CL-2018-000023

Neutral Citation Number: [2018] EWHC 2686 (Comm)

Case No: CL-2018-000023

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 17/10/2018

Before :

MRS JUSTICE MOULDER

- -

Between :

INTEGRAL PETROLEUM S.A	**Claimant**
- and -	
(1) PETROGAT FZE	**Defendants**
(2) SAN TRADE GMBH	
-and-	
(1) MR KLAUS SONNENBERG	
(2) MS MAHDIEH SANCHOULI	
(3) MR HOSSEINALI SANCHOULI	
(4) MR KANYBEK BEISENOV	
(5) MS NADIA LOBIS	
	Third Parties

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- -

Guy Blackwood QC (instructed by **Drukkers Solicitors & Vitaliy Kozachenko) (Fortior Law S.A.**) for the **Claimant**
Stephen Cogley QC and Edward Ho (instructed by **Stephenson Harwood LLP**) for the **Defendants** and **Third Parties**

Hearing dates: 18 and 19 September 2018

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the reserved judgment of the court on a jurisdictional challenge made pursuant to an application dated 14 June 2018. It arises out of an application by the claimant dated 30 April 2018 (the "Committal Application") for the committal to prison of five individuals (together the "Third Parties") which in turn arose out of an ex parte interim order initially made by Morgan J on 14 January 2018 against Petrogat FZE ("Petrogat") and San Trade GmbH ("San Trade") concerning delivery of a cargo of fuel oil.

2. By their application of 14 June 2018, the Third Parties apply for an order pursuant to CPR 11:

   i) to set aside service of the Committal Application;

   ii) to set aside the order of 1 May 2018 granting permission to serve the Committal Application by email; and

   iii) a declaration that the English court has no jurisdiction to try the Committal Application.

Background

3. The claimant, Integral Petroleum S.A., is an oil and petroleum trading company based in Switzerland.

4. Petrogat is a trading company based in the UAE and San Trade is a company based in Germany. Of the Third Parties, Mr Klaus Sonnenberg is a German national who lives in Germany and is the sole director of San Trade. Mr Beisenov is a Kazakhstan national who lives in Kazakhstan and the UAE and is the sole director and registered owner of Petrogat. Ms Nadia Lobis is a Turkmen national who lives in Turkmenistan and is an operations manager of Petrogat. It is the claimant's case that she was in charge of implementing the instructions of Petrogat/San Trade to move the cargo to Iran. Mr Sanchouli is an Iranian national who lives in the UAE. It is the claimant's case that he controls Petrogat and is the owner of San Trade. Ms Sanchouli, his daughter, is also an Iranian national who lives in Iran and the UAE. She is not a director of either company but has powers of attorney to act for San Trade and Petrogat respectively.

5. The dispute arose out of a contract entered into between the claimant and Petrogat in September 2017 for the sale of medium sulphur fuel oil and low sulphur fuel oil. Petrogat's obligations were guaranteed by San Trade. The dispute first came before the courts as an urgent out of hours application pursuant to section 44 of the Arbitration Act 1996. Morgan J made an order directing Petrogat and San Trade to take no steps to direct delivery of the cargo of fuel oil then believed to be loaded on railway wagons in Turkmenistan to Iran. Morgan J further

required the companies to provide a letter in this regard by noon on 14 January 2018.

6. The matter then came before HHJ Waksman QC on the return date, 26 January 2018, who continued the injunction until 2 February 2018 with an amendment to allow for the letter to be signed "forthwith".

7. Following a hearing on 2 February 2018 before Popplewell J the application to continue the injunction was dismissed. Popplewell J found that there was a "very strong prima facie case" that the claimant had property in the cargo in 37 railcars. He was also satisfied that there was a "good arguable case" that there had been breaches of the orders, in particular in not providing the letter as required by Morgan J, in relation to cooperating with the Turkmen authorities to enable the cargo to go to Iran, and failing to sign the letter in its revised form as ordered by HHJ Waksman. However the best evidence before him was that of the 37 cars, 24 which were at the border had all crossed into Iran and a further eight had probably also gone such that the order sought would only have effect in relation to 5 or possibly 13 railcars. Popplewell J concluded that as matters stood before him, he did not regard the balance of convenience as being in favour of making the order which was sought.

8. On 30 April 2018 the claimant made the Committal Application seeking an order that the Third Parties be committed to prison for contempt of court. The claimant stated that the Third Parties as "owners and/or principals and/or directors" of Petrogat and San Trade caused and/or enabled and/or permitted the defendants to breach the orders of Morgan J and HHJ Waksman.

9. The claimant also applied for an order that the court dispense with personal service of the Committal Application and that if the claimant required permission, it have permission to serve the Committal Application out of the jurisdiction and in any event have permission to serve by alternative means.

10. It is accepted for the purposes of the application before me that the order of Popplewell J dated 1 May 2018 did not grant permission to serve the Committal Application out of the jurisdiction but did grant permission to serve by alternative means and dispensed with the need for personal service.

11. It is the Third Parties' case that the Committal Application has not been validly served because the claimant has not obtained permission to serve out of the jurisdiction.

Evidence

12. In support of their application, the Third Parties rely on a first affidavit of Mr Mark Lakin dated 14 June 2018. Mr Lakin is a solicitor in the firm of Stephenson Harwood Middle East LLP instructed on behalf of the

Third Parties. Two further affidavits given by Mr Lakin have now been filed together with evidence from experts as to the law of Germany and the UAE.

13. The claimant relies on affidavits from Mr Kozachenko, an English solicitor having conduct of the matter on behalf of the claimant dated 27 April 2018, 10 July 2018, 27 July 2018 and 11 September 2018. The claimant has also obtained expert evidence as to German law and the laws of the UAE, from Professor Schnelle and Mr Azhari.

Issues

14. The issues which fall for determination are as follows:

    i) Does Article 24(5) of Recast Brussels I Regulation no. 1215/2012 ("Brussels 1 Recast") have the effect that the claimant did not require permission to serve the Committal Application out of the jurisdiction?

    ii) If Article 24(5) does not apply, is it open to the court to grant permission for service out of the jurisdiction under CPR PD6B 3.1 (3) or (10)?

Does Article 24(5) of Brussels I Recast have the effect that the claimant did not require permission to serve the Committal Application out of the jurisdiction?

15. Article 24(5) provides:

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> …
>
> (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced"

16. In summary it is the Third Parties' case that

    i) Article 24 (5) does not apply to committal proceedings as they are not "proceedings concerned with the enforcement of judgments";

    ii) Article 24(5) only applies where the defendant is domiciled in a Member State and apart from Mr Sonnenberg, the Third Parties are not domiciled in a Member State.

    iii) Article 24(5) only applies to civil and not criminal contempt proceedings and since the second, third and fifth Third Parties

are not directors of the defendants, such proceedings against those Third Parties cannot be civil contempt proceedings.

I. Does Article 24 (5) apply to committal proceedings?

17. The first issue is whether the committal proceedings are concerned with the enforcement of "judgments". Article 2 of Brussels I Recast defines "judgment" as

> "any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court". [Emphasis added]

18. Gross LJ in *Vik v Deutsche Bank AG* [2018] EWCA Civ 2011 observed (albeit obiter) at [80]:

> "… given the width of the wording of Article 2(a), I would have struggled to see why the CPR 71 order was not a "judgment" falling within the meaning of that wording and would have been minded to agree with Teare J's reasoning, at [23] – [24]."

19. In his judgment in the court below (*Deutsche Bank AG v Sebastien Holdings Inc (No 2)* [2017] EWHC 459 (Comm)) Teare J had considered an argument that notwithstanding the wide terms of Article 2, a Part 71 order was not within the extended definition of "judgment". As set out in the judgment of Teare J, the submission derived from the Schlosser report which suggested that "the wide definition of "judgment" extended to any decision governing the legal relationship of parties but not to decisions which arranged the further conduct of proceedings". In that case Teare J found that the Part 71 order was different in character from a procedural order for the giving of discovery and exchange of evidence to enable a dispute between parties as to their legal rights to be resolved. He concluded at [24] that it was an order "designed to ensure that effect was given to the court's final determination of the parties legal relationships" and there was "no reason to exclude the Part 71 order from the wide definition of "judgment" in Article 2".

20. Teare J was dealing with a different kind of order, namely an order made after final judgment to enable that judgment to be enforced. In this case, whilst the order was not related to a "final" determination of the parties legal relationship, it was not a procedural order of the type envisaged in Schlosser. Accordingly in my view there is no reason why the broad definition in Article 2 should not encompass the interlocutory orders which were made in this case for the purposes of the phrase "enforcement of judgments" in Article 24(5).

21. The second issue is whether committal proceedings are of such a nature that they can be characterised as falling within Article 24(5) as being proceedings concerned with the "enforcement" of judgments.

22. In *Reichert v Dresdner Bank (No 2) (Case C – 261/90)* the European Court was concerned with an *action paulienne* by which under the French civil code creditors could challenge acts by their debtors to defraud creditors of their rights. Dresdner Bank was a creditor of Mr and Mrs Reichert and sought to challenge a gift of an interest in real property to the Reichert's son. The European Court held that the action (*action paulienne*) had the object of safeguarding the creditor's charge by applying for an order that the disposition by the debtor in order to defraud the creditor be set aside. The court held that although the *action paulienne* protected the creditor's interests "with a view to subsequent enforcement of the obligation" it did not:

> "aim to settle a dispute relating to the "use of force or constraint, or the dispossession of movables and immovables in order to obtain the physical implementation of judgments and measures."

Accordingly the European Court held that the *action paulienne* did not fall within the scope of Article 16(5) (the equivalent provision in the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of Article 24).

23. The European Court stated that Article 16:

> "should not be interpreted in a sense wider than required by its objective because it has the effect of preventing the parties from choosing the forum which they could otherwise do and, in certain cases, of bringing them before a court which is not the court of the domicile of either of them."

24. Further that:

> "the main reason for the exclusive jurisdiction of the courts of the place in which the judgment is to be enforced is that it is for the courts of the Contracting State in which enforcement is sought alone to apply the rules relating to the actions in that state of the authorities responsible for enforcement."

25. *Reichert* was concerned with a very different type of proceedings. In my view it is entirely consistent with the objective of Article 24 that committal proceedings which seek to coercively enforce the order of the court should fall within the exclusive jurisdiction of the courts in the place in which the judgment is to be enforced.

26. Counsel for the Third Parties placed reliance on the *Jenard Report* (Report by MP Jenard on the EEC Judgments Convention [1979] OJ C 59/1 – 65) in support of the submission that Article 24(5) is limited to enforcement against property. The submissions before the European court in *Reichert* referred to the *Jenard Report* and the passage cited by the European Court (referred to above) that a dispute concerning the enforcement of judgments means:

> "disputes which may be caused by the use of force or constraint or the dispossession of movables and immovables in order to obtain the physical implementation of judgments and measures."

27. However such an argument was rejected by the Court of Appeal in *Dar Al Arkan Real Estate Development Co v Refai* [2015] 1 WLR 135 where it was submitted that Article 22(5) (now Article 24) does not apply to committal applications because such an application was not "proceedings concerned with the enforcement of "judgments"". Counsel in that case relied on the *Jenard Report* which he argued made it clear that those proceedings meant implementation of the order of the court and not coercion to induce such implementation or punishment for non-compliance. Counsel also relied on the decision in *Reichert* and the decision in *Masri v Consolidated Contractors International (UK) Ltd [2008] EWCA Civ 303,* in particular the words of Lawrence Collins LJ at [123] that:

> "it seems to me clear from the *Reichert* case that Article 22(5) is concerned with actual enforcement and not with steps which may lead to enforcement."

28. At [64] Beatson LJ rejected these arguments stating:

> "As to whether Article 22(5) applies to committal proceedings, Mr Bear's submissions were powerful, but it was stated in Reichner v Dresdner Bank AG… that "the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State in whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement."

29. The point was also briefly considered by Gross LJ in *Vik* at [82] where he observed:

> "the point that committal proceedings are not concerned with the "enforcement" of judgments was not raised before Teare J. My immediate reaction is that this submission appears improbable, sitting

> uneasily with the nature and wording of CPR 81.4 as well as the observations in *Dar*"

30. The observations of Beatson LJ in *Dar Al Arkan* and Gross LJ in *Vik* in this regard were obiter. However I see no reason to dissent from the conclusion reached by Beatson LJ and Gross LJ who had considered the same arguments that have now been placed before this court. Although counsel for the Third Parties submitted that Beatson LJ expressed the view "with some hesitation", I note Beatson LJ also recorded that the court had heard full submissions on the point and I do not therefore accept that his conclusion was anything other than considered.

31. Whilst I note the narrow approach expressed by the European Court in *Reichert* to the interpretation of the provision, the nature of the proceedings in *Reichert* was very different and there is nothing in the Article or in its objective which in my view would limit it to enforcement proceedings directed only at property. Committal proceedings are in my view both coercive and punitive in nature but they are directly concerned with the enforcement of court orders and if the committal proceedings result in an order to commit an individual to prison being made, they involve the use of force or constraint. That conclusion as to the nature of committal proceedings cannot in my view be dependent on the facts of an individual case and is therefore unaffected by the fact that in this case, given that the injunction has not been continued, the purpose of the committal proceedings cannot be said to encourage compliance.

32. In this regard it seems to me that a distinction can be drawn with the case of *Masri* where the court found that it was not precluded by Article 22(5) from appointing a receiver by way of equitable execution on the basis that the receivership order did not amount to proceedings concerned with actual enforcement of judgments. It may appear to be a fine line but in my view a distinction can be drawn between proceedings dealing with the appointment of a receiver which may be said to "pave the way for execution" and committal proceedings which in my view are directly concerned with enforcement of the order in question.

33. It would not, in my view, be consistent with the object and purpose of the provision if an arbitrary line were to be drawn between measures against property such as sequestration which, if the defendants' submission were correct, would fall within the scope of Article 24 and committal proceedings, which the defendant submits would be outside the scope of Article 24. Both are concerned with the enforcement of judgments.

34. I also note that giving exclusive jurisdiction to the court is consistent with the fact that no steps by way of enforcement are required to be taken in the domicile of the respondent to the application. Whilst in

order for enforcement of the committal proceedings to take place, the Third Parties will need to be within the jurisdiction, there will be no element of enforcement in the domicile of the Third Parties because extradition is not available for civil contempt.

35. For all these reasons I find that Article 24(5) applies to committal proceedings.

II. Does Article 24(5) only apply where the defendant is domiciled in a Member State?

36. Apart from Mr Sonnenberg, the Third Parties are not domiciled in a Member State. Counsel for the Third Parties submitted that this court is bound to follow the decision of the Court of Appeal in *Choudhary v Bhattar* [2009] EWCA Civ 1176 where Sir John Chadwick concluded at [38]:

> "in the absence of authority which compels a different conclusion, I would hold that it is unnecessary–and wrong–to construe the words "regardless of domicile" in Article 22 as having any application to a case where the person to be sued is not domiciled in a Member State."

37. In *Dar Al Arkan* at first instance, Andrew Smith J concluded that the decision in *Choudhary* was reached per incuriam but that he was compelled by the doctrine of precedent to follow it. In the Court of Appeal, Beatson LJ did not have to determine the point. However he noted that the court had heard full submissions on the point and he expressed the view (at [64]) that the reasoning of Andrew Smith J on the question of whether the jurisprudence of the Court of Justice of the European Union meant that the decision in Choudhary's case was *per incuriam* appeared to him to be "compelling".

38. The wording of Article 24 has changed in Brussels I Recast. However it was submitted for the Third Parties that the language was "materially identical". Counsel for the Third Parties acknowledged that in *Deutsche Bank AG v Sebastian Holdings Inc (No. 2)* [2017] 1 WLR 3056 Teare J said that he did not regard the decision in *Choudhary* as a decision which was binding on the court given that it was in different terms. However counsel submitted that these reasons were part of an obiter conclusion.

39. Further, counsel for the Third Parties submitted that Teare J did not consider the preparatory *travaux* which were before this court. Counsel for the Third Parties submitted that, prior to the passing of Brussels I Recast, amendments were proposed to extend the regulation to non-domiciled defendants and those proposals included deleting the words in Article 22 "regardless of domicile". However the proposal was rejected by the European Parliament and the original words were

not deleted. The wording was amended by the addition of the words "of the parties" so that the phrase read "regardless of the domicile of the parties". However counsel for the Third Parties submitted that even if Teare J was correct such that the use of different wording meant that this court was entitled to distinguish the decision in *Choudhary*, it is clear from the *travaux* that the European Commission considered extending the regulation to non-EU domiciled parties and the European Parliament rejected it.

40. The court was taken to the Explanatory Memorandum which proposed the recasting of Brussels I. In particular amongst the shortcomings identified was that access to justice in the EU was unsatisfactory in disputes involving defendants from outside the EU. The memorandum stated that: "with some exceptions, the current regulation only applies where the defendant is domiciled inside the EU." The proposed reform referred to extending the regulation's jurisdictional rules to third country defendants. The proposed draft attached to the memorandum proposed that Article 22 would be amended to read:

> "The following courts shall have exclusive jurisdiction [regardless of domicile]
>
> "… 5 in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced"

The words in square brackets "regardless of domicile" were proposed to be deleted.

41. It was submitted that by analogy with other changes proposed to the regulation where the words "domiciled in a Member State" had been deleted it could be inferred that it was intended to change the position from that of Article 22 being limited to defendants domiciled in a Member State. When the proposal was put to the European Parliament however the text was changed to read:

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties".

42. It was submitted that this court should infer that the rejection by the European Parliament of the attempt to extend the jurisdictional rules to third country defendants as reflected in the Explanatory Statement which accompanied the resolution which was put before the European Parliament (with certain limited express exceptions for disputes in the field of employment, consumer and insurance contracts) should be interpreted as maintaining the status quo namely that the regulation only applied to defendants domiciled in a Member State.

Discussion

43. In *Choudhary* Sir John Chadwick held that the words of Article 22 "the court shall have exclusive jurisdiction" displaced the general rule in Article 2(1) that a person domiciled in a member state should be sued in the courts of that member state. Thus he took the view that the words "regardless of domicile" distinguished Article 22 from provisions elsewhere in the regulation which gave a choice between suing in the courts of the member state in which the defendant is domiciled or the courts of a member state with which there is some connecting factor such as consumer contracts or contract of employment.

44. However at first instance in *Dar Al Arkan* Andrew Smith J concluded that the relevant passages of three ECJ judgments, namely *Universal General Insurance v Group Josi Reinsurance* (Case C-412/98), *Owusu v Jackson* (Case C-281/02) and *Land Oberosterreich v CEZ* (Case C-343/04) would have compelled the Court of Appeal in *Choudhary* to a different decision. He described at [49] the *Land Oberosterreich* case as containing the most recent and clearest statement of the ECJ's views when it observed at paragraph 21 that;

> "although the Czech Republic was not party to the Brussels Convention at the date on which the [proceedings were brought] and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent application of Article 16 of the Brussels Convention, as expressly stated in the first subparagraph of Article 4."

45. Andrew Smith J also referred at [48] to the opinion of Advocate General Maduro who stated that the effect of Article 4 of the Convention was to exclude cases of exclusive jurisdiction established in Article 16 from the application of the domestic provisions on international jurisdiction. Article 16 thus granted a ground for jurisdiction that would not otherwise be available given that the defendant was not domiciled in a Contracting State.

46. At [81] of *Vik* Gross LJ noted that the *Choudhary* decision was based on the differently worded predecessor to Article 24(5) and stated that:

> "my instinct would have been that Art. 24(5) means what it says and applied regardless of Mr Vik's domicile. I would also be much influenced by the consideration that this Court in *Dar*, at [59] – [64], albeit obiter, concluded that the Choudhary decision was *per incuriam*. In all those circumstances, my inclination would have been to follow the views

> expressed in *Dar* and to give effect to the wording of the current Art. 24 (5)."

These remarks were obiter but were expressed having had "full arguments advanced" ([73] of the judgment). I do not therefore accept that his views can be dismissed as merely following the reasoning in *Dar Al Arkan*.

47. In arriving at his (obiter) conclusion Teare J in the *Sebastian Holdings* case stated at [25]:

> "in my judgment the amended wording of Article 24(5) together with the reasoning of Andrew Smith J… and the approval of that reasoning by the Court of Appeal in *the Dar Al Arkan* case… makes it clear that the exclusive jurisdiction provisions in the Article apply "regardless of the domicile of the parties." Thus the fact that Mr Vik is not domiciled in a Member State is an irrelevant consideration."

48. Teare J considered that the authority of *Choudhary* was "very substantially diminished" by the decision in the *Dar Al Arkan* case that the decision was *per incuriam*.

49. In my view the *travaux* did not provide clear evidence to support the submissions that *Choudhary* is in fact correctly decided. However it seems to me for the detailed reasons explained in the judgment of Andrew Smith J in *Dar Al Arkan* at [53] – [59] that this court is compelled by the doctrine of precedent to follow the decision in *Choudhary* unless *Choudhary* can be distinguished.

50. I am not persuaded that the change in wording in Article 24 can be said to be sufficiently clear to distinguish the decision in *Choudhary*. Further it seems to me that the decision in *Choudhary* was focused on the court's interpretation of the purpose of the provision as much as the actual language. It seems to me difficult for this court on the one hand to accept the claimant's submission that *Choudhary* was wrongly decided and thus the correct position is that on the old wording Article 24 applied irrespective of domicile and on the other to conclude that this court can rely upon the minor change of wording in order to find that the change of wording preserves the position as advanced by the claimant. That seems to be merely a device to distinguish a decision which is otherwise binding on me.

51. The decision of Teare J was obiter on this point and for the reasons set out above, notwithstanding the views of Beatson LJ in the Court of Appeal referred to above, the decision in *Choudhary* has not been overturned, cannot be distinguished and is binding on this court.

52. Accordingly for these reasons I proceed on the basis that Article 24 only applies to defendants domiciled in a Member State.

III Are the second third and fifth Third Parties to be regarded as directors of the defendants under CPR 81.4?

53. Counsel for the Third Parties submitted that Mr Sanchouli, Ms Sanchouli and Ms Lobis are not directors of the defendants. In the light of my finding above, this issue does not arise for determination in relation to Article 24(5). It is however relevant to the issue of the availability of the jurisdictional gateways in CPR PD6B discussed below.

54. It is common ground that Article 24 does not apply to criminal proceedings for contempt. It is the claimant's case that the proceedings brought by the claimant against all the Third Parties are for civil contempt because the Third Parties are directors or officers of the two companies within the meaning of CPR 81 and therefore the committal proceedings are issued "as if" the respondent were the defendants. For the purposes of Article 24(5) the issue therefore is whether each of the Third Parties are to be regarded as directors or officers of the relevant company.

55. CPR 81.4 provides so far as material:

> "(1) If a person –
>
> (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
>
> (b) disobeys a judgment or order not to do an act,
>
> then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.
>
> …
>
> (3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation." [Emphasis added]

56. Counsel for the Third Parties submitted in summary:

    i) "Director" in CPR 81 means *de jure* not *de facto;*

    ii) If the term extends to *de facto* or shadow directors, the Third Parties (other than Mr Sonnenberg and Mr Beisenov who were *de jure* directors) were not *de facto* or shadow directors and were not officers of the company.

57. Counsel for the claimant submitted that the court should adopt a broad construction of CPR 81.4(3). Counsel further submitted that the

defendants are companies with the consequences that English rules of corporate attribution are engaged. Whilst primary rules of attribution derive from the company's constitution, particular rules require the fashioning of special rules of attribution.

58. Counsel for the claimant relied on the judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507:

> "the company's primary rules of attribution together with the general principles of agency, vicarious liability….are usually sufficient to enable one to determine its rights and obligations. In exceptional cases however, they will not provide an answer….
>
> "… There will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation; given that it was intended to apply to a company, how is it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." [Emphasis added]

59. In *Touton Far East PTE v Mahal* [2017] EWHC 621(Comm) Leggatt J at [5] stated that responsibility for contempt by a company extended to *de facto* directors:

> "In relation to each of the individual defendants, in order to establish a contempt of court the claimant needs to prove, first, a breach of the court's order; second, that at the time of the relevant breach the defendant was aware of the court's order; and third, that the defendant is responsible for the breach – which is established by showing that the defendant was at the relevant time either a director as a matter of law or a de facto director of the company which was the subject of the order. Fourth, it is necessary to show that the committal proceedings have been served on the relevant defendant so that it has had due notice of this application and has had the

> opportunity to appear or to be represented before the court today…" [Emphasis added]

60. Leggatt J said that in his case the second defendant was the person "with primary control" over the company:

> "[6] I start with the second defendant, Mr Prem Garg. There is ample evidence to show that he is, if not the controlling mind, then the person with primary control over the first defendant company. He was formerly a director of the company. He resigned from that office on 11 May 2015, but there is clear evidence to show that he still acts de facto, not only as a director, but as the managing director of the company. In particular, he is held out on the company's own website as the owner of the Shri Lal Mahal Group and as its managing director. He has also been referred to as such in various reports in Indian newspapers which I have been shown, and he continued to be shown as a director notwithstanding his purported resignation in a report obtained in July of last year based on corporate documents which were available on the official website of the Ministry of Corporate Affairs in India.
>
> [7] In addition, there is evidence given by Mr Espir, who is charged with responsibility for seeking to recover the monies owing to the claimant, of a conversation with Mr Prem Garg which took place on 10 March 2016… It was clear from the tenor of the conversation that Mr Prem Garg was the person chiefly responsible for the affairs of the first defendant." [Emphasis added]

61. The defendants did not appear and were not represented before Leggatt J and therefore the arguments which were put before this court do not appear to have been considered.

62. Counsel for the Third Parties submitted that it should be confined to *de jure* directors on the basis of a need for legal certainty because failure to comply with the order exposes the director to liability for contempt.

63. In Dar Al Arkan, it was argued that where the context is a criminal provision or one with penal consequences, it is only exceptionally and then by clear words that the United Kingdom legislates extra territorially. This was in the context of whether CPR 81.4 extended to the director of a foreign company where the director was a foreign national and outside the jurisdiction. However Beatson LJ at [32]

rejected that argument stating that the provisions in CPR 81.4 are not provisions in a criminal statute but a vehicle and a mechanism for the court's disciplinary powers over corporate contemnors.

64. Further he observed at [38]:

> "…The overriding objective is to enable the court to deal with cases justly. It includes enforcing compliance with rules, practice directions and orders (CPR 1.1(1) and (2)(f)). I consider that the combination of that part of the objective, the need to ensure that the courts have the ability to control proceedings which are properly brought in this jurisdiction, and the anomalies that would result if the provision designed to provide such control for a corporation in contempt does not apply to foreign directors of that company which are responsible for its contempt, provide the underlying reason of principle for reading CPR 81.4(3) as including foreign directors out of the jurisdiction. [Emphasis added]

65. Beatson LJ stated at [42] that:

> "In my judgment, the nature of committal proceedings is very different from the nature of the power of the court under Part 71 to obtain information from judgment debtors. The rationales for the two procedures are also very different. Mr Béar's submissions underplay the public interest element underlying the modern law of civil contempt. The twofold character of civil contempt in modern law is well-established. As well as the authorities relied on by the judge (see [15(ii)] above), in Jennison v Baker [1972] 2 QB 52 at 61 and 64, Salmon LJ stated that "the public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered". He also said, of the purpose of enforcing an injunction, that it is to vindicate "(a) the rights of plaintiffs (especially the plaintiff in the action) and (b) the authority of the court. The two objects are in my view inextricably intermixed." Similarly, in JSC BTA Bank v Solodchenko (No. 2) [2011] EWCA Civ 1241, reported at [2012] 1 WLR 350, which concerned non-compliance with a court order, Jackson LJ stated (at [45]) that punishment for non-compliance with a court order "upholds the authority of the court" and has "everything to do with the public interest that court orders should be

> obeyed". It is thus clear that it is for the public good that the order of the court should not be disregarded." [Emphasis added]

66. The court in *Dar Al Arkan* was concerned with *de jure* directors and not the issue of whether CPR 81.4 extends to *de facto* directors. However it seems to me that the principles which were enunciated are of equal application. There will be a negative impact on the court's disciplinary powers if the scope is confined to *de jure* directors and the court cannot discipline the person who is exercising control over the company and as such can be said to be responsible for the breach of the order. It therefore accords with the overriding objective and the public interest to conclude that there is a special rule of attribution in this case.

67. Further whilst I accept the serious consequences of a finding of civil contempt, there is in reality my view no real risk of uncertainty or unfairness if responsibility for the civil contempt of a company extends to *de facto* directors. Contrary to the submissions of counsel for the Third Parties, in my view an individual who is a *de facto* director does not need to take legal advice or engage in onerous fact-finding as to his position in order to decide whether he is personally obliged to procure compliance with an order against the company or face the risk of civil contempt proceedings. His level of involvement with the company and the responsibility on him to procure that the company complies with an order of the court will in all likelihood be readily apparent to him.

68. In my view however the case is not made out in relation to "shadow directors". This is a term which derives from section 251 of the Companies Act 2006. A "shadow director" is defined as a person "in accordance with whose directions or instructions the directors of the company are accustomed to act". It is of limited application as a matter of English law and in my view no policy ground has been made out which would require the court to extend responsibility for corporate contempt beyond de facto directors to the statutory concept of shadow directors.

69. Had it been necessary to decide the point, I would have held that there is a special rule of attribution and the issue which then arises is whether the status of an individual as a *de facto* director is governed by local law.

70. Counsel for the Third Parties submitted that all matters concerning the constitution of a corporation are governed by the law of the place of incorporation: *Dicey, Morris & Collins on The Conflict of Laws* (15th edition, 2017) at Rule 175 (2).

71. *Dicey, Morris & Collins* states at [30 – 028] that:

> "the principle of Rule 175 (2) has been increasingly accepted by the authorities. The cases at least establish that the law of the place of incorporation determines the composition and powers of the various organs of the constitution, whether directors have been validly appointed, the nature and extent of the duties owed by the directors to the corporation, who are the corporation's officials authorised to act on its behalf, the extent of an individual members liability for the debts or engagement of the corporation…"

72. However in this case the court is concerned with *de facto* directors for which by definition the constitution of the company is irrelevant. The special rule of attribution is an English rule which concerns whether certain individuals ought to be accountable for the conduct of the company in breaching an English court order. In my view the test is as stated by Leggett J into Touton at [13]:

> "a de facto director for this purpose means someone who has assumed the status and function of the director so as to make himself responsible as if he were one."

It is not a question to be determined by the laws of Germany or the UAE and as the matter is in any event not determinative, I do not propose to consider the alternative position if I were wrong on that and in particular the expert evidence as to the position under those laws.

73. Turning then to the evidence and whether the claimant has shown that it has the "better of the argument" that the Third Parties are *de facto* directors.

74. In relation to Mr Sanchouli, he was the managing director of San Trade until October 2015. In his second affidavit (paragraph 11.2.1), Mr Lakin stated that in relation to responsibilities at San Trade, Mr Sanchouli is "in charge of determining company policy, company organisation and negotiations with creditors". In an email of 9 October 2017, Ms Sanchouli described Mr Sanchouli as the "single owner of San Trade". Given her own involvement in the company and as his daughter, Ms Sanchouli may be expected to be fully aware of her father's position. Mr Sanchouli signed contracts between San Trade and the Turkmen refinery in 2016 as "director" of San Trade and the guarantee from San Trade in relation to this particular contract as "President".

75. As to Petrogat, Mr Sanchouli uses the email ceo@petrogat.com. The evidence of Mr Lakin in his witness statement dated 25 January 2019 (paragraph 19 and 56) referred to a meeting in November 2017 and

telephone discussions in early January 2018 between Mr Sanchouli and the claimant to discuss delays in performance of the contract by Petrogat. This evidence would suggest that Mr Sanchouli is fully involved in Petrogat despite the absence of any formal appointment.

76. Ms Sanchouli holds broad powers of attorney on behalf of both Petrogat and San Trade. Although counsel for the Third Parties referred to the fact that the power of attorney granted by Mr Beisenov as "the legal owner of Petrogat… trade licence no…" authorised Ms Sanchouli to act on his behalf in managing his "private [bank] accounts" in UAE, it also granted "the right to review and clear, receive and deliver all the transactions related to the trade licence mentioned above before the official and nonofficial federal or local government entities in the [UAE]".

77. In relation to the power of attorney granted by Mr Sonnenberg as managing director of San Trade, Ms Sanchouli is given the right to conclude business contracts in the name of San Trade subject to the condition that the contracts "correspond to the corporate purposes" and are "in the financial scope" of San Trade. In my view these limitations are so broad as to be arguably of little or no effect in restricting the powers of Ms Sanchouli.

78. Counsel for the Third Parties submitted that Ms Sanchouli had done nothing which was inconsistent with the exercise of her powers under the power of attorney.

79. However the power of attorney expressly excludes any power to issue invoices although the evidence would suggest that she has done so. Further the evidence would suggest that her involvement is more far-reaching: it is notable in my view that Ms Sanchouli signed the letter ordered by the court on behalf of both San Trade and Petrogat directing that the disputed cargo should not be sent to Iran and should be preserved in its present location pending further order from the court or arbitral tribunal. Although Mr Sonnenberg is the *de iure* managing director of San Trade, he was not involved in the correspondence with the claimant until after the injunction had been served.

80. In my view therefore, on the evidence before this court the claimant has established that it has the "better of the argument" and both Mr Sanchouli and Ms Sanchouli should be regarded as *de facto* directors of San Trade and Petrogat.

81. Ms Lobis has a power of attorney to act on behalf of Petrogat and is the operations manager in Turkmenistan. She was involved in operational correspondence and signed contracts between Petrogat and the Turkmen refinery as "Representative of the Company". Her authority is consistent with that of an operations manager rather than a director and had it been necessary to decide the point, her authority

in my view does not extend to control of the company to an extent that she should be regarded as a *de facto* director for these purposes. The meaning of the words "other officer" in CPR 81.4(3) has not been judicially determined. However in my view there is no policy reason why this should be extended so as to catch someone such as Ms Lobis who was operating below director level in an operational capacity.

82. I therefore find, for the reasons set out above, that the claimant has not shown that it has the "better of the argument" that Ms Lobis is a director or officer within the meaning of CPR 81.4(3).

Is it open to the court to grant permission under PD6B 3.1 (3) or (10)?

83. If the claimant cannot rely on Article 24(5), then the court can only grant permission to serve out if the service out gateways in CPR PD 6B para 3.1(3) or (10) are available.

84. CPR PD 6B reads (so far as material) as follows:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> …
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> …
>
> (10) A claim is made to enforce any judgment or arbitral award."

Gateway (10)

85. Dealing first with the gateway in subparagraph (10), in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWHC Teare J at [19] held that a claim to enforce a court order under CPR 71.2 was not a "judgment" within the meaning of subparagraph (10). His reasoning was that firstly, the word "judgment" is not ordinarily used to describe an order, secondly rule 81.4 refers to a "judgment or order" that may be

enforced by an order for committal which suggests that where the CPR refers to a judgment such reference is not apt to include an order; thirdly the purpose of paragraph (10) was to fill a gap in the service regime in relation to claims to enforce at common law foreign judgments which were not capable of registration in England; fourthly the juxtaposition of "judgment" with "arbitral award" suggests that the subject matter is a judgment or award which determines the rights of the parties and orders the payment of money; and fifthly there are no words which clearly show that judgment includes an order. Teare J expressly considered the definition in Brussels Recast but concluded that subparagraph (10) could not be interpreted by reference to that regulation.

86. In the Court of Appeal in *Vik* Gross LJ did not have to decide the point but he noted that full arguments had been advanced. He observed that "despite the clear public interest in there being such a gateway…", "there may well be considerable force in the view taken by Teare J on this issue" and at [89] that this is a matter where consideration by the Rules Committee would be "most welcome".

87. Counsel for the claimant submitted that the court should proceed on the basis that the rules are coherent and that it should be legitimate to construe the term "judgment" by reference to European jurisprudence, particularly Article 2 of Brussels I Recast.

88. Although not strictly binding on this court, it seems to me that there is no reason to depart from the reasoning of Teare J. As noted in the Court of Appeal, although there is a clear public interest in the existence of a gateway, the absence of a specific jurisdictional gateway is something which would need to be addressed by the Rules Committee. I therefore find that the claimant cannot rely on subparagraph (10) of PD6B 3.1.

Gateway (3)

89. Turning to subparagraph (3), it was submitted for the Third Parties that subparagraph (3)(a) was not satisfied in that there was not "between the claimant and the defendant a real issue which it is reasonable for the court to try". In particular it was submitted that the issue between the claimant and the defendant, the injunctive relief was finished as the court declined to continue the injunction. Counsel for the Third Parties relied on the decision of Flaux J in "*Red October"* [2013] EWHC 2926 (Comm) that the court should look at the position when permission to serve out was given. Counsel submitted that even if the court were to look at the position in May (when it is common ground for the purpose of this hearing that permission was not in fact given), there was no "anchor claim" at that point. Counsel for the Third Parties submitted that in the Committal Application, no application was made against the defendants but only against the Third Parties.

90. Counsel for the claimant submitted that the relevant time should be when the breaches occurred and that it would be "odd" if permission to serve out was dependent on when the application for committal was made. In Mr Kozachenko's sixth affidavit in support of the application for committal for contempt (paragraph 115), he stated that the reasonable issue for the court to try between the claimant and the defendants was the claimant's application for an injunction. However in submissions counsel for the claimant relied on the decision of the Court of Appeal in *Dar Al Arkan* as to what amounted to the "anchor claim". At [58] Beatson LJ said:

> "there is clearly a real issue between the second defendant and the claimant companies as to whether the companies fall within the scope of CPR 81.4 (1). Under the rule of attribution in CPR 81.4 (3) there is clearly a real issue as to whether the jurisdiction to seek an order for the committal of the director exist. The cause of action against the director asserts a factual situation, that is the claimant companies contumacious breaches of the preservation, undertaking and delivery order and the director's responsibility for the same."

91. It seems to me that that analysis in *Dar Al Arkan* holds good for the present situation. The real issue which it is reasonable for the court to try between the claimant and the defendant companies is whether as alleged in the application for committal the defendants breached the orders of the court. The Third Parties will only be liable for contempt under CPR 81.4(3) if the claimant can show that the defendant companies were in breach of the orders so unless that issue is determined the Committal Application must fail. Thus in my view it is not fatal to the applicability of the gateway that the claim (the application for committal) is brought against the Third Parties and not the defendant in order to satisfy the requirement that there must be "an issue" which it is reasonable for the court to try in circumstances where the application is dependent on establishing the liability of the defendant.

92. As to the second limb of subparagraph (3), it seems to me that the Third Parties are "necessary and proper parties" because the issue is whether the court has jurisdiction to make committal orders against the Third Parties or some of them for breaches of the injunction whilst it was in force. The liability of the Third Parties, as discussed above, arises if it is shown that they were responsible for the acts of the defendant as *de jure* or *de facto* directors.

93. As so analysed it is irrelevant that the injunction was not continuing as at the date the court considers the availability of the gateway.

94. It would be contrary to the overriding objective and public policy to conclude that an application for committal which was brought against both the company and its directors and sought relief against both the corporate entities and the directors was within paragraph (3) but an application for committal for contempt which, as in this case, sought relief only against the directors would fall outside that gateway in the circumstances where the contempt alleged is that of the company which is identified as the defendant and upon whom the application is served.

95. For all these reasons I conclude that the claimant has the better of the argument that the gateway under subparagraph (3) is available to the claimant in respect of the Third Parties other than Ms Lobis.