidence that agreement had been reached and the consent order made, when the conversation took place. In any event I accept that Mr Fenton's understanding of the position, in the conversation outside the courtroom on 10th November 2023, was that an affidavit was due by 4.30pm on that day.

114. Putting together the analysis in my previous five paragraphs, given the stress to which Mr Fenton was subject at the time, and given the fact that Mr Fenton was effectively dealing with two sets of litigation, in the form of the work required as a consequence of the Freezing Order and the Search Order, I have no difficulty in accepting that Mr Fenton was confused in his reference, in the conversation outside the courtroom, to an affidavit in relation to the assets of TRF being due by 4.30pm that day. I find that Mr Fenton was confused in this reference to an affidavit and that he did indeed think, in giving the information about the assets of TRF which he gave in this conversation, that he was providing the right information at the right time. I do not think that any inference can or should be drawn from this conversation that Mr Fenton must have known either that he had been served with Freezing Order on 3rd November 2023 or that the time limits in Paragraphs 10 and 11(1) ran from that date.

115. Drawing together all of the above analysis, my key findings are as follows:
    (1) I find that that Mr Fenton did not know or understand, either on 3rd November 2023 or thereafter that he had been served with the Freezing Order on 3rd November 2023 or that the time limits in Paragraphs 10 and 11(1) ran from that date.
    (2) I find that when Mr Fenton first instructed TS, Mr Fenton's understanding of the position, in terms of service of the Freezing Order, was that the date of service of the Freezing Order upon him was 9th November 2023, and that the time limits in Paragraphs 10 and 11(1) ran from that date.
    (3) I find that the earliest occasion on which Mr Fenton became aware that his understanding of the position might be wrong, in terms of service of the Freezing Order and in terms of the dates for compliance with Paragraphs 10(1) and 11, was whenever Mr Fenton saw the email from RWK to TS, sent on the evening of 13th November 2023 (19:33). It was in that email that RWK asserted, for the first time, that personal service of the Freezing Order had been effected on 3rd November 2023. I do not know precisely when Mr Fenton saw this email. I assume that it was at some point either on the evening of 13th November 2023 or early on 14th November 2023. The precise time is not important. The relevant point is that I find that Mr Fenton's knowledge and understanding of the position, as described in sub-paragraphs (1) and (2) above, did not change until, at the earliest, Mr Fenton saw the email of 13th November 2023 (19:33) from RWK.
    (4) Even at that point, and given the terms of the argument which thereafter took place over the date of service of the Freezing Order, I do not think that it can be said that Mr Fenton then became aware that he had breached the terms of the Freezing Order. At most, and I so find, Mr Fenton should have known, once he had become aware of the email exchange of the evening of 13th November 2023 and had had the opportunity to consider the same, that he was at some risk of a finding that he had already breached the terms of the Freezing Order, given the argument which RWK were advancing in relation to the date of service.

116. In conclusion I am, as I have said, unable to accept that Mr Fenton was in knowing, or deliberate, or wilful breach of the Freezing Order, or knowingly flouted the terms of the Freezing Order. I find that Mr Fenton's breaches of the Freezing Order, as now admitted, were not of this character and that Mr Fenton was not aware, at the times when the breaches occurred, that he was breaching the terms of the Freezing Order.

117. As I have said, I consider that the burden was upon the Claimant to establish, to the criminal standard of proof, that Mr Fenton's breaches of the Freezing Order were

knowing and wilful. In my judgment the Claimant's case has never come anywhere near discharging this burden. It also seems to me that, on any fair consideration of the evidence, the incidence of the burden of proof is not of significance. If it is assumed that I am wrong and that, by reason of the Strike Out Application, the burden was upon Mr Fenton to prove, to the civil standard of proof, the negative proposition; namely that he did not knowingly, or deliberately, or wilfully breach the Freezing Order or knowingly flout its terms, the position does not change. On that hypothesis, I would have had no hesitation in concluding that Mr Fenton had discharged the burden of proof. The position on the evidence seems very clear to me.

118. Ultimately, I do not consider that the allegation of knowing and wilful breaches on the part of Mr Fenton should have been made. This was a serious allegation, with potentially serious consequences for Mr Fenton in terms of sentencing, assuming contempt is established, which required solid evidence to support the allegation. The evidence in the present case, in my judgment, was not capable of providing that support. To my mind this should have been appreciated by the Claimant from the outset. The worst which can be said of Mr Fenton is that once RWK had declared their position on the date of service, on the evening of 13th November 2023, Mr Fenton should have realised that he was at some risk of being found to have been in breach of Paragraphs 10(1) and 11, given the argument which RWK were advancing in relation to the date of service. As such, so it may be said, Mr Fenton should have taken immediate pre-emptive action on 14th November 2023. By immediate pre-emptive action I mean the provision of the affidavit required by Paragraph 11 on 14th November 2023 and/or an application to the court, in advance of the return date on 16th November 2023, for a retrospective extension of the time limits in Paragraphs 10(1) and 11. The fact that Mr Fenton did not take these immediate steps seems to me to be part of what I have to consider in my analysis of the Strike Out Application. For present purposes however, it seems to me, on any view of the matter, that the omission to take these immediate steps falls well short of justifying the characterisation of Mr Fenton as a person who knowingly and wilfully breached the terms of the Freezing Order.

<u>The Strike Out Application – the law</u>

119. The Strike Out Application identifies the application as being made pursuant to CPR 3.4(2)(b) and pursuant to the inherent jurisdiction of the court. Although this point was not taken it does not seem to me that the Strike Out Application falls to be made pursuant to CPR 3.4(2)(b), which contains the power for the court to strike out statements of case which are an abuse of the process of the court. It is however clear that the court has the inherent jurisdiction to strike out the Contempt Application, if it can be shown to be an abuse of the process of the court. I therefore proceed on the basis that I am considering the Strike Out Application pursuant to the inherent jurisdiction of the court.

120. In terms of the principles which should guide the court in deciding whether a contempt application does constitute an abuse of the process of the court, guidance can be found in the judgment of Briggs J (as he then was) in *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch). In that judgment, which dealt with a number of applications which were before the court, Briggs J had to consider an application to strike out a committal application on three alternative grounds, pursuant to what was then paragraph 5 of the Practice Direction to RSC Order 52. One of the grounds was abuse of process. In the section of his judgment where he came to consider abuse of process Briggs J commenced,

at [44] - [46], with the following identification of the concept of abuse, particularly in the context of contempt applications:

> *"44. It is now well established, in the light of the new culture introduced by the CPR, and in particular with the requirements of proportionality referred to in CPR 1.1(2) as part of the overriding objective, that it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking: see Jameel v. Dow Jones & Co [2005] QB 946 per Lord Phillips at paragraphs 54, 69 and 70 (conveniently extracted in note 3.4.3.4 on page 73 of the 2009 White Book).*
>
> *45. The concept that the disproportionate pursuit of pointless litigation is an abuse takes on added force in connection with committal applications. Such proceedings are a typical form of satellite litigation, and not infrequently give rise to a risk of the application of the parties' and the court's time and resources otherwise than for the purpose of the fair, expeditious and economic determination of the underlying dispute, and therefore contrary to the overriding objective as set out in CPR 1.1. The court's case management powers are to be exercised so as to give effect to the overriding objective and, by CPR 1.4(2)(h) the court is required to consider whether the likely benefit of taking a particular step justifies the cost of taking it. Furthermore, paragraph 5 of the Contempt Practice Direction makes express reference to the court's case management powers in the context of applications to strike out committal proceedings.*
>
> *46. It has long been recognised that the pursuit of committal proceedings which leads merely to the establishment of a purely technical contempt, rather than something of sufficient gravity to justify the imposition of a serious penalty, may lead to the applicant having to pay the respondent's costs: see Adam Phones v. Goldschmidt (supra) per Jacob J at 495 to 6, applying Bhimji v. Chatwani [1991] 1 All ER 705. Jacob J concluded, by reference to that case:*
>
> > *"Since that judgment the Civil Procedure Rules have come into force. Their emphasis on proportionality and on looking at the overall conduct of the parties emphasises the point that applications for committal should not be seen as a way of causing costs when the defendant has honestly tried to obey the court's order."*

121. Briggs J elaborated on the question of when contempt applications would amount to an abuse of process at [47]:

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

an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them."

122. Mr Ahmed stressed to me in his submissions that *Sectorguard* involved very different facts to the present case. As he pointed out, in that case, it had turned out that it was impossible for the respondents to the committal application to comply with the relevant undertaking. Mr Ahmed drew my attention to what Briggs J said in his judgment, at [48]:

> *"48. In my judgment, viewed in that light, the application to commit Dienne and Mr Hare for breach of Undertaking 5 is just such an abuse. My reasons follow. First and foremost, it is apparent from the evidence now served on both sides that the application has no real prospect of success. The application was, for the reasons which I have given, apparently launched on the mistaken assumption that it did not matter whether or not Undertaking 5 was capable of performance, providing that it could be shown (as it obviously could) that it had not been complied with. Thus, when detailed evidence from three witnesses explaining cogently why the undertaking could never have been complied with from the date when it was given was served on Sectorguard, no response in terms of a reasoned basis for rejecting that evidence, or an intention to cross-examination all three witnesses, was forthcoming."*

123. I will return to the facts of the present case when I come to my analysis of the Strike Out Application itself. I accept that the facts of *Sectorguard* were not on all fours with the present case, and I accept that this is something to keep in mind in my analysis of the Strike Out Application. It is however important to add that what was said by Briggs J, in the extracts from his judgment quoted above, at [44]-[47], was clearly intended to be of general application. It is also important to keep in mind that the paragraph in the judgment highlighted by Mr Ahmed, namely [48], is the opening paragraph of the part of the judgment in which Briggs J set out his reasons for deciding, by reference to the principles which he had set out, that the committal application was an abuse. In terms of the overall reasoning in *Sectorguard*, and although the reasoning of Briggs J was stated first and foremost to be based on the fact that the application had no real prospect of success, the decision of Briggs J to strike out the committal application as an abuse was based upon two grounds. The first ground was that Briggs J considered the application to have no real prospect of success. The second ground was that Briggs J considered that the application had been brought for an improper motive. As Briggs J explained, at [53]-[54]:

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

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

124. In *PJSC Vseukrainsky Aktsionernyi Bank v Maksimov* [2014] EWHC 4370 (Comm) Hamblen J (as he then was) had to consider what costs order to make, following an application by the claimant bank to commit the first defendant in that case, Mr Maksimov, to prison on the basis of alleged breaches of two worldwide freezing orders. The application was only partially successful. In relation to the seven grounds of alleged contempt only two were established. One of those had previously been admitted and the other, as found by the judge, was characterised as being a *"technical"* contempt. The costs of the parties incurred in the contempt proceedings were very substantial, amounting to a combined total of over £1 million. For the reasons given in his judgment Hamblen J decided that Mr Maksimov should be awarded 80% of his costs as from a specified date (January 2014). A key part of the judge's reasoning was that the claimant bank had pursued its alleged grounds of contempt, as amended, with considerable aggression but with a striking absence of any real identified prejudice to the bank. As the Judge explained, at [17]-[20]:

"17. Thereafter the Bank pursued all of those amended grounds with considerable aggression, challenging almost every explanation given by Mr Maksimov. Some of the allegations were dropped, but only at a very late stage (for example, the other Ground 7 allegations in relation to alleged non-disclosure of assets).

18. What is particularly striking is that the allegations that Mr Maksimov had failed to disclose assets, usually the centrepiece of a case of this type, were downplayed and eventually almost completely abandoned. The only such allegation that was pursued in closing submissions was in relation to Cascade and that allegation was rejected by the court.

19. This was not therefore a normal asset disclosure case. The claimant's central concern is usually that there is a pool of assets that the defendant has failed to disclose and the contempt proceedings are the means of both punishing the claimant for his past breaches of the order and effectively forcing the defendant to come clean and disclose his full assets.

20. Here, there was a striking absence of any real identified prejudice to the Bank. Neither the Bauman shares nor the Kiev River Port shares had been placed out of reach. Nor was there ever any real evidence that meaningful assets had been concealed."

125. Hamblen J then went on in his judgment to cite the judgment of Briggs J in *Sectorguard* at [44]-[47], which I have quoted above. Hamblen J then added his own comments, at [22]-[24]:

"22. I respectfully endorse those comments. An increasing amount of this court's time is being taken up with contempt applications. Claimants should give careful consideration to proportionality in relation to the bringing and continuance of such proceedings. In appropriate cases respondents should give consideration to

applying to strike out such applications for abuse of process. The court should be astute to detect when contempt proceedings are not being pursued for legitimate aims. Adverse costs orders may follow where claimants bring disproportionate contempt applications.

23. There is no application to strike out for abuse of process in this case. Nor is this a case in which the contempt application had no real prospect of success. However, it is a case in which the pursuit of the proceedings has merely led to the establishment of a technical contempt rather than something of sufficient gravity to justify the imposition of a serious penalty.

24. In such circumstances, as made clear by Bhimji v. Chatwani [1991] 1 All ER 705 , Adam Phones v. Goldschmidt [1999] 4 All ER 486 and Sectorguard plc v Dienne plc , the claimant may well be ordered to pay the respondent's costs. In the present case that is a further reason why the Bank should pay Mr Maksimov's costs."

126. Both Mr Ahmed and Mr Sullivan attempted to draw contrasts between *Maksimov* and the facts of the present case, in each case to the advantage of their respective arguments. Mr Sullivan sought to persuade me that it was significant that *Maksimov* involved a much longer period during which Mr Maksimov was in breach of the asset disclosure provisions in the relevant freezing orders, during which Mr Maksimov was aware of the need to comply with the orders. For his part Mr Ahmed drew my attention to the particular and very difficult circumstances which Mr Maksimov faced at the time when the orders were made. His submission was that Mr Fenton's circumstances in the present case were in no way comparable.

127. I did not find submissions of this kind to be particularly helpful, either in relation to *Maksimov* or in relation to the other authorities cited to me in relation to the Strike Out Application. I accept, as I have already indicated in my analysis of *Sectorguard*, that it is important to keep in mind the particular facts of each case in my analysis of the Strike Out Application. The authorities cited to me in relation to the Strike Out Application are however primarily of assistance in their identification of the principles which govern the question of when a contempt application constitutes an abuse of the process of the court. The question of whether any particular contempt application does constitute an abuse of the process of the court is a fact sensitive question. In these circumstances attempts to compare and contrast the facts of different cases, as a means of deciding whether the Contempt Application constitutes an abuse of process, seem to me to be of limited value.

128. The guidance given by Briggs J in *Sectorguard* has also been the subject of recent approval by the Court of Appeal in *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 [2024] 1 All ER (Comm) 1194. In his judgment (with which Singh and Snowden LJJ agreed) Popplewell LJ, after citing the judgment of Briggs J at [47] (quoted above), said this, at [57]:

> *"**[57]** I would readily associate myself with those views. Moreover, I would accept Mr Moxon Browne's submission that although they are expressed in terms of case management powers, the abuse jurisdiction can be used at the committal hearing itself, in an appropriate case, to decline to find contempt even where, as here, there has been no prior application to dismiss the committal proceedings for abuse."*

129. It will be noted that Popplewell LJ explained that the abuse jurisdiction could be used, at the hearing of a contempt application, to decline to find contempt even where, although

this is not the present case, there had been no prior strike out application. On the facts of *ADM* Popplewell LJ did not consider that this principle was engaged. It is instructive to set out the reasons why this was so, as summarised by Popplewell LJ at [58]:

> ***"[58]*** *However, the principle has no application in the current case. When the committal proceedings were commenced GHI was still in breach of the ADO in having failed to supply an unredacted copy of the Societe Generale facility. That breach, and its past breaches in relation to all the facilities, formed part of a pattern of behaviour relied on in support of arguments that the other breaches were deliberate; and as relevant to the appropriate sanction for GHI's conduct as a whole. In that context there was nothing abusive about proceeding with that contempt and asking the Judge to adjudicate upon it. Had it stood alone the position might have been different, but it did not stand alone."*

130. It will be noted that Popplewell LJ identified, at [58], two factors as being important, in his decision that the abuse jurisdiction was not engaged. The first was that when the committal proceedings were commenced GHI was still in breach of the asset disclosure order. It should be noted, in this context, that the committal proceedings were commenced well over a year after the relevant asset disclosure order was made and over a year after the deadline for provision of the information, as extended by agreement, had expired. The second was that the failure of GHI to comply with the asset disclosure order formed part of a pattern of behaviour which supported the argument that GHI's various breaches of its obligations had been deliberate.

131. *Sectorguard* was also considered by the Carr LJ (as she then was) in *Navigator Equities Limited v Deripaska* [2021] EWCA Civ 1799 [2022] 1 WLR 3656. In her judgment in this case, with which Snowden and Asplin LJJ agreed, Carr LJ considered the question of whether a contempt application should be struck out in circumstances where it could be shown to be motivated by a personal desire for revenge on the part of the applicant. Carr LJ did not consider this could constitute a good reason to strike out a properly formulated contempt application. As she explained, at [110]:

> *"110 I do not agree with this analysis of the authorities. In my judgment, for the reasons set out below, where a civil contempt application:*
> *(i) is made in accordance with the relevant procedural requirements;*
> *(ii) is properly arguable on the merits (by reference to the necessary constituents of a claim for contempt); and*
> *(iii) has the effect (and so at least the objective purpose) of drawing to the attention of the court to an allegedly serious contempt, then the fact that the application is motivated, whether predominantly or even exclusively, by a personal desire for revenge on the part of the applicant is not a good reason for striking out the application as an abuse of process."*

132. Carr LJ went on to make the point, in her judgment, that *Sectorguard* did not point in a different direction in this respect. After quoting from the judgment of Briggs J, Carr LJ explained the position in the following terms, at [114]:

> *"114 Sectorguard was thus "First and foremost" a case where compliance with the relevant undertaking was found to be impossible at all material times; that set the context for all that followed. I do not consider that the subsequent reference in para 53 to "legitimate motive" is a reference to subjective motive but rather a reference to legitimate purpose in the sense identified in para 47, where Briggs J had identified the two "legitimate ends" of*

committal proceedings, namely enforcement or bringing to the court's attention serious rather than technical breaches. The words "ends" and "motives" were being used interchangeably, but the clear thrust of para 47 is that proceedings which are hopeless or relate to purely technical contempts are the signs to look for when searching for abuse, not questions of subjective motive."

133. Carr LJ thus concluded, at [122] and [123], that it was wrong in principle to take subjective motive into account for the purposes of an abuse application. In his submissions Mr Ahmed placed considerable reliance on this authority. His case was that the Contempt Application had not been motivated by any animosity against Mr Fenton on the part of the Claimant or Mr Rotheroe. As he also pointed out, even if one assumed that such animosity existed, it was clear from the judgment of Carr LJ in *Navigator Equities* that any such subjective motive was not a ground for striking out the Contempt Application. I accept this submission. It is clear that subjective motive is irrelevant. It seems to me however that it is also important to note that the judgment of Carr LJ also constitutes a further approval of what was said by Briggs J in *Sectorguard*, in terms of identifying when a contempt application constitutes an abuse of process. As Carr LJ explained, the question identified by Briggs J in *Sectorguard* is whether the relevant contempt application has been brought for a legitimate or illegitimate purpose. The two legitimate purposes (*"legitimate ends"*) identified by Briggs J were (i) *"albeit as a last resort"*, seeking to obtain the compliance by a party with the court's order, and (ii) as an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of court orders or undertakings given to the court. I note that Carr LJ stressed, in the extract from her judgment which I have quoted above, that *Sectorguard* was a case where compliance with the relevant undertaking was found to be impossible at all material times. This was the point on which Mr Ahmed also laid stress in his submissions on *Sectorguard*. It seems clear to me however that this did not cause Carr LJ to consider that Briggs J had been wrong in his identification of *"the signs to look for when searching for abuse"*. In other words, and as I have said, Carr LJ was providing further approval of the approach to determining when a contempt application constitutes an abuse, as set out by Briggs J in *Sectorguard*. I do not read the judgment of Carr LJ as qualifying or restricting that approach.

134. A further question which arises from what Briggs J said in *Sectorguard*, at [46] and [47], is what is meant by a technical or involuntary breach, as opposed to a serious breach. Marcus Smith J sought to answer this question in *Absolute Living Developments Limited v DS7 Limited* [2018] EWHC 1717 (Ch). In his judgment at [36(3)] the judge explained what is meant by seriousness. I should set out the whole of [36] in order to put [36(3)] into its proper context:

> ***"36.*** *When considering whether an allegation of contempt, which is accepted as factually well-founded, should nevertheless be struck out as an abuse of process, it is necessary to bear in mind the following:*
>
> ***(1)*** *The contempt jurisdiction exists generally only in relation to orders that have a penal notice and that have been personally served on the defendant. The public interest in seeing such orders obeyed is, inevitably, a strong one. Since a court can be presumed not to make unnecessary orders, where an order of the court remains uncomplied with, it seems to me extremely difficult to say that contempt proceedings*

in relation to such a contempt can ever be said to be an abuse of process.

(2) *Where the defendant – albeit in past breach of the order – has now complied with the order or has taken steps to regularise his breach (for instance, by seeking an extension of time for compliance, and apologising for the past non-compliance), that is a factor suggesting that contempt proceedings may not be necessary.*

(3) *Whether that factor is determinative depends upon the seriousness of the breach. Seriousness has two aspects to it:*

(a) *Deliberation. In [47] of Sectorguard, Briggs J. classified breaches of order into (i) serious, (ii) technical or (iii) involuntary. "Technical" breaches are breaches where the defendant's conduct was intentional and where he knew of all the facts which made that conduct a breach of the order, but where the defendant did not appreciate that his conduct did breach the order. "Involuntary" breaches are those cases where even this element of deliberation is absent. "Serious" or "contumelious" breaches are those going beyond the technical, generally because the defendant has deliberately breached the order.*

(b) *The importance of the order in question. Some orders are more important than others. Although, of course, all orders of the court must and should be obeyed, breach of some orders can have more serious consequences than breaches of other orders. In JSC BTA Bank v. Solodchenko (No. 2) [2011] EWCA Civ 1241 at [55], Jackson L.J. emphasised the fact that any substantial breach of a freezing order was a serious matter.*

(4) *The number of breaches of an order are a relevant factor. As I have noted, CPR 81.10(3)(a) requires each act of contempt to be separately enumerated. That, however, does not mean that where there are a series of breaches, the court should not take this fact into account when considering whether the contempt application is an abuse of process."*

135. The question of whether Briggs J had such a precise approach in mind, in his reference to *"purely technical contempt"* in *Sectorguard*, was raised by Andrew Baker J in his decision at first instance in *Navigator Equities Limited v Deripaska* [2020] EWHC 1798 (Comm). At [139] in his judgment Andrew Baker J addressed the question of what Briggs J had meant in *Sectorguard*, by his reference to *"purely technical contempt"*:

> *"139. By "purely technical contempt", Briggs J appears to have had in mind simply the question of seriousness (by reference to the nature of the obligation broken or the consequences of the particular breach): see Sectorguard at [46]-[47], and the phrase "contempt ... of a technical nature" as used by Hamblen J in his main judgment in Maksimov [2014] EWHC 3771 (Comm) at [129], the judgment cited in (ii) above being the costs judgment that followed. In Absolute Living Developments Ltd (in liquidation) v DS7 Ltd et al. [2018] EWHC 1717 (Ch) at [36(3)(a)], Marcus Smith J read rather more into Briggs J's terminology than that. Mr Mill QC argued that this was an unjustified gloss and, with respect, that it was wrong and should not be followed. It is not necessary to take a view on that in this judgment."*

136. Andrew Baker J did not find it necessary to resolve the question of whether the identification by Marcus Smith J, in *Absolute Living*, as to what constituted a technical breach was too narrowly stated. In *Maksimov* the question of whether the breach was serious was not assessed by reference to whether the respondent, Mr Maksimov, appreciated that his conduct had breached the order but rather by reference to the consequence of the particular breach in respect of which Hamblen J had found Mr Maksimov to be in contempt; see the substantive judgment of Hamblen J on the contempt application, for which the neutral citation number is [2014] EWHC 3771 (Comm), at [129]. In this context Mr Sullivan also drew my attention to the decision of Scott J (as he then was) in *Bhimji v Chatwani* [1991] 1 WLR 989. In *Bhimji* the question of the seriousness of the breach was also assessed by reference to a more general review of the facts surrounding the breach of, in that case, an *Anton Piller* order; see the judgment of Scott J at 1002E-1003C.

137. It remains to be seen whether the question, left unresolved by Andrew Baker J in *Navigator Equities* at first instance, is material in the present case. If it is material, it seems to me that the authorities support, or at least permit a broader approach to the assessment of whether a breach of an order is serious or technical than that adopted by Marcus Smith J. It also seems to me that Briggs J, in his reference to purely technical contempt in *Sectorguard*, did not have in mind as precise a test of seriousness as that set out by Marcus Smith J in *Absolute Living*. I do however note that Marcus Smith J identified the concept of the importance of the relevant order as being a factor to consider in relation to the question of seriousness. As such, I do not think that it is right to say that Marcus Smith J was necessarily confining the distinction between serious and technical to the nature of the defendant's conduct. This in turn leads to me to doubt that there is necessarily any material difference as between (i) the distinction between serious and technical breaches drawn by Briggs J in *Sectorguard* and (ii) the distinction drawn by Marcus Smith J in *Absolute Living*. Beyond that, and looking more generally at [36] in the judgment in *Absolute Living*, it seems to me that Marcus Smith J provides a useful summary of factors to bear in mind in deciding whether an allegation of contempt, which is accepted as factually well-founded, should nevertheless be struck out as an abuse of process.

138. Finally, and before turning directly to the present case, there is a specific point on the purpose of asset disclosure provisions in freezing orders which, it seems to me, it is important to keep in mind in my analysis of the Strike Out Application. Mr Ahmed submitted, and I accept, that asset disclosure is an integral and essential part of the relief granted to a claimant in order to ensure the effectiveness of a freezing order; see the judgment of Gloster J (as she then was) in *Akcine Bendrove Bankas Snoras v Antonov* [2013] EWHC 131 (Comm), at [76], and see the judgment of Pill LJ in the Court of Appeal in *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1125. The latter case was concerned with an appeal against an order for the provision of information about assets, made in support of an earlier freezing order. The appeal was dismissed. In considering the argument of the defendants that the judge had failed adequately to consider the prejudice to the defendants if the relevant information had to be disclosed, Pill LJ identified the following principles which emerged from the authorities, in his judgment at [5] and [6]:

> ***"[5]*** *The claimants rely on the majority decision of this court in Motorola Credit Corp v Uzan [2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945, where well-established principles were stated and reaffirmed. Waller LJ referred (at [27]) to*

the statement of Steyn LJ in Grupo Torras SA v Al-Sabah [1994] CA Transcript 159 that without disclosure, a freezing order would be a 'relatively toothless procedure in the fight against rampant transnational fraud'. Waller LJ stated (at [29]), that 'a freezing order in normal circumstances simply cannot be effective without that disclosure'. Once it is accepted that the freezing order should continue, 'a disclosure provision would be the normal provision so that that the freezing order can be properly policed and be effective'. Lord Woolf CJ, concurring, stated (at [37]), that 'the disclosure order, where there is a freezing order, is intimately involved in the effectiveness of the freezing order'.

[6] *In Raja v van Hoogstraten [2004] EWCA Civ 968 at [105], [2004] 4 All ER 793 at [105], Chadwick LJ stated: '[Motorola] provides support for the proposition that, in a normal case, a stay of the disclosure obligations is likely to be refused.' Chadwick LJ accepted, however, that the Motorola Credit Corp case 'is no authority for the proposition that a defendant will always be refused a stay of the obligation to make disclosure pending the final determination of his application to set aside the freezing order'."*

139. It is to be noted that the quoted reference to a freezing order being a relatively toothless procedure was made in the context of a reference to the fight against *"rampant transnational fraud"*. It is however clear from the authorities that asset disclosure provisions are an essential part of ensuring that a freezing order can be properly policed and can be effective. This principle is not confined to freezing orders concerned with alleged transnational fraud.

140. The above is not a comprehensive review of all the authorities cited to me, of which there were a number. While all of the authorities cited to me have been taken into account in my analysis of the Strike Out Application, I have only found it necessary to make specific reference to the authorities cited above. I now turn to apply the principles, which emerge from the authorities cited to me, to the question of whether the Contempt Application constitutes an abuse of process.

<u>The Strike Out Application - analysis</u>

141. I have spent a considerable amount of time going through the chain of events, which commenced with the execution of the Search Order on 3rd November 2023 and concluded with the service of the Contempt Application on Mr Fenton on 20th November 2023, because that chain of events seems to me to be unusual.

142. The Claimant's case, which is not now contested, is that Mr Fenton was required to provide the information about the assets of TRF, as required by Paragraph 10(1), by 4.30pm on the working day following service of the Freezing Order. The information was therefore required by 4.30pm on 6th November 2023 (the Monday of that week). The affidavit, confirming the information, was due by 10th November 2023 (the Friday of that week). As from 4.30pm on 6th November 2023 Mr Fenton was therefore in breach of Paragraph 10(1) although, as I have found, Mr Fenton was not then aware of this. Equally, the clock was ticking down fast to his obligation to provide the affidavit.

143. Given the stress which is now laid by the Claimant, both in Mr Dodman's evidence and in Mr Ahmed's submissions, on how important it was that Mr Fenton should comply with his asset disclosure obligations within the time limits specified in the Freezing Order, one might have expected the Claimant, by RWK, to have been straight on to Mr

Fenton, on or shortly after 4.30pm on Monday 6th November 2023, pointing out his breach and demanding the missing information.

144. What in fact happened was quite the opposite. There was no claim that Mr Fenton was in breach of the Freezing Order, nor was there any demand for the missing information. Instead, RWK sent Mr Fenton the letter of 7th November 2023, which was drafted on the basis that service of the Freezing Order was being effected under cover of that letter, and made no reference to the fact that service of the Freezing Order had already been effected on 3rd November 2023. Still less did the letter say anything about Mr Fenton being in breach of the Freezing Order.

145. This continued to be the position following the arrival of TS on the scene. In their email of 8th November 2023 (15:47) TS stated that the Freezing Order had been served *"under cover of your letter dated 7 November 2023"*, and also stated, correctly, the understanding of TS *"that the Order, inter alia, requires TRF to provide information and an affidavit by deadlines relative to the date of service, with a return date of 16 November 2023"*. A request was then made for the deadlines in Paragraphs 10(1) and 11 to be extended and for the return date hearing to be adjourned. The email did not actually state the dates for compliance with Paragraphs 10(1) and 11 which followed from the understanding of TS as to the position in relation to service. What was obvious was that TS were treating those dates as falling some days after, respectively, 6th November 2023 and 10th November 2023.

146. The response from RWK, on 9th November 2023 (12:44), was even more striking. RWK said that *"in principle"* they had no objection to the proposal from TS. The reference to *"the proposal"* was not qualified. The proposal made in the email from TS was that the time limits in Paragraphs 10(1) and 11 be extended and the return date hearing be adjourned to a later date. Mr Dodman said in cross examination that the statement of no objection, in principle, to the proposal from TS should have been restricted to the request for the adjournment of the return date hearing. There was however no such restriction stated in the email of 9th November 2023. If the Claimant had been concerned that Mr Fenton was already in breach of Paragraph 10(1) and had been concerned that the information about assets was urgently required, I have no doubt that RWK, as competent solicitors, would have spelt this out clearly in the email. Instead, RWK simply made the point that compliance with Paragraph 10(1) should not have been a problem for Mr Fenton, and asked for an explanation as to why there was a problem in this respect. This was a perfectly reasonable point to make but, in common with the remainder of the email, it is completely at odds with the stance which the Claimant now seeks to take in relation to the importance of (i) prompt compliance with Paragraphs 10(1) and 11 and (ii) such compliance being achieved by, respectively, 6th November 2023 and 10th November 2023.

147. I accept, of course, that the response from RWK did not agree to the proposal from TS. RWK said that there was no objection in principle. All that this form of words did was to create the possibility that agreement could be reached subject, in particular, to Mr Fenton explaining why there was a problem complying with Paragraph 10(1). The relevant point remains however that the statement of no objection in principle was completely at odds with the stance which the Claimant now seeks to take.

148. This stance does not appear to have changed on 10th November 2023. On 10th November 2023 Mr Fenton provided the information which was required by Paragraph 10(1). There is no evidence of anyone suggesting to Mr Fenton or TS, on 10th November 2023, that he had provided this information late.

149. The stance taken by the Claimant changed on 13th November 2023. In their email of 13th November 2023 (12:17) TS stated their understanding that Mr Fenton had complied with Paragraph 10(1), on 10th November 2023, and stated their understanding that the deadline for compliance with Paragraph 11 was 16th November 2023, and repeated their request for an extension of this deadline. The response of RWK, in the email of 14:38, was not a direct challenge to the understanding of TS, but a request for confirmation of what TS understood to be the dates for compliance with Paragraphs 10(1) and 11. TS set out their understanding in their email of 15:54. The dispute over the date of service of the Freezing Order and the time limits in Paragraphs 10(1) and 11 was not however articulated until the exchange of emails (19:33 and 21:02) which took place on the evening of 13th November 2023.

150. It is important to keep in mind that it was on the same day, 13th November 2023, that the decision was made by the Claimant to proceed with the preparation of the Contempt Application. Even allowing for the distinction stressed by Mr Ahmed between deciding to prepare the Contempt Application and deciding to make the Contempt Application, it is obvious that the Claimant would not have made the decision to incur the not insignificant costs of preparing the Contempt Application unless it was some way down the road to a decision actually to proceed with the Contempt Application. It is also important to keep in mind that the email from RWK, sent at 19:33, asserted for the first time not only that Mr Fenton had been obliged to provide the information about the assets of TRF by 6th November 2023, but also that Mr Fenton *"had failed to provide the relevant information on time or at all"*. The reference to *"at all"* was plainly wrong, as TS pointed out in their email in reply. Mr Fenton had provided the required information on 10th November 2023.

151. It is difficult to understand why the Claimant, by RWK, began to adopt such an aggressive stance on 13th November 2023. It is also difficult to understand why the Claimant chose to move so quickly to the preparation and making of the Contempt Application. In order to answer these questions, it is necessary to go back to the evidence.

152. In paragraph 35 of his third affidavit Mr Dodman states that the Claimant was *"justifiably concerned that TRF would not comply without further Court intervention"*. In cross examination Mr Dodman was challenged on his evidence that the Contempt Application was justified. It was put to Mr Dodman that there was no reason for Mr Dodman or his client to think that the required affidavit would not be served on 16th November 2023. Mr Dodman did not accept this. In cross examination, Mr Dodman gave the following reasons in defence of the making of the Contempt Application. Mr Dodman said that both he and his client were worried about non-compliance. He pointed out that he did not know what Mr Fenton's intentions were. He pointed out that in his experience as a solicitor, dealing with these kinds of cases, he was regularly told that affidavits were coming, which did not then appear. There was a need to police freezing orders, specifically by the obtaining of information about assets. In the absence of the affidavit Mr Dodman did not know if the information provided orally would be confirmed by Mr Fenton on oath. Mr Dodman said that he had made a decision to protect his client, which

even if considered to be wrong now, was the right decision at the time. Mr Dodman was asked if he thought that Mr Fenton would willingly breach the Freezing Order. Mr Dodman's response was he could not answer that question, which I took to be a repetition of Mr Dodman's point that he did not know what was in Mr Fenton's mind at the relevant time. As Mr Dodman put the matter, he made a judgment call.

153. Mr Dodman was asked why, if the Claimant was concerned about compliance with the Freezing Order, RWK did not send a communication warning Mr Fenton that if he did not comply with Paragraph 11 a contempt application would be made. Mr Dodman accepted that, typically, his firm would do that, but he said that it was a busy time, and that they had a lot on.

154. Turning to Mr Rotheroe, his evidence in his second affidavit was principally concerned with the proceedings in the Isle of Man mentioned earlier in this judgment. As I read his second affidavit, Mr Rotheroe does not address the question of why the Contempt Application was made when it was, beyond referring to the chronology of events as establishing that Mr Fenton was in breach of the Freezing Order. In cross examination it was put to Mr Rotheroe that there was no reason to think that Mr Fenton would fail to provide the affidavit. In response Mr Rotheroe claimed that there had been earlier problems with obtaining accounts for the Claimant from Mr Fenton. Mr Rotheroe said that he had chased for this information in February 2023. Mr Rotheroe accepted that this was not a matter which he had mentioned in his written evidence.

155. It seems to me that the question of whether the making of Contempt Application was justified was more a matter for submissions than evidence. It seems to me that this question falls to be answered on an objective basis, by reference to the evidence, rather than by reference to the question of whether the Claimant was in fact concerned about Mr Fenton's compliance with Paragraph 11 at the relevant time. If, on objective examination, the making of the Contempt Application was not justified, it does not seem to me that it can be considered to have been justified simply because the Claimant thought that it was justified. In addition to this, and so far as the Claimant's state of mind was concerned, there was no waiver of privilege on the part of the Claimant, with the consequence that it was not possible to know what was passing between the Claimant and RWK at the relevant time. I stress that I do not say this by way of criticism of the Claimant, or on the basis that I am thereby entitled to draw adverse inferences. The Claimant was quite entitled to maintain privilege. This did however have the consequence that the ability of the court to investigate the Claimant's state of mind at the relevant time was limited.

156. Given however that both Mr Dodman and Mr Rotheroe gave evidence that the Claimant did have the alleged concern as to whether Mr Fenton would comply with his obligations under the Freezing Order, it seems to me that I should deal with this evidence. I am bound to say that I found this evidence to be unsatisfactory, for a number of reasons.

157. First, the evidence of Mr Dodman and Mr Rotheroe signally failed to explain why the Claimant, by RWK, only began to adopt such an aggressive stance on 13th November 2023. On the Claimant's case, which is now admitted, Mr Fenton had been in breach of the Freezing Order since 4.30pm on 6th November 2023. As I have pointed out, if the Claimant was so concerned about compliance with the terms of the Freezing Order, one would have expected the Claimant, by RWK, to have pointed this out to Mr Fenton at

some point during the previous week, rather than first raising the issue of the dates for compliance with the Freezing Order in the afternoon of 13th November 2023. On the available evidence what appears to have happened (and this is the inference which I draw) is that it was realised on the Claimant's side, at some point between 10th November 2023 and 13th November 2023, (i) that the Claimant was able to say that the Freezing Order had been served on Mr Fenton on 3rd November 2023, (ii) that Mr Fenton was thereby in breach of the terms of the Freezing Order, and (iii) that this opened the way to a contempt application.

158. Second, there are the events of 14th November 2023, which are more notable for what did not happen than for what did happen. RWK indicated, by their email of 15:34, that they were taking instructions on the points raised by TS in the email from TS of the previous evening (21:02). TS chased for that response by their email of 14th November 2023 (20:20). RWK also sent a formal letter by email setting out their terms for adjourning the return date hearing. The letter was silent on the dispute which had arisen the previous evening, in relation to the date of service of the Freezing Order. If the Claimant was so concerned to see the affidavit which was due under Paragraph 11, I find it odd that the matter was not vigorously pursued on 14th November 2023, by which time it was clear, from the email exchange of the previous evening, that there was a dispute over the time limits in the Freezing Order.

159. Third, there are the events of 15th November 2023. These events were principally concerned with the exchanges between RWK and TS concerning the terms for the adjournment of return date hearing. What is however puzzling about the events of this day is how they could be said to have justified the decision to proceed with the making of the Contempt Application, so far as those events actually occurred before the decision was made by the Claimant to proceed with the making of the Contempt Application. As I have previously explained, that decision must have been made by the Claimant and actioned by RWK, at the latest, within court office hours on 15th November 2023. At that time however the situation confronting the Claimant was not one where Mr Fenton had refused or was refusing to comply with his obligations under Paragraphs 10(1) and 11. Nor was there any indication that Mr Fenton was stalling or prevaricating in terms of compliance with these obligations.

160. So far as Paragraph 10(1) was concerned, Mr Fenton had provided the required information on 10th November 2023. The information may have been provided late, but Mr Fenton did not know this when he provided this information, and RWK only took the point that the deadline under Paragraph 10(1) had been 6th November 2023 on the evening of 13th November 2023. I note that RWK, in their email of 15th November 2023 (16:29), repeated their assertion that, in their belief, Mr Fenton had failed to comply with Paragraph 10(1) *"at all"*. There was no basis for RWK to hold this particular belief. Even if, and there is no evidence of this, RWK considered at that time (and contrary to the actual position) that the information which had been provided on 10th November 2023 was inadequate, this was no basis for saying that there had been no compliance *"at all"*. No grounds were identified by RWK for saying that the information provided by Mr Fenton had been inadequate. The most that RWK could reasonably have said or considered, at the time, was that they needed to see the confirmatory affidavit required by Paragraph 11, in order to satisfy themselves that Mr Fenton was prepared to confirm, on oath, the information which he had provided on 10th November 2023.

161. This brings me to Paragraph 11 and the required affidavit. In that respect the Claimant was not confronted with a refusal on the part of Mr Fenton to provide the affidavit. The argument between the parties was to as to whether the affidavit had been due on 10th November 2023 or was due on 16th November 2023. By the time the argument came to be articulated between Ms Toomer and Mr Dodman the parties were only a day away from the date, 16th November 2023, when the affidavit was due, whoever was right on the date of service.

162. Mr Ahmed sought to defend the Claimant's stance by pointing to the fact that Ms Toomer's email of 15th November 2023 (17:15) referred to the provision by Mr Fenton of the affidavit *"by the time any contempt application is heard"*. Mr Ahmed sought to suggest that this meant that the Claimant was left in a position where it was at risk of the provision of the affidavit being indefinitely delayed. I do not regard this as a reasonable reading of the email. On the argument of TS, the affidavit was due by 16th November 2023. It does not seem to me that Ms Toomer was suggesting that Mr Fenton would fail to meet that deadline, nor do I think that her email could reasonably be read as making that suggestion. On any reasonable reading of the email, it seems to me that Ms Toomer was simply making the point that the affidavit would have been provided by the time any contempt application was heard.

163. Beyond this however Mr Ahmed's point ignores the important fact that, by the time Ms Toomer sent her email, the decision to make the Contempt Application had been made and implemented. In reality, it did not matter what Ms Toomer said. The decision to proceed with the Contempt Application had already been made. The Contempt Application was only served on Mr Fenton on 20th November 2023. As Mr Dodman candidly admitted in cross examination, if Ms Toomer had not telephoned him in the late afternoon of 15th November 2023, in the course of which telephone conversation Mr Dodman mentioned that the Claimant was making the Contempt Application, Mr Fenton and those advising him would not have known of the Contempt Application until 20th November 2023. This seems to me to be a remarkable position, if the Claimant was genuinely concerned that Mr Fenton would not provide the affidavit required by Paragraph 11.

164. Fourth, and more generally, Mr Ahmed's attempts to persuade me that the Claimant was genuinely and reasonably concerned as to whether it was going to be provided with the affidavit take no account of the fact that, as at 15th November 2023, there was no evidence on the basis of which it could reasonably have been concluded that Mr Fenton was likely to ignore the terms of a court order. So far as the Search Order is concerned, it is accepted that Mr Fenton complied with the Search Order, notwithstanding that compliance was, it is clear from the evidence, a very onerous task. I am not entirely clear as to whether any obligations under the Search Order remained for compliance as at 15th November 2023, but it is clear that there had been compliance with the obligations in the Search Order which required to be observed up to that date. So far as the Freezing Order was concerned, Mr Fenton had provided the required information on 10th November 2023. The information was late, but this was not raised by RWK until late on 13th November 2023.

165. In this context it is also important to note that Mr Dodman, in his email sent at 18:05 on 15th November 2023, accepted that the information which was required to be confirmed by affidavit, that is to say the information required by Paragraph 10, was *"duly provided"*

by Mr Fenton on 10th November 2023, subject to Mr Dodman's point that the information should have been provided by affidavit on that date. RWK thereby retracted their previous assertions that Mr Fenton had failed to comply *"at all"* with Paragraph 10.

166. I take the point made by Mr Dodman, in cross examination, that he had experience of being assured by solicitors that an affidavit from their client would be forthcoming by a certain date, with no affidavit then appearing by the promised date. I accept the need for the prompt provision of information about assets, so that a freezing order can be policed. I also accept the need to take into account that, in situations of this kind where events may be moving fast and one party cannot know what the other party is going to do or fail to do, judgment calls have to be made, and clients protected. As such, it is important to avoid the judgment of hindsight when considering the basis for such judgment calls.

167. Nevertheless, and in the particular circumstances of the present case which I have described above, I cannot see how the present case was one where RWK could reasonably have entertained doubts that the affidavit would be provided by Mr Fenton, at least in compliance with what TS were saying was the relevant deadline.

168. If however I am wrong in saying this, the obvious and proportionate course of action would have been to wait for 16th November 2023 and see if the affidavit did arrive, which it did. If the situation was seen as so serious as to justify further action, and I am not persuaded that it was, the obvious course of action would have been to send an email or write a letter threatening a contempt application if the affidavit was not provided by a specified deadline. Mr Dodman conceded that, typically, that was what his firm would have done. I cannot however accept that this was not done because RWK were busy, and had a lot on. Mr Dodman was leading a competent legal team and it was clear from Mr Dodman's evidence that he had extensive experience of this kind of litigation. If the Claimant's objective, in making the Contempt Application, was to procure compliance by Mr Fenton with Paragraph 11, as opposed to seeking to exploit the fact that he was in breach of the Freezing Order, I have no doubt that RWK would have been instructed to send an appropriate letter (or email) before application.

169. In this context, there is also Mr Rotheroe's evidence that he was concerned about compliance because of the alleged failure of Mr Fenton previously to provide accounts for the Claimant. I am not able to accept that this was a ground for concern in Mr Rotheroe's mind at the relevant time. This evidence only emerged in cross examination. It was not foreshadowed in Mr Rotheroe's written evidence. It related to events which had occurred some eight months prior to the relevant time in November 2023. The impression which I formed was that Mr Rotheroe came up with this allegation, in cross examination, in an attempt to find an answer to Mr Sullivan's question as to whether there was any reason to think that Mr Fenton would fail to provide the affidavit. Beyond, this, I did not understand Mr Rotheroe, in his evidence, to identify any other ground for concern as to whether Mr Fenton would provide the affidavit.

170. Fifth, it is also significant that the Contempt Application was not served until 20th November 2023. By that time the affidavit had been provided. In those circumstances the Contempt Application was not, on any view of the matter, required for enforcement purposes. Its pursuit could only have been justified on the basis that Mr Fenton's breaches of the Freezing Order needed to be brought to the attention of the court and/or on the basis that Mr Fenton should pay the Claimant's costs of preparing and issuing the

Contempt Application. In this context the correspondence between the parties which postdated the service of the Contempt Application is important; in particular the letter of 19th February 2024. The letter of 19th February 2024 makes a series of very serious allegations against Mr Fenton, including the following:

(1) The Claimant did *"not consider that Mr Fenton honestly sought to obey the terms of Freezing Injunction"*.

(2) It was *"clear and obvious from the above* [RWK's summary of events set out earlier in the letter] *that Mr Fenton's breach was a knowing breach,"*.

(3) It *"would appear that Mr Fenton wilfully disregarded the terms of an order carrying a penal notice"*, which was *"an extremely serious matter"*, and rendered the Contempt Application *"wholly appropriate and necessary"*.

171. The pre-penultimate paragraph of this letter should be quoted in full:

> *"It therefore follows that Mr Fenton's breach was not "technical". It was a serious and knowing breach by a professional who was personally served with a Freezing Injunction; who knew when the affidavit was to be provided; who was reminded that he had breached the relevant paragraph of the order and yet still decided to take three days (and only after the contempt application had been issued) to provide an affidavit; and who ultimately provided a short affidavit containing details that were in his knowledge at all material times, and which therefore could (and should) have been provided before the 10 November 2023 deadline. The contempt application is therefore wholly proper and our Client intends to continue with it."*

172. There are three particular points to be made on this paragraph of the letter of 19th February 2024. First, the allegation of serious and knowing breach by a professional person is at odds with my findings on the question of whether Mr Fenton was in knowing and wilful breach of the Freezing Order; see the relevant earlier section of this judgment. For the reasons which I have already set out, this allegation should not have been made. I do not think that the allegation reflects much credit on the Claimant. The same applies to the other allegations of knowing and wilful breach which were made in the letter of 19th February 2024. Second, Mr Fenton did not *"decide"* to take three days to provide the affidavit. Mr Fenton's understanding at the time was that the affidavit was due on 16th November 2023. At the worst, it may be said that Mr Fenton should have realised that he was at some risk of being in breach of the Freezing Order as from 14th November 2023, given the argument which RWK were advancing on the date of service of the Freezing Order. Third, the reference to Mr Fenton providing the affidavit only after the Contempt Application had been issued implies that it took the issue of the Contempt Application to force Mr Fenton into complying with Paragraph 11. I do not accept this. As I have pointed out, the reality was that the Claimant had decided to proceed with the Contempt Application and had filed the Contempt Application for issue before Mr Fenton, by TS, was even made aware that a contempt application might be issued. Beyond this it is quite clear, on the evidence, that Mr Fenton provided the affidavit, on 16th November 2023, because that was when he believed it was required to be provided.

173. It is instructive to compare the letter of 19th February 2024 with the email which Mr Dodman sent on 15th November 2023 (18:05). In this email Mr Dodman set out the Claimant's case on the date of service and explained why the Claimant could not accept a draft order which recorded that Mr Fenton was not in breach of the Freezing Order. The allegations of knowing and wilful breach of the Freezing Order, made subsequently in

the letter of 19th February 2024, were not made in this email. By the time of the letter TS had raised the argument that the Contempt Application constituted an abuse of process, and battle was being joined on this issue. The conclusion to which I am driven is that the Claimant chose to make the allegations of knowing and wilful breach of the Freezing Order as a means of trying to defend and justify the making of the Contempt Application. Equally, it seems to me that the contrast between the terms of the letter of 19th February 2024 and Mr Dodman's email of 15th November 2023 further undermines the argument that the Claimant was, either in the period between 13th November 2023 and 16th November 2023 or for that matter in the previous week, genuinely concerned with the question of whether Mr Fenton would comply with his obligations in Paragraphs 10(1) and 11.

174. There is one further point which it is convenient to deal with in this context. The paragraph of the letter of 19th February 2024 which I have quoted above asserted that the affidavit could have been provided by Mr Fenton much earlier than 16th November 2023 because it contained only limited information, which reflected the information provided orally by Mr Fenton on 10th November 2023. Mr Ahmed also highlighted this point in his submissions. I do not accept this point, for a number of reasons. First, the point takes no account of the pressure under which Mr Fenton was placed, both in terms of the amount of work required of him and in terms of personal stress, in the days following 3rd November 2023. Second, the point takes no account of the difficulties created for Mr Fenton by the problems with accessing the bank account of TRF. Third, and most important, the point takes no account of the need for Mr Fenton and those advising him to ensure that the information he provided, pursuant to Paragraphs 10(1) and 11, was accurate. In the case of Paragraph 10(1) it is true that Mr Fenton was required to provide information *"to the best of* [his] *ability"*, but this was no licence to Mr Fenton to be careless in the information he provided. In the case of Paragraph 11 the information had to be provided in an affidavit, on oath. I reject the suggestion that, once Mr Fenton had provided the information orally, on 10th November 2023, he was in a position to provide an affidavit confirming that information, more or less immediately. Any respondent to a freezing order and any person advising a respondent would need to spend additional time and take additional care to make sure that the asset disclosure information was accurate, before it went into an affidavit. This, of course, was why there was a gap of four working days between the deadlines in Paragraphs 10(1) and 11. In summary, I reject the argument that Mr Fenton should have been able to comply with the obligations in Paragraph 10(1) or in Paragraph 11 at the drop of a hat.

175. Drawing together all of the above analysis, and coming specifically to the question of whether the making of the Contempt Application was justified, I make the following findings on the evidence:
    (1) For the reasons which I have given I am unable to accept that the Claimant was, either at the time when it made the Contempt Application or at any time following the obtaining of the Freezing Order, genuinely concerned that Mr Fenton would fail to comply with his obligations under Paragraphs 10(1) or Paragraph 11. I am not able to accept the evidence of Mr Dodman or Mr Rotheroe to this effect.
    (2) For the same reasons, I am also unable to accept that the Claimant made the Contempt Application for the purposes of securing the compliance by Mr Fenton with his obligation under Paragraph 11. I am not able to accept the evidence of Mr Dodman or Mr Rotheroe to this effect.

(3) In rejecting the relevant evidence of Mr Dodman and Mr Rotheroe I should make it clear that I am not finding that either Mr Dodman or Mr Rotheroe was dishonest in their evidence. It seems to me, and I so find, that, in relation to this part of their evidence, both witnesses had persuaded themselves that reasons and explanations existed for the relevant events, which did not in fact exist at the relevant time. This is not uncommon in cases where the parties are firmly entrenched in a bitter dispute. Regrettably, the present case is very much a dispute of this kind.

(4) Although I do not think that it is necessary to go this far in my findings, there is the question of why the Claimant did make the Contempt Application at the time, and in the manner in which it was made. The answer to this question seems clear to me, on the evidence. In obtaining the Freezing Order and the Search Order the Claimant had clearly decided on the pursuit of an aggressive strategy against Mr Fenton. So far as the Orders were concerned, this was legitimate. The Deputy Judge was persuaded to make the Orders and, so far as I am aware, neither of the Orders has been set aside on the basis that it should not have been made. As I have already found, at some point between 10th November 2023 and 13th November 2023 it was realised on the Claimant's side (i) that the Claimant was able to say that the Freezing Order had been served on Mr Fenton on 3rd November 2023, (ii) that Mr Fenton was thereby in breach of the terms of the Freezing Order, and (iii) that this opened the way to a contempt application. I find that, in further pursuit of its aggressive strategy, the Claimant decided to proceed with the Contempt Application.

176. As I have already noted, it seems to me that the question of whether the making of Contempt Application was justified is a question which falls to be answered on an objective basis, by reference to the evidence, rather than by reference to the question of whether the Claimant was in fact concerned about Mr Fenton's compliance with Paragraph 11 at the relevant time.

177. If however the question is considered on an objective basis, it seems to me that the answer does not change. For the reasons which I have set out in my analysis of the evidence, I cannot see that the making of the Contempt Application was justified, either on the basis that it was required in order to secure compliance by Mr Fenton with his obligation to provide the affidavit required by Paragraph 11, or on any other basis.

178. I now return to the specific question of whether the Contempt Application constitutes an abuse of process. On the basis of my analysis of the facts and circumstances of this case, as set out above, it seems to me that the issue and pursuit of the Contempt Application in the present case fall squarely within almost of all of the circumstances, identified by Briggs J in *Sectorguard* and by other judges in other cases, where the making of a contempt application will be considered to be an abuse of process. I say this for the following reasons.

179. It is convenient to start at the high level. As Briggs J explained in *Sectorguard*, at [44] and [45], it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking. The concept that the disproportionate pursuit of pointless litigation is an abuse takes on added force in connection with contempt applications. In the present case the Claimant has commenced and pursued the Contempt Application, in relation to the provision by

Mr Fenton of information about the assets of TRF a few days after the respective dates when the information was due. It cannot be suggested that these delays caused any or at least any real or material prejudice to the Claimant, and there is no evidence of any such prejudice having been caused to the Claimant. The result of the making of the Contempt Application has been a substantial and bitterly fought two day hearing, involving extensive preparation and evidence, very substantial expenditure of costs, and this very lengthy judgment. I do not know what progress has been made in the action itself since its commencement, but it seems reasonable to assume that the Contempt Application has been a substantial and expensive diversion from the process of actually determining the claims in this action.

180. In terms of expense, some idea of the resources expended on the Contempt Application can obtained from examining the statements of costs of the parties for the hearing of the Contempt Application. The figures are depressing. The Claimant's statement of costs amounts to a figure of £204,036.80. Mr Fenton's statements of costs come out at a figure of £164,312.91. By reference to these statements of costs, a combined figure of £368,349.71 has been spent on this piece of satellite litigation. In my judgment, and given the particular facts of this case, the issue and pursuit of the Contempt Application is correctly described as the disproportionate pursuit of pointless litigation.

181. I do not think that it is an answer to this point to say that the Claimant made an open offer, by a letter from RWK dated 19th April 2024, to withdraw the Contempt Application if Mr Fenton agreed to pay the Claimant's costs of the Contempt Application to that date. The justification for that offer, which was put forward in the letter, was that the Claimant had been entirely justified in issuing the Contempt Application because it was only after Ms Toomer had been told that the Claimant was proceeding with a contempt application that Mr Fenton provided the affidavit required by Paragraph 11. For the reasons which I have set out I do not accept that this is an accurate or fair account of what occurred in this case. In my judgment the Contempt Application should not have been made, and should not have been pursued. I do not think that the Claimant was justified in making payment of its costs the condition of withdrawing the Contempt Application.

182. Moving to more specific matters, the position would be different in the present case, if it could be said that the Contempt Application was legitimately made for the purposes of enforcing compliance by Mr Fenton with the provisions of the Freezing Order. On the facts of this case, as I have analysed them, the Contempt Application was not made for this purpose. Beyond this, and even if the Claimant had this purpose, I do not consider that the Contempt Application was legitimately or reasonably made for this purpose. Looking at the matter objectively I cannot see how the view could reasonably have been taken by the Claimant, if (contrary to my findings) it was taken, that the Contempt Application was required to enforce compliance with the Freezing Order by Mr Fenton.

183. I have already set out, in some detail, the facts which lead me to these conclusions. I briefly reiterate those facts, in summary form:
    (1) In the week ending on 10th November 2023 there was no suggestion from the Claimant that the time limits in Paragraphs 10(1) and 11 ran from 3rd November 2023 or that Mr Fenton was in breach of the Freezing Order.
    (2) By the time that RWK raised the argument, on the evening of 13th November 2023, that the time limits ran from 3rd November 2023, with the consequence that Mr Fenton was already in breach of Paragraphs 10(1) and 11, the decision to prepare

the Contempt Application had already been made or at least, although this seems unlikely given the late timing of the email from RWK (19:33), was in the process of being made.

(3) At that point and thereafter there were no reasonable grounds upon which the Claimant could have been concerned that Mr Fenton would not provide the affidavit required by Paragraph 11.

(4) Mr Fenton had complied with the Search Order and had provided the information required by Paragraph 10(1) on the day which, on the argument put forward by TS to RWK, was the due date for compliance.

(5) Equally, the Claimant was aware from the inter-solicitor correspondence that, on the argument put forward by TS to RWK, the due date for provision of the affidavit was 16th November 2023. That argument turned out to be wrong, but in the two days which elapsed between 13th November 2023 and 16th November 2023 there were no reasonable grounds for thinking that the affidavit would not be produced.

(6) There was no pattern of behaviour on the part of Mr Fenton to justify a concern that Mr Fenton would not comply with Paragraph 11.

(7) If there had been a concern, the Claimant could have threatened Mr Fenton with a contempt application if he did not produce the affidavit. The Claimant did not do this. Instead it simply proceeded to make the Contempt Application without waiting to see if the affidavit did arrive, as it did, on 16th November 2023. But for the happenstance of Ms Toomer telephoning Mr Dodman on 15th November 2023, the Claimant would have been content for Mr Fenton to find out about the Contempt Application when it was served upon him.

184. In summary I do not consider that the Contempt Application can be regarded as having been directed at the obtaining of compliance with the Freezing Order in question. The facts of this case do not support this analysis of the position. Indeed, they point in the contrary direction. This was one of the matters identified by Briggs J in *Sectorguard* as an indication that a contempt application is not being pursued for a legitimate end.

185. I reach this conclusion independent of the point that Briggs J also made it clear, in *Sectorguard*, that a contempt application is an appropriate way of seeking to obtain the compliance by a party with an order of the court or an undertaking, *"albeit as a last resort"*. In the present case and even if, contrary to my view, the Contempt Application can legitimately be seen as directed at obtaining compliance by Mr Fenton with Paragraph 11, the making of the Contempt Application was nowhere near the last resort. It is difficult even to describe the Contempt Application as the first resort, given the absence of any process by which Mr Fenton was warned that if he did not provide the affidavit, a contempt application would be made. This additional point seems to me to provide a further reason for concluding that the Contempt Application was not being pursued for a legitimate end.

186. The position would also be different in this case if the breaches of the Freezing Order by Mr Fenton had been serious, and were breaches which required to be brought to the attention of the court. It seems to me that it is important to be clear in my use of the word *"serious"* in this context. I have accepted the submission of Mr Ahmed as to the importance of asset disclosure provisions in the policing of a freezing order. Orders of the court should be obeyed. In particular, orders of the court indorsed with a penal notice should be obeyed. Any substantial breach of a freezing order is a serious matter. No respondent to a freezing order should think that a delay in complying with the order, even

a delay of a few days, will necessarily be excused, or that such a delay will necessarily be immune from proceedings for contempt. Equally, it is the responsibility of the respondent to comply with the relevant order. As a general principle (the execution of the Search Order being an example of an exception to this principle), it is not the responsibility of the applicant who has obtained the relevant order to explain to the respondent what they are required to do and by when.

187. In the sense identified in my previous paragraph any breach of the asset disclosure provisions in a freezing order is serious or, at the least, is capable of being viewed as serious. Applying the authorities however, the question of whether a breach of a court order is serious and requires to be brought to the attention of the court is a fact sensitive exercise. On the facts of the present case as I have found them, and applying the relevant authorities, I cannot see that Mr Fenton's breaches of the Freezing Order did qualify as serious breaches, which required to be brought to the attention of the court.

188. I reach this conclusion for a number of reasons, which I can summarise as follows:
    (1) In the case of each of the breaches the delay in complying with relevant time limit was a short one, amounting to no more than four working days.
    (2) The breaches were not deliberate, in the sense that Mr Fenton did not know that he was breaching the Freezing Order at the times when he was in fact required to comply with Paragraphs 10(1) and 11.
    (3) Mr Fenton's understanding of the position was that the relevant dates for compliance were, respectively, 10th November 2023 and 16th November 2023. Mr Fenton complied with his obligations by those dates.
    (4) The worst that can be said of Mr Fenton is that he should have appreciated, as from 14th November 2023, that he was at some risk of being in breach of the Freezing Order, given the argument raised by RWK on the date of service of the Freezing Order.
    (5) So far as the consequences of the breaches were concerned, it seems to me that there were no serious or adverse consequences. As I have said, the Claimant has not identified any, or at least any real or material prejudice which it suffered as a consequence of the late provision of the information about assets. It is not suggested that the information which Mr Fenton did provide was defective in any way, or that the short delay in its provision caused any real problems for the Claimant.
    (6) By the time the Contempt Application came to be served, Mr Fenton was no longer in breach of the Freezing Order, in the sense that he had complied with Paragraph 11, albeit out of time. So far as the issue of the Contempt Application was concerned, Mr Fenton complied with Paragraph 11 only a day after the date of issue.

189. It is convenient at this point to return briefly to a question which I left outstanding earlier in this judgment and which is also relevant to my conclusion that the breaches were not serious. This question is whether Mr Fenton should have acted more quickly once he became aware that RWK were contending that the date of the service of the Freezing Order was 3rd November 2023 with the consequence, if RWK turned out to be right in this contention, that the dates for compliance with Paragraphs 10(1) and 11 had been, respectively, 6th November 2023 and 10th November 2023. This point has given me some pause for thought. It seems to me, in principle, that if a respondent to a freezing order finds themselves in a situation where there is a question mark over the date for

compliance with an asset disclosure order and/or where the respondent requires or may require more time for compliance with an asset disclosure order, it is the responsibility of the respondent to ensure that they do not end up in breach of the order, either by reaching agreement with the applicant on an extension of time or by application to the court. It also seems to me that a respondent should not necessarily assume that a breach will be excused or will not be treated as serious simply because they were attempting to agree an extension of time with the applicant when the relevant deadline expired or on the basis that there was a dispute over the relevant deadline or on the basis that the respondent made a mistake about the deadline. Whether the breach should be treated as serious is however a fact sensitive question.

190. In the present case the facts do not seem to me to justify treating Mr Fenton's breaches as serious on the basis that he should have taken pre-emptive action on 14th November 2023; being the date when, as it seems to me, it can be said that Mr Fenton should first have understood the risk of his being in breach of the Freezing Order. In theory, Mr Fenton could have made an application for an extension of the time limits in Paragraphs 10(1) and 11. In theory, Mr Fenton could also have acted more promptly to produce the affidavit. In reality, I do not think that the failure of Mr Fenton to take either of these steps justifies treating Mr Fenton's breaches as serious. The period between 14th November 2023 and 16th November 2023 was two working days. The possibility that Mr Fenton might be in breach of the Freezing Order was sprung on him by the Claimant on the evening of 13th November 2023. The obtaining of the Freezing Order and the Search Order had placed Mr Fenton under immense pressure, and condemned him to two weeks of intense legal activity. On the facts of the present case I am not prepared to treat Mr Fenton's failure to take steps which he might have taken to try to protect his position, between 14th November 2023 and 16th November 2023, as rendering his breaches of the Freezing Order serious, within the meaning of the authorities.

191. In common with Andrew Baker J, I do not find it necessary to make a final decision on whether the reference of Briggs J to purely technical contempt has the more precise meaning given to it by Marcus Smith J in *Absolute Living* or the broader meaning which emerges from *Bhimji* and *Maksimov*. Nor do I find it necessary to make a final decision on whether there is, in reality, any conflict in the authorities in this respect. On the particular facts of the present case, and whether the distinction between serious and technical breaches is taken from *Absolute Living* or from other authorities cited to me on this question, it seems to me that Mr Fenton's breaches of the Freezing Order do not fall to be classified as serious and, as such, qualify as technical breaches within the meaning of Briggs J's use of that phrase in his judgment in *Sectorguard*, at [47].

192. In summary I do not consider that the present case is one where the Contempt Application can be regarded as an appropriate means of bringing to the court's attention serious breaches of the Freezing Order. Applying the authorities, and on the particular facts of this case, I do not think that the breaches were serious or were breaches of the kind which required to be drawn to the attention of the court. This was another of the matters identified by Briggs J in *Sectorguard* as an indication that a contempt application was not being pursued for a legitimate end.

193. Drawing together all of the above analysis, I conclude that the Contempt Application was not issued for any legitimate end or purpose, and has not been pursued for any legitimate end or purpose:

(1) For the reasons which I have given, the Contempt Application cannot be justified as an appropriate, let alone a necessary way of enforcing compliance by Mr Fenton with the terms of the Freezing Order.
(2) Even if, contrary to my view, the Contempt Application could be so justified, it is impossible to say the Contempt Application was made as a last resort to enforce compliance by Mr Fenton. Indeed, it is difficult even to describe the Contempt Application as having been made as a first resort.
(3) For the reasons which I have also given, the Contempt Application cannot be justified as an appropriate means of bringing to the attention of the court serious breaches of the Freezing Order.

194. For the avoidance of doubt I can see no other legitimate end or purpose which could justify the making of the Contempt Application. Indeed, and while this may be said to be a reiteration of the reasons which I have already stated, it seems to me that if one stands back and considers the Contempt Application, as a whole and in the context of what has been said in the authorities as to the nature of the contempt jurisdiction, the Contempt Application, on its particular facts, cannot be considered either a proportionate or a legitimate exercise of the contempt jurisdiction.

195. For the reasons which I have set out above, I conclude that the Contempt Application constitutes an abuse of process, and must be struck out on this basis.

196. There is one other matter which I should mention, for the sake of completeness, before I leave my analysis of the Strike Out Application. I have not found it necessary, in my analysis of the Strike Out Application, to investigate or take into account the question of whether the making of the Contempt Application was motivated by personal animosity on the part of the Claimant, and in particular Mr Rotheroe against Mr Fenton. The same applies to the proceedings in the Isle of Man mentioned earlier in this judgment. I mention this because I did hear a certain amount of evidence and argument on these matters in the course of the hearing. So far as the question of whether the Contempt Application was motivated by personal animosity is concerned, I have accepted that this is not a relevant matter, in considering whether the Contempt Application constitutes an abuse of process; see Carr LJ in *Navigator Equities*. I have made no findings in this respect and this is not a matter which I have taken into account in my analysis of the Strike Out Application. In relation to the proceedings in the Isle of Man I do not know much about those proceedings, and I do not consider that I am in a position to make any findings, in relation to those proceedings, which would be relevant or helpful to my consideration of the Strike Out Application. In these circumstances I have also left the Isle of Man proceedings out of account in my analysis of the Strike Out Application, save for a minor role in relation to the issue of the extent of Mr Fenton's previous experience of litigation of the present kind.

<u>The Contempt Application</u>

197. In the light of my reasoning and decision on the Strike Out Application, the Contempt Application does not require separate analysis. I should however make it clear that, if the Strike Out Application had not been made, I would, on the particular facts of the present case and for the reasons which I have relied upon in reaching my decision on the Strike Out Application, have taken the course identified by Popplewell LJ in *ADM*, and declined to find contempt. Even if I had been prepared to make a finding of contempt, I cannot see that I would have regarded it is appropriate to impose any sentence upon Mr Fenton.

I cannot see how the particular facts of this case would have justified imposing a sentence upon Mr Fenton.

The outcome of the Applications

198. The outcome of the Applications is that the Strike Out Application succeeds. I will make an order striking out the Contempt Application.

Postcript

199. Although I have endeavoured to make this clear in the course of my analysis of the Strike Out Application, the point bears repeating that my decision that the Contempt Application constitutes an abuse of process has been made on the particular facts of this case. The public interest in ensuring that orders of the court are obeyed is a very strong one, particularly when such orders contain a penal notice. This judgment is not authority for the proposition that a short delay in complying with the terms of a freezing order will be excused, or that such a breach is effectively immune from a contempt application. A respondent who fails to comply with the terms of a freezing order, or for that matter any other order containing a penal notice, acts at their own risk, even where the period of delay in compliance is short and/or where there is a legitimate dispute over the date for compliance. It is the responsibility of the respondent to ensure that they comply with the relevant terms of the order. If further time is required, including in a situation where the respondent requires further time in order to protect themselves against the risk of being found to be wrong in a dispute over the relevant date for compliance, it is the responsibility of the respondent to seek to obtain the required extension of time from the court, with the agreement of the applicant if this can be obtained or without if agreement cannot be obtained.