Neutral Citation Number: [2020] EWHC 1798 (Comm)

Case No: CL-2018-000304

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

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

Date: 17 July 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

(1) NAVIGATOR EQUITIES LIMITED **(2) VLADIMIR ANATOLEVICH CHERNUKHIN**	**Claimants**
- and -	
OLEG VLADIMIROVICH DERIPASKA	**Defendant**

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- -

Ian Mill QC, James Weale and Fraser Campbell (instructed by **Clifford Chance LLP**) for the **Claimants**
Nathan Pillow QC, Tim Akkouh and Freddie Popplewell (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 8, 9, 10, 11 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 17 July 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. By an Application Notice dated 14 November 2019, the claimants applied for an order that the defendant, Mr Oleg Deripaska, be committed to prison or sanctioned in any other manner the court might think appropriate for what they said were contempts of court. Mr Deripaska denied being in contempt of court and by Application Notice dated 18 February 2020 sought to have the contempt application struck out as an abuse of the process of the court.

2. The suggested contempts of court were breaches, as the claimants said there had been, of an undertaking given by Mr Deripaska to the court in June 2018. The claimants said that undertaking constituted or gave effect to an agreement with them that operated as a binding contract, so that the breaches of the undertaking (if proved) were also breaches of contract sounding in damages. The claimants' Application Notice sought, effectively by way of summary judgment, an order for damages to be assessed.

3. The parties were involved in a long-running dispute concerning valuable real property in Central Moscow owned through a joint venture vehicle, Navio Holdings Ltd ("Navio"). The main issue between them was whether the second claimant, Mr Vladimir Chernukhin, was party to a shareholder agreement relating to Navio that was concluded between Mr Deripaska and his company Filatona Trading Ltd ("Filatona"), on the one hand, and Ms Lolita Danilina and the first claimant, Navigator Equities Ltd, on the other hand. Mr Chernukhin said that Ms Danilina was acting throughout as his nominee, to the knowledge of Mr Deripaska. An arbitration tribunal decided that issue in favour of Mr Chernukhin. The issue was effectively re-litigated before Teare J at a trial of a challenge to the arbitration award under s.67 of the Arbitration Act 1996 (the "Section 67 Proceedings"). There were also issues between the parties over the value of Mr Chernukhin's interest in Navio, if indeed he was the interested party.

4. The arbitrators concluded that Mr Chernukhin was a party to the shareholder agreement and ordered Mr Deripaska and Filatona to buy Mr Chernukhin out, requiring them to pay c.US$95 million for his interest in Navio. In the Section 67 Proceedings, the arbitrators' award was upheld by Teare J who dismissed Mr Deripaska's s.67 challenges, [2019] EWHC 173 (Comm).

5. The hearing of the Application Notices before me took place over four days commencing on 8 June 2020. It was conducted remotely but still as a hearing in open court (i.e. in public) in accordance with CPR PD51Y during the currency of the Coronavirus Act 2020. Due to Covid-19 travel restrictions, Mr Deripaska, who was in Russia, could not travel to London for the hearing, so would have had to participate remotely, including to give evidence if the time came for him to elect whether to give evidence in his defence on the contempt charge and he elected to do so. Principally for that reason, meaning that sitting in a Rolls Building courtroom would have been a little like putting on *Hamlet* with no prince, but also for other reasons, I declined an application by the claimants to conduct the hearing in person.

6. There was live witness evidence at the hearing nonetheless, to take cross-examination by Mr Pillow QC for Mr Deripaska of Ms Marie-Emmanuelle Berard, a partner in

Clifford Chance LLP, the claimants' solicitors, who has had conduct, with colleagues, of these proceedings, the underlying arbitration and the Section 67 Proceedings. Mr Chernukhin has also, it seems, been advised in connection with these matters in London by Quinn Emanuel LLP and Mishcon de Reya LLP, and by other advisers internationally. Ms Berard confirmed, without going into any privileged matters, that Clifford Chance and Quinn Emanuel at least have worked together or liaised since June 2018, albeit Clifford Chance have always been the solicitors on the record; the involvement of Mishcon de Reya, it seems from Ms Berard's cross-examination, was at a senior level with experience and expertise of international corporate law.

7. I was slightly surprised to find when Mr Mill QC moved to call Ms Berard for her oral evidence that this was to be from the conference room at Blackstone Chambers from which Mr Mill was addressing me, his juniors also in attendance (or it may be they were elsewhere in Chambers). I had no reason to think that those in the room were not adopting proper social distancing precautions under current circumstances. My surprise lay not in that direction, but in the fact that the court had not been notified or asked to approve that arrangement, no attempt had been made to ensure there was a Bible available so that Ms Berard could be sworn as she would have preferred (but thankfully she was content to affirm instead), the words for her oath or affirmation were not to hand (although I did notice when drafting this judgment that they were tucked away at the end of the authorities volume of the electronic hearing bundle), the conference room setup meant that I could not have both Ms Berard and Mr Mill QC on screen, and no representative of Mr Deripaska was present.

8. Mr Andrew McGregor of Reynolds Porter Chamberlain LLP ("RPC"), acting for Mr Deripaska, was also potentially to give evidence at the hearing. Having enquired of counsel, I understand that it was agreed between the solicitors that no one from RPC would attend upon Ms Berard when she gave her evidence, and no one from Clifford Chance would attend upon Mr McGregor if he gave evidence. RPC may have assumed, as I was assuming, that Ms Berard would be giving evidence from her own office or from home, but nothing was asked or said about that and Mr Mill QC told me that no decision had been taken on the claimants' side at the time of the relevant correspondence.

9. I do not suggest there is any reason to think anything inappropriate occurred or was likely to occur in this case, but nonetheless I do not regard what happened as entirely satisfactory. If a witness is to give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. That is always so, in my view, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court. Any arrangement other than that the witness will be on their own during their evidence should be approved by the court, in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them. Sensible arrangements discussed and agreed in advance are likely to meet with approval if the court does not identify any difficulty of possible substance that the parties may have overlooked. But it must be for the court, not the parties, to control how it receives the evidence of witnesses called before it. I acknowledge that the parties were not asked by the court in advance to specify the witness arrangements here. They should have been, and that they were not is my responsibility, but equally parties should not wait to be asked.

10. That concern of mine aside, the hearing was prepared and conducted very effectively, despite having to take place remotely using video conferencing software and the internet, as the court has become used to over the last few months. The parties used Opus 2 to provide and maintain an electronic hearing bundle, to provide real time and daily final transcripts, and to organise and host the video conference itself, subject to my approval through my Clerk and liaison with her, using the Cisco WebEx platform on which they could integrate on-screen presentation of evidence as well. I am extremely grateful for that service.

Procedural Chronology

11. The parties were in substantive dispute about whether Mr Chernukhin was Mr Deripaska's true joint venture partner in respect of the Moscow real estate project from 2002. The shareholders' agreement by which the joint venture had been formalised dated back to 31 May 2005.

12. On 3 November 2015, the claimants initiated an LCIA arbitration to resolve the dispute. On 20 July 2017, the arbitral tribunal ordered Mr Deripaska and Filatona to purchase the claimants' shares in the joint venture vehicle at a price of US$95,181,285. By a further award dated 18 January 2018, the arbitral tribunal ordered the Deripaska parties to pay approximately £7 million in costs and interest.

13. On 11 May 2018, a worldwide freezing order was granted against Mr Deripaska by Robin Knowles J pursuant to the claimants' application of 8 May 2018 ("the WFO"). The return date hearing came before the same judge on 19 June 2018. During the course of that hearing, both sides became content in principle for the WFO to be replaced by undertakings relating to certain shares in En+ plc ("En+"), an idea the claimants had been against prior to the hearing. En+ was at that time incorporated in Jersey and the shares in question were said to be indirectly beneficially owned by Mr Deripaska. In the course of the dialogue with counsel, the judge had indicated that he would be content to discharge the WFO in return for undertakings to like effect, but the nature of the undertakings concerning En+ shares that were proposed by Mr Deripaska meant he would only want to look at those as an alternative if their form and terms were agreed between the parties. The three undertakings in fact given to the court ("the Undertakings") did relate to shares in En+ and were in a form and terms agreed between the parties. They are central to this judgment and are explained in detail below.

14. For that return date hearing on 19 June 2018, the claimants had also listed an application for an order under s.70(7) of the Arbitration Act 1996 that Mr Deripaska secure the sums awarded to the claimants by the arbitrators. The Order eventually drawn up on the hearing recorded that the s.70(7) application was dismissed, the WFO was discharged, and the claimants' application for its continuation and Mr Deripaska's application for it to be varied or set aside were both withdrawn. That was done not upon the giving of the Undertakings but upon an undertaking by Mr Deripaska through his then leading counsel, Justin Fenwick QC, that the Undertakings would be given (drafts that had been agreed between the parties being attached to the Order), and to comply with the terms of the WFO until that had been done. Finalising the wording for the Order and the draft undertakings to go with it took some time, so that in the event the Order dated 19 June 2018 was not sealed until 3 July 2018, by when the Undertakings had in fact all been signed and lodged already.

15. The three Undertakings were, one from Mr Deripaska himself, one from B-Finance Ltd ("B-Finance"), a BVI company owned by Fidelitas International Investment Corp ("Fidelitas"), a Panamanian company, and one from Mr Rupert Boswall, senior partner in RPC. The B-Finance Undertaking came with a signed comfort letter from Fidelitas addressed to B-Finance confirming that Fidelitas had read and considered the proposed B-Finance Undertaking in draft, had concluded that it was in the best interests of Fidelitas for B-Finance to provide that Undertaking, and therefore that B-Finance should do so, so far as Fidelitas was concerned. The comfort letter also contained an indemnity from Fidelitas in favour of B-Finance and its directors in respect of the consequences of B-Finance providing its Undertaking. Under further ownership arrangements it is not necessary to rehearse, Mr Deripaska effectively beneficially owned or was able to control Fidelitas; and the shares in En+ that were the subject matter of the Undertakings were owned by B-Finance.

16. The Fidelitas comfort letter was dated 25 June 2018. The Undertakings from Mr Deripaska and B-Finance were dated 28 June 2018. Mr Boswall's Undertaking ("the RPC Undertaking") was dated 29 June 2018, and all three Undertakings were lodged with the court on that date.

17. The Section 67 Proceedings were case managed and heard with a claim brought by Ms Danilina. The trial took place in November and December 2018 with closing submissions on 17 and 18 January 2019. Teare J handed down judgment on 7 February 2019, dismissing the claims brought by Mr Deripaska and Filatona ("the Deripaska Parties") the Deripaska parties and Ms Danilina. He granted the Deripaska parties and Ms Danilina permission to appeal on a point of contractual interpretation. Their appeal was dismissed on 6 February 2020 after argument in early December 2019, [2020] EWCA Civ 109. It is subject to a pending application for permission to appeal to the Supreme Court.

18. On 26 June 2019, the claimants applied for an order that Mr Deripaska make a payment into court. The application was heard on 3 July 2019 by Teare J whose Order of that date was sealed on 5 July 2019. The Order provided:

> *1. Mr Deripaska shall forthwith take, and procure the taking of, all necessary steps to ensure that the sum of £90,595,749.03 in cleared funds is paid into the Court's Funds Office (the "**Payment into Court**") as soon as reasonably practicable and, at all events by 4pm on 31 July 2019.*
>
> *2. Mr Deripaska shall have liberty to apply in relation to the timing of the Payment into Court referred to in paragraph 1, above.*
>
> *3. The steps to be taken pursuant to paragraph 1, above, shall include but not be limited to making all applications as may be necessary to the United States Office of Foreign Asset Controls ("**OFAC**") in order to facilitate the Payment into Court and Mr Deripaska shall provide copies of all correspondence with OFAC to the Applicants immediately upon the sending or receipt of such correspondence.*

> *4. If the Payment into Court has not been made by 4pm on 17 July 2019, Mr Deripaska shall by 4pm on 19 July 2019 file and serve an affidavit setting out all of the steps which have been taken to make the Payment into Court and provide a full explanation of why the Payment into Court has not been made.*
>
> *5. Upon making the Payment into Court, the Undertakings given to the Court by Mr Deripaska, Rupert Boswall and B-Finance shall be discharged.*
>
> *6. The Applicants shall have liberty to apply for further directions and relief in the event that Payment into Court is not made by 3pm on 31 July 2019.*
>
> *7. The Receiver Application and the WFO Application shall be adjourned with liberty to restore.*
>
> *[Points 8 and 9 related to costs.]*
>
> *10. Permission to appeal is granted in relation to the order for the Payment into Court.*
>
> *11. Mr Deripaska shall have liberty to apply for the release of the sums paid pursuant to the Payment into Court if his challenge to the arbitral awards in LCIA Arbitration No. 153168 is successful and/or if those awards are otherwise satisfied.*

19. As I shall explain below, the payment into court application was brought in response to a provocative letter from RPC to Clifford Chance dated 29 May 2019 ("the May 2019 Letter") concerning arrangements, by then far advanced, for a continuance of En+ from Jersey to a recently established Russian Special Administrative Region ("SAR") with a more favourable tax regime than under an ordinary (domestic) Russian registration ("the Redomiciliation"). The May 2019 Letter was provocative because it suggested, erroneously, that the Redomiciliation would render the Undertakings devoid of subject matter or unworkable, and proposed, unreasonably, that they should be discharged and not replaced by anything. By the time the parties were back before the court, to argue the payment into court application, RPC had modified their explanation of the position, and it was in substance common ground (as it was before me) that the Undertakings would continue (and did continue) to have application to the relevant block of shares in En+ after it moved to the Russian SAR.

20. The basis for the claimants' charge of contempt of court and allegation of breach of contract was the part played by Mr Deripaska, so they alleged, in relation to the Redomiciliation, either actively to facilitate it or passively by failing to block it. But as I noted at the outset, the claimants brought that charge and made that allegation only in November 2019. The fact that the claimants would say that Mr Deripaska was in breach of his Undertaking was before Teare J on the payment into court hearing, and that gave rise to one element of the abuse of process argument.

21. At a further hearing on 29 July 2019, on an Application Notice issued a few days before, the claimants applied for further relief in light of the fact that Mr Deripaska was in

difficulty over paying into court, as ordered, because of the ongoing US sanctions against him that form the ultimate backdrop here. The matter was further complicated by the fact that a hearing before the arbitral tribunal was scheduled for 31 July 2019 at which terms might be settled for how the buyout of Mr Chernukhin's shares in the joint venture vehicle was to be achieved. In view of the imminent long vacation, Teare J was persuaded to make provision for what should happen if the buyout was not completed by 14 August 2019, so he granted a number of the orders sought ("the 29 July Orders").

22. On 13 August 2019, Mr Deripaska applied to the court for variation of the 29 July Orders. The application was dismissed, save that Teare J extended the time that would need to elapse before Mr Deripaska would be compelled to sell assets to realise and preserve the sum of £90,595,749.03.

23. On 5 September 2019, Bryan J made various Orders, including a Freezing Injunction proposed by Mr Deripaska himself to support the effectiveness of his then efforts to ensure that the joint venture buyout was successfully completed.

24. On 30 September 2019, Clifford Chance confirmed that US$106,258,897.95 had been received into their client account. The buyout of Mr Chernukhin's share in Navio could then be completed, which it was the next day, 1 October 2019, as a result of which the Undertakings were finally discharged by a Consent Order dated 4 October 2019.

25. On 14 November 2019, the claimants issued the contempt application, with its 'side order' damages claim; and on 18 February 2020 the cross-application to strike out the contempt application as an abuse was issued. Cockerill J held a case management hearing on 28 February 2020 and the combined hearing before me was conducted pursuant to her order of that date.

The Applications

26. In the contempt application, the claimants charged Mr Deripaska with contempt, essentially in that, so they alleged:

    (i) Mr Deripaska's Undertaking was given to the court in lieu of the continuation of the WFO.

    (ii) It required Mr Deripaska to preserve a certain number of certificated, Jersey-registered shares in En+, said to be worth then c.£190 million.

    (iii) Mr Deripaska procured the passing of a resolution by the shareholders of En+ in favour of the Redomiciliation, whereby to export the value of En+ to the Russian SAR, denuding the Jersey-registered shares of their value and denuding the Undertakings of any use they might have had to the claimants.

27. The claimants' damages claim alleged, as I have already indicated, that Mr Deripaska's Undertaking took effect as a contract as well, and that his breaches of undertaking, as alleged, caused them loss, largely in the form of legal costs incurred in various jurisdictions. It was common ground that there was no cause of action for damages for contempt; the allegation that Mr Deripaska's Undertaking had contractual effect was a necessary element of the damages claim.

28. Mr Deripaska did not accept that he had breached his Undertaking, but said as a prior argument against the contempt application that it was an abuse of the process, on five grounds (some of which to an extent overlapped), namely that:

    (i) the claimants were not seeking to enforce compliance with any Order;

    (ii) the claimants were seeking to relitigate matters already considered by the court;

    (iii) there was an improper purpose behind the application, namely the personal animus of Mr Chernukhin towards Mr Deripaska;

    (iv) the contempt application was a disproportionate response to technical breaches by Mr Deripaska, if there were breaches at all; and

    (v) the contempt application had not been prosecuted even-handedly by the claimants as quasi-prosecutors, as part of which the claimants had suppressed documents and given false evidence as to their knowledge of the Redomiciliation.

29. Mr Pillow QC accepted that the damages claim was not an abuse of the court's process; but equally the fact that damages were not available on the contempt application could not make it proper to have brought the contempt application if otherwise it was abusive. The desire to pursue compensation would not provide a proper motive for seeking to have Mr Deripaska punished by the court as a contemnor.

30. I directed at the start of the hearing, as proposed by Mr Deripaska and not opposed by the claimants, that I would take the claimants' evidence, including cross-examination of Ms Berard, the claimants' only witness, and then take closing argument on the abuse application and a submission of no case to answer, if made (an indication that such a submission might be made having appeared in Mr Pillow QC's skeleton argument). In the event, no submission of no case to answer was advanced, only the abuse of process argument.

31. I heard the evidence of Ms Berard on the first day of the hearing and the submissions of counsel on the abuse application on the second day. At the start of the third day of the hearing, I gave a short *ex tempore* ruling upholding the abuse application and in consequence dismissed the contempt application. I indicated that a written judgment setting out my detailed reasons would follow. This is, in part, that judgment.

32. Having upheld the abuse application, I discussed with counsel how best to proceed. The upshot was an Order upon undertakings from the claimants that were there to be a successful appeal against the dismissal of the contempt application, (a) they would not refer to, rely on or otherwise use any decision or finding I might make in the damages claim at or for the purposes of the contempt application, and (b) they would not resist any application, if made, for me to be recused from dealing with the restored contempt application. The Order was that I would hear the damages claim so as to determine whether Mr Deripaska's Undertaking amounted or gave effect to a contract and, if so, whether that contract had been broken, but would not attempt to deal with questions of causation or assessment of loss. I took that argument on the final day of the hearing. This is also my judgment on those issues.

33. In the hearing management discussion, I offered to direct that any resumed contempt trial, were there a successful appeal, not be put before me, as a way of managing Mr Deripaska's twin concerns, expressed by Mr Pillow QC, that it might not be appropriate for a judge who had found Mr Deripaska to be in breach of his Undertaking, if that were the finding as a matter of contract judged on the civil standard of proof, to consider the contempt charge, to be judged on the criminal standard, but at the same time that it was wasteful and potentially unjust not to make full use of the remaining hearing time to deal with the parts of the damages claim for which both sides were fully prepared and ready. In the event, the Order I made dated 10 June 2020, in a form agreed between the parties and approved by me before the hearing resumed on the final morning, did not make that direction but recorded the undertaking by the claimants not to resist a later request, if made, for such a direction.

The Facts

34. The facts giving rise to the dispute and the findings of Teare J in the Section 67 Proceedings are irrelevant to the present applications and can be seen from his and the Court of Appeal's judgments in those Proceedings. It is not necessary to recite them here.

35. The pertinent facts now are those that go to: i) whether the contempt application was an abuse of the process, as I held, i.e. whether any of the five grounds put forward by Mr Pillow QC were made out; ii) the meaning and effect of Mr Deripaska's Undertaking, i.e. the facts against the background of which that Undertaking falls to be construed; iii) whether the parties formed a contract by agreeing the content of the Undertaking; and iv) whether, if so, the resulting contract was broken by Mr Deripaska.

The Undertakings

36. As I have explained, Mr Deripaska's Undertaking was one of a set of three Undertakings that together purchased the discharge of the WFO. After referring to the WFO (paragraph 1) and the B-Finance Undertaking (paragraph 2), by paragraph 3 Mr Deripaska confirmed and warranted that he was the ultimate beneficial owner of B-Finance. Then the Undertaking itself, paragraph 4, was in these terms:

> *"4) Once the undertakings have been provided by … B-Finance, I understand that Fidelitas is unable to take any step to frustrate compliance with, and/or enforcement of, the undertakings. Nevertheless, and for the avoidance of doubt, I hereby further undertake to the court in connection with the above proceedings, as follows:*
>
> *(a) I shall not take any steps or procure the taking of any steps, whether directly or indirectly, in my capacity as ultimate beneficial owner or in any other capacity, which has the effect of preventing, impeding or obstructing the fulfilment of the undertakings set out in the B-Finance Letter as they may fall due for performance.*
>
> *(b) I shall take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares*

> *legally owned by B-Finance in En+ Group Plc) remain available for direct enforcement."*

37. The B-Finance Undertaking, by letter to the court from Mr Anton Vishnevskiy as sole director of B-Finance, first referred to the WFO (paragraph 1) and next (paragraph 2) gave formal details, about Mr Vishnevskiy and B-Finance, and stated that Mr Deripaska was B-Finance's ultimate beneficial owner. Then by paragraph 3 it was confirmed and warranted: that B-Finance was "*the legal owner of 245,000,000 unencumbered shares in En+ Group Plc (a company incorporated under the laws of Jersey) ("**En+**"). Of these 45,500,000 are held in certificated form ("the Shares")*"; that B-Finance had no current or contingent liabilities that could result in a claim being made against the Shares; and that on 19 June 2018 the Shares were worth c.£187 million. By paragraph 4 it was confirmed that Mr Vishnevskiy considered it to be in the best interests of B-Finance to give the undertakings set out in paragraph 5, which were in these terms:

> *"5) I … hereby undertake to the court in connection with the above proceedings, in my capacity as Director and on behalf of the Company [i.e. B-Finance], as follows:*
>
> *(a) The Company will arrange for the original share certificates in respect of the Shares ("the Share Certificates") to be deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London.*
>
> *(b) The Company will not dispose of the Shares or otherwise deal with them pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim Nos CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018-000121 between the Claimants on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Arbitration Claims"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and the fulfilment of any obligation imposed on Mr Deripaska and/or Filatona by the Court or such written agreement, following which all undertakings contained in this letter shall immediately lapse.*
>
> *(c) I and the Company will irrevocably instruct RPC to (i) hold the Share Certificates and not to deal with or dispose of or otherwise deal with the Shares in any way pending the final outcome of the Arbitration Claims, or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and (ii) provide an undertaking to the High Court of England & Wales to that effect.*
>
> *(d) In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Arbitration Claims in favour of the Claimants, and in the event Mr Deripaska fails within 42 days to comply with any obligations to make payment required*

> *under the terms of any such Order or agreement or by the terms of any Share Purchase Agreement or Order as may be ordered or agreed, the Company will take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance (following which all undertakings contained in this letter shall immediately lapse). In this event, the Company will make such irrevocable instructions as are necessary such that the said sale proceeds shall be received into RPC's bank account and paid by RPC directly to the Claimants or as otherwise ordered or agreed so as to satisfy any liabilities of Mr Deripaska and/or Filatona Trading Limited under a final judgment.*
>
> *(e) The Company has not incurred and will not incur any liability that would have the effect of preventing, impeding, or obstructing the fulfilment of the undertaking at sub-paragraph (d) above."*

38. It should be noted that "the Shares", the subject of the B-Finance Undertaking, were defined as that parcel of 45,500,000 shares in En+ owned by B-Finance that were then held in certificated form. B-Finance did not state, let alone undertake, that they would remain in certificated form. So long as the Shares were in certificated form, having the Share Certificates held by RPC under the RPC Undertaking, the terms of which are set out below, might perhaps have seemed an additional comfort, but it is not suggested that they were documents of title.

39. A key issue initially, as to whether Mr Deripaska may have acted in breach of his Undertaking, given the terms of the B-Finance Undertaking, was whether the Redomiciliation caused "the Shares" (as defined) to cease to exist because it caused En+ no longer to be a company incorporated in Jersey. That is because, provocatively (as I have said already) the May 2019 Letter suggested it was *Mr Deripaska's* position that indeed "the Shares" (as defined) would be destroyed by the Redomiciliation when it completed. As I alluded to in paragraph 19 above, however, it was always the claimants' position, by the time the parties were in front of Teare J on 3 July 2019 it was effectively also Mr Deripaska's position, and before me it was common ground, that after the Redomiciliation completed, "the Shares" (as defined) *would* still exist, and have still existed, being then the relevant block of 45,500,000 shares in En+ as incorporated in the Russian SAR.

40. Thus, for example, in Ms Berard's evidence for the hearing on 3 July 2019 she stated the claimants' position to be that the B-Finance Undertaking "*draws a clear distinction between the Shares in EN+ and the Share Certificates relating to the Jersey shares in EN+. The Undertakings … relate specifically to the shares in EN+. Consequently, the Undertakings extend to the shares in EN+ held by B-Finance after the Redomiciliation (i.e. the shares in the Russian EN+ entity, which will come to replace B-Finance's current shares in the Jersey EN+ entity), even if those shares are held in dematerialised form.*" I agree with that analysis, except to say that although it is not an unnatural use of language, it is not strictly correct to say or imply that "*the Russian EN+ entity*" and "*the Jersey EN+ entity*" were other than the same legal person, after and before a change of domicile. By contrast, in part, but in other part agreeing with Ms Berard, Mr

McGregor's responsive evidence on the one hand asserted that at all events the RPC Undertaking would become unworkable (on the mistaken premise that it assumed that selling the Shares would require or necessarily involve a transfer of the Share Certificates deposited with RPC), but on the other hand stated, as had Ms Berard, that En+'s shares in "*the new Russian entity post-Continuance*" would be subject to the B-Finance Undertaking, which could only mean that "the Shares" as there defined would still exist, so as to be the subject matter of B-Finance's obligations, for example, not to dispose of or deal with them.

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

> *"I hereby undertake to the court in connection with the above proceedings and pursuant to irrevocable instructions I have received from the Company [i.e. B-Finance] (which owns the Share Certificates and the Shares) that RPC will hold the Share Certificates and not dispose of or otherwise deal with the Shares in any way pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim No.s CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018-000121 between Navigator Equities Limited and Vladimir Chernukhin on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Proceedings"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and Navigator Equities Limited and Vladimir Chernukhin (on the other).*
>
> *In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Proceedings in favour of the Claimants or any such settlement, and in the event Mr Deripaska fails within 42 days to make any payment required under such judgment or settlement, I hereby undertake that pursuant to irrevocable instructions I have received from the Company RPC will take appropriate steps to facilitate the sale of such number of the Shares as are required to satisfy any Order of the Court as regards a judgment debt or other order to complete the purchase of Navigator's shares in Navio Holdings Ltd on terms that the proceeds of such sale are paid to this firm and further undertake to remit such proceeds as required by the Court or agreement between the parties up to the amount ordered by the Court or agreed."*

Context

42. The context in which the Undertakings were provided is material both to their construction and to whether a contract came to exist between the parties.

43. The Undertakings came about when Mr Deripaska sought to compromise the claimants' application dated 14 June 2018 for the continuation of the WFO by offering undertakings to the court in place of that order.

44. In their skeleton argument for the hearing of 19 June 2018, the Deripaska Parties said that Mr Deripaska had "*been endeavouring to engage constructively with the Claimants so as to provide them with meaningful comfort and permit the parties to move on to the real dispute between them*" and that he had "*offered very substantial undertakings to the Claimants*" related to shares in En+. The skeleton argument also noted that Mr Deripaska was "*content to provide alternative undertakings to the Court*" and that the claimants had "*to date refused to accept the undertakings offered*". His position was that his "*proposal gives the claimants a robust safeguard against any risk of asset dissipation*".

45. The claimants in correspondence and in their skeleton argument for the hearing had resisted the sufficiency of undertakings relating to En+ shares because Mr Deripaska said he did not own the shares. They noted, moreover, that the position stated by his then solicitors, Bryan Cave Leighton Paisner LLP, when it came to asset disclosure under the WFO, had been that B-Finance's En+ shares were not assets of Mr Deripaska's for that purpose because the director of B-Finance owed "*fiduciary duties to the company and is not entitled to treat the company's assets as belonging to Mr Deripaska*". The claimants did not accept that to be a sound approach under the WFO. They relied on the fact that, as is now typical in this court, Mr Deripaska's "*assets*" for the purpose of the WFO included any asset he had the power, directly or indirectly, to treat as his own, including because a third party held or controlled the asset in accordance with his direct or indirect instructions.

46. Mr Fenwick QC for Mr Deripaska submitted to Robin Knowles J in oral argument that the claimants would be "*effectively secured to meet any award or any judgment*" and that "*What Mr Deripaska has sought to do is not simply to identify assets which would satisfy the court's criteria of £125 million so as to cover the amount which Mr Deripaska may be ordered to pay and fairly ordered to pay, but actually to provide some means by which the court and Mr Chernukhin can be satisfied that if Mr Chernukhin wins, he will get his money.*" He said that "*this is indeed a real form of security if it is effective*", and that "*the wording is designed so that whatever order is made, the money is held, and once the shares certificates and an appropriate comfort is provided in accordance with the order of the court, or a direction of the tribunal if it is remitted, then the money is handed over. So, the money is held in safeguard.*"

47. The scope and terms of the proposed undertakings were modified during the course of the hearing. Robin Knowles J indicated that: "*unless by agreement a structure that is tolerable to both teams in relation to the [En+ shares] is available, I will proceed on the footing that the question for me is whether to continue the freezing order relief or not*". Having taken instructions, Jonathan Crow QC, then appearing for the claimants, indicated that the claimants were "*minded to accept the package that was offered"* (subject to finalising the terms).

48. Following the hearing, junior counsel negotiated and finally settled the precise wording of the proposed undertakings. Final wordings were agreed on 26 June 2018 and they were then appended to an agreed draft for the Order on the 19 June hearing that was submitted to Robin Knowles J for his approval. As I noted before, this was followed by

the lodging of the Undertakings with the court, duly signed, as it happens before the Order was finally sealed on 3 July 2018.

49. It is easy to see the force of the claimants' contention on the meaning of "*assets*" under the WFO (paragraph 45 above), but the point now is that the concern that was thus trailed before the court, and was the context for Robin Knowles J's indication that he would only look at discharging the WFO in return for undertakings if their terms were agreed by the claimants, was the way in which the En+ shares were held (the ownership structure), not their *situs*. Further, it must be remembered that the WFO was challenged by Mr Deripaska as not properly granted and apt to be discharged. There was no concession by Mr Deripaska, or *inter partes* finding, that but for the Undertakings having proved in the event to be a solution acceptable to both sides, the WFO would have been continued. It will be not be helpful or appropriate, therefore, to look at the meaning and effect of the Undertakings through a lens of comparison between how they would operate, upon any given proposed interpretation, and how a WFO would have operated. Whether it had force as a contract between the parties as well or only as an Order of the court, the discharge of the WFO upon the provision of the Undertakings to the court involved Mr Deripaska in not pursuing his primary case as much as it involved the claimants in not pursuing theirs.

50. That is the immediate litigation context giving rise to the Undertakings. They were given, also, in the wider context of US sanctions imposed on Mr Deripaska and entities associated with him, including B-Finance and En+ itself, and the possibility that, as part of seeking to secure the lifting of sanctions directly against itself (whatever might happen as regards Mr Deripaska personally), En+ might seek, as ultimately it did, to redomicile to the Russian SAR. The possibility of a redomiciliation of En+ to Russia was in the public domain at the time the Undertakings were provided; but it was not referred to between the parties, or mentioned by either side to the court, at the time.

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

52. The Redomiciliation was at the heart of this stage of the parties' struggle over the enforcement of the arbitration award, so I should now set out its story in a little more detail.

The Redomiciliation

53. En+ was and is a substantial holding company with a number of divisions and holdings in the metals and energy industries. It is listed on the London and Moscow Stock Exchanges by way of tradeable Global Depository Receipts ("GDRs") in respect of a proportion (in June 2018, c.19%) of its shares. The shares held by B-Finance were not included in the GDR programme, so that selling them would require a private share sale transaction as with an unlisted company. The listed GDR price nonetheless gives some indication of the approximate value of En+ shares.

54. En+ owns, among other things, a controlling stake in Rusal, one of the world's largest producers of aluminium. The Redomiciliation, i.e. En+'s corporate continuance from Jersey to the Russian SAR, was a response to and ultimately was in effect necessitated by the US sanctions imposed on Mr Deripaska and, by association, businesses the US believed him to own or control. Those sanctions were imposed in April 2018 by the addition of Mr Deripaska, B-Finance, and En+ (amongst others), to the Specially Designated Nationals and Blocked Persons List ("the SDN List") maintained and published by the US Treasury's Office of Foreign Assets Control ("OFAC").

55. By the time the Undertakings were given to the court at the end of June 2018, redomiciling En+ out of Jersey had a much longer history than the US sanctions against Mr Deripaska and entities associated with him. A continuance from Jersey to Cyprus, a popular offshore domicile for substantial Russian business interests as this court knows well, had been under consideration since 2016. This was not confidential. The prospectus dated 3 November 2017 for the London Stock Exchange GDR listing stated that "*Following the Offering, the Company intends to become a tax resident of Cyprus by the end of 2017 and to redomicile from Jersey to Cyprus in 2018*". It provided a description based upon external legal advice received by En+ as to Jersey and Cypriot law of the steps required to implement a redomiciliation out of Jersey (in that case, obviously, to Cyprus).

56. However, the April 2018 SDN listing of En+ substantially froze its business; it could not deal with banks and other businesses which had links to the US or that wanted to preserve the possibility of dealing with US interests. The share value of En+, as indicated by GDR prices, fell heavily. The inability of Rusal to trade freely caused the price of aluminium to rise more than 20%.

57. It was clear that En+ was caught up in the sanctions only because of the extent of Mr Deripaska's indirect ownership and control. If that were reduced or eliminated, En+ might hope to persuade OFAC to de-list it, even if not Mr Deripaska personally. En+ developed a plan to procure the lifting of sanctions ("the Barker Plan") under its Chairman, Lord Barker of Battle, formerly Greg Barker MP, a UK Government Minister for the 2010-2015 Parliament. The Barker Plan was informed by discussions between the En+ Board and OFAC. It was endorsed by the En+ Board on 18 May 2018, a little over a month after the US sanctions had been imposed and a little over a month before the Undertakings were given.

58. In broad outline, the Barker Plan was that OFAC would be asked to de-list En+ in return for:

(i) Mr Deripaska ceding his indirect majority ownership and control of En+, reducing his stake from c. 70% to 44.95%;

(ii) Mr Deripaska being permitted to vote only 35% of his reduced shareholding; and

(iii) most of Mr Deripaska's nominees on the board of En+ being removed and replaced by independent directors.

59. The Barker Plan was implemented and was successful; En+ was de-listed by OFAC, after a vote in the US Senate that became very tight after a substantial number of Republican Senators crossed the House in an attempt to block the de-listing. On 19 December 2018, OFAC made a notification to the US Senate expressing its intention to terminate the sanctions imposed on En+, giving the Senate 30 days in which to make its own independent assessment of whether the proposal adequately protected US economic and national security. The Senate debated and voted on the OFAC notification on 15 and 16 January 2019. To block OFAC's proposal to lift the sanctions, 60 Senators had to vote in favour of the blocking resolution. In the event, 11 Republican Senators crossed the House and the final tally was 57:42 in favour of blocking the de-listing, i.e. the move to block the lifting of sanctions failed by just 3 votes.

60. The Barker Plan and the Redomiciliation were inextricably linked because the reduction of Mr Deripaska's shareholding demanded by OFAC required various arrangements with other stakeholders, principally:

(i) a debt-for-equity swap with En+'s major banker, VTB Bank in Russia, and

(ii) an equity swap under which Glencore would swap shares in Rusal for shares in En+, Rusal's parent,

as well as an arrangement by which Mr Deripaska would donate some of 'his' En+ shareholding to charity and to a foundation holding shares for the benefit of his children. VTB Bank insisted on redomiciliation to Russia in return for its necessary support. For its part, OFAC made it a condition of de-listing En+ that any redomiciliation be approved by the incoming, more fully independent Board of En+.

61. Mr Pillow QC was thus able to say in argument, and I find, that the Redomiciliation was a necessary element of the way in which the lifting of US sanctions on En+ was achieved in the event, and so it was a key step taken to preserve the value of B-Finance's shareholding in En+ for the benefit, indirectly, of the claimants, given that the WFO had been discharged in return for the Undertakings. One illustration of the beneficial impact is that the de-listing of En+ produced an instant surge in its listed GDR price, from £5.40 to £8.95, lifting the indicative value of the Shares the subject of the B-Finance Undertaking from c.£245 million to over £400 million.

62. The Redomiciliation, as implemented, thus involved the following key stages:

(i) In May 2018, the Barker Plan was adopted by the (old) En+ Board.

(ii) On 1 November 2018, that Board approved the continuance from Jersey to the Russian SAR. En+ made a public announcement of that decision through the

Regulatory News Service ("RNS") of the London Stock Exchange the next day. The notification appeared on the En+ and Stock Exchange websites, and it was featured by the *Wall Street Journal* online on 9 November 2018.

(iii) On 30 November 2018, En+ publicly announced, again via the RNS and its own and the Stock Exchange's websites, notice of its general meeting to be held on 20 December 2018 to put the continuance proposal to shareholders for approval.

(iv) On 20 December 2018, the shareholders of En+, including B-Finance, voted to adopt special resolutions approving the continuance. Out of a total of 571,428,572 shares in En+, holders of 511,785,736 shares voted in favour and holders of only 17,849 shares voted against. B-Finance owned in total 307,750,000 shares, c.54% of En+, so obviously its shares, indirectly beneficially owned ultimately by Mr Deripaska, had to be voted in favour of the continuance to Russia for the special (two-thirds) majority required to be obtained.

(v) On 27 January 2019, OFAC removed En+ from the SDN List following the proceedings in the US Senate referred to above. The press release on OFAC's website read:

> *"Under the terms of their removal from OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List"), En+, Rusal, and ESE have reduced Oleg Deripaska's direct and indirect shareholding stake in these companies and severed his control. This action ensures that the majority of directors on the En+ and Rusal boards will be independent directors – including U.S. and European persons – who have no business, professional, or family ties to Deripaska or any other SDN, and that independent U.S. persons vote a significant bloc of the shares of En+.*
>
> *The companies have also agreed to unprecedented transparency for Treasury into their operations by undertaking extensive, ongoing auditing, certification, and reporting requirements. All sanctions on Deripaska continue in force."*

(vi) The new, independent En+ Board was installed on that same date, 27 January 2019. On 18 April 2019, it reviewed and approved the continuance.

(vii) On 7 May 2019, an application was filed with the Jersey Financial Services Commission ("JFSC") for permission for En+ to leave the jurisdiction. On 16 May 2019, the JFSC granted permission.

(viii) On 24 June 2019, the Russian Central Bank registered the issuance of shares in En+ as an international public joint-stock company situated in the Russian SAR.

(ix) On 9 July 2019, the continuance was completed, albeit that the JFSC did not issue a certificate confirming as much until 22 August 2019.

63. All shareholders in En+ at the Redomiciliation date were automatically granted shares in Russia-domiciled En+, on a one-to-one basis. Those shares are held in dematerialised form, that is share certificates were not issued, although it was said by Mr Pillow QC on instructions – there was no evidence on it – that under Russian law the shareholders would be entitled to be issued with a certificate on demand. The share registration in Jersey was cancelled, and with that any share certificates for Jersey-registered En+, including the Share Certificates held by RPC.

64. The listing in London and Moscow via GDRs of a proportion of the issued shares in En+, not including the Shares, continued. That listing and related trading was unaffected by the Redomiciliation. As I noted above, it provides a useful rough proxy for the value of En+ shares, albeit shares not part of the GDR programme might not fetch on the private sale that would need to be negotiated the full price at which En+ GDRs might trade, especially a large block of shares such as 45,500,000 being sold under pressure of time. That of course is balanced here by the fact that in June 2018, even when En+'s GDR price was discounted heavily because of the US sanctions, the indicative value of 45,500,000 shares, if benchmarked to the GDR price, was still of the order of twice the potential award or judgment debt in favour of the claimants that the WFO had originally sought to ensure would be paid.

The Claimants' Knowledge

65. A major focus of Mr Deripaska's response to the contempt application, and of Mr Pillow QC's cross-examination of Ms Berard, was the claimants' awareness over time (in practice, Mr Chernukhin's awareness) of the pursuit or possible pursuit by En+ of a continuance to Russia, all within its response to the US sanctions. In charging Mr Deripaska with contempt and inviting the court to consider punishing him for it, the claimants took on a quasi-prosecutorial role in the public interest, as I explain further below. I agree with Mr Pillow QC that if, prior to the summer of 2019, the claimants were aware of yet made no complaint about the (planned) Redomiciliation, that was plainly relevant because it went to the claimants' prosecutorial motive and to a fair assessment of the seriousness of what Mr Deripaska was alleged to have done, indeed it might be exculpatory generally on whether Mr Deripaska should be treated as in contempt at all, and because some of the claimants' evidence in support of the contempt charge was rendered misleading if indeed Mr Chernukhin had had prior knowledge of the Redomiciliation but raised no concern about it.

66. The claimants adopted the stance, in my judgment misguided, that their prior knowledge of the Redomiciliation was irrelevant to the contempt application. Whilst they did not refuse to provide any information at all, they sought to provide a bare minimum of information, only when pressed for it, and Mr Chernukhin did not give evidence even in writing, let alone allow himself to be tested on what he might say in cross-examination. There was therefore a focus in Requests for Further Information on behalf of Mr Deripaska and in the cross-examination of Ms Berard on particular news reports the claimants eventually conceded that they had seen at the time. But I am not satisfied that the claimants produced all the evidence I would have wanted in order to assess properly what Mr Chernukhin knew, when, who was advising him, on what and to what effect (leaving aside privileged advice), and why the proposal for En+ to move from Jersey to Russia generated no alarm bells at all until the May 2019 Letter.

67. As will be clear from my descriptions of them above, the Barker Plan and the (planned) Redomiciliation were newsworthy and in the open. It is improbable that a well-advised businessman with reason to be keenly interested in the value of En+ shares, i.e. Mr Chernukhin, would not have kept himself aware of developments. Mr Pillow QC contended on that basis, and given the claimants' concessions, limited and reluctantly made, as to what Mr Chernukhin had seen and when, that there was a strong case for Mr Chernukhin to answer that he was well aware of, and probably well advised about, the planned Redomiciliation and its possible consequences well before the May 2019 Letter, yet chose to make no complaint about it at all, let alone suggest that Mr Deripaska was or might be guilty of contempt of court in relation to it. I agree.

68. An adverse inference was then to be drawn, Mr Pillow QC argued, from Mr Chernukhin's evasiveness on the point, through the Part 18 Responses, misleading presentation of the case, through Ms Berard's evidence, and failure to give evidence himself, such that it should be held (a) that Mr Chernukhin was aware at all material times (i.e. from before the Undertakings were even given) that En+ was actively considering a redomiciliation to Russia, (b) that he was untroubled by the possibility that the shares would move from Jersey to Russia, and content to treat the Undertakings as acceptable alternatives to a continuation of the WFO notwithstanding that possibility, and (c) that the motivation for the contempt application therefore was not a belief or concern on Mr Chernukhin's part that the Redomiciliation had somehow prejudiced or threatened to prejudice Mr Chernukhin's interests. I agree again.

69. Because the claimants conceded that these had been seen by Mr Chernukhin contemporaneously, five media reports were the subject of particular scrutiny at the hearing:

    (i) On 24 June 2018, a *Vedomosti* article was published online, entitled "*Oleg Deripaska's En+ may register in Russia*" (the "June Article"): "*The energy and metallurgical company En+ is exploring the possibility of changing company registration from Jersey to a Russian island, as Vedomosti understands from two sources that are close to the company and one of its shareholders. …*". On 25 June 2018, Mr Chernukhin emailed that article to himself. That was after the hearing before Robin Knowles J but before the Undertakings had been given or the terms for them had been finalised between the parties. Ms Berard sought to suggest that perhaps Mr Chernukhin had not paid the article any attention, or even read it at the time, but she had never asked the question of her client and I find she had no proper basis for thinking the truth was other than that Mr Chernukhin spotted and read the article, and emailed it to himself to make sure that he had kept a copy for himself, precisely because it came out just as the Undertakings were on the point of being provided to the English court. That is the obvious probability and were it not the truth of the matter, Mr Chernukhin could readily have said so for himself and made himself available to be tested on that evidence.

    (ii) On 16 August 2018, Reuters published an article entitled "*En+ considers move to Russia's new offshore zone*" (the "First August Article"): "*En+ Group …, hit by US sanctions against Russia in April, said on Thursday it was investigating the possibility of re-domiciling from Britain's Jersey to one of Russia's new offshore zones. …*". Mr Chernukhin sent the First August Article to Clifford Chance the same day.

(iii) On 17 August 2018, Bloomberg published an article entitled "*Tycoon Deripaska Weighs Moving Sanctioned Companies to Russia*" (the "Second August Article"): "*Billionaire Oleg Deripaska's companies said they're considering re-domiciling from the British isle of Jersey to a Russian offshore zone created by the Kremlin in response to American sanctions. ...*". Clifford Chance sent the Second August Article to Mr Chernukhin on 21 August 2018.

(iv) On 5 November 2018, Rusal issued a press release entitled "*Update to the Proposed Change of Domicile*" (the "Rusal Press Release"). The Press Release noted that "*At a meeting of the Board held on 2 November 2018, the Board considered the proposed Company's continuance out of Jersey to the Russian Federation by way of de-registration in Jersey and continuance as an International Company under the laws of the Russian Federation ... . After careful deliberation, the Board determined that it is in the best interest of the Company and the shareholders as a whole to proceed with the Company's Continuance Out of Jersey*". It went on to note that a number of matters would need to be approved by shareholders. At about this time, Mr Chernukhin and his lawyers at Clifford Chance read press articles reporting on this consideration by Rusal of a change in domicile.

(v) On 30 November 2018, *Vedomosti* published an article entitled "*The question of relocating En+ to Russia is to be decided in Paris*" (the "November Article"). That article explained that the re-registration of the company in Russia was approved by the En+ board of directors on 1 November 2018. The by-line said, "*Oleg Deripaska's shareholder's meeting is scheduled for December 20th.*", and the article continued: "*En+, which unites the assets of US sanctioned businessman Oleg Deripaska in power generation and metallurgy, has announced that an extraordinary general meeting of shareholders will be hosted in Paris on the 20th December ... . The company, which suffered from the US sanctions in April along with other Deripaska assets, announced its intention to change its registration in June ... . On Thursday, November 1, the re-registration of the company to Russia was approved by the board of directors of En+.*" Mr Chernukhin and his lawyers from Clifford Chance read the November Article at around the time it was published.

70. Ms Berard's evidence was that she only realised the effect the Redomiciliation would have on the Undertakings when she saw the May 2019 Letter. Ms Berard's evidence was that she and Mr Chernukhin were both shocked at its content. As I have said, that was a provocative letter; but that is because it asserted, unreasonably, that due to the Redomiciliation the Undertakings should all be discharged with nothing to replace them. I can see how that may have come as a surprise; but that is uninformative about Mr Chernukhin's relevant prior knowledge and understanding, and it was a matter of history well before the contempt application that neither explains nor justifies bringing that application.

71. Ms Berard's evidence in cross-examination was as follows:

> "*I accept that we [meaning Mr Chernukhin and Clifford Chance] knew of the possibility of a redomiciliation, but we had no understanding of what the redomiciliation process meant, of its consequences, and in particular on the undertakings, and that*

understanding arose from the communication that we received at the end of May, very shortly before the redomiciliation. …

What I am certain of, because of discussions with my client, is that he was as shocked as we were – by "we" I mean myself and Clifford Chance – about RPC's letter at the end of May, and the understanding dawning on us of what it meant to the undertakings."

72. The May 2019 Letter said:

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

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

a) the Jersey Financial Services Commission confirmed in principle the migration to Russia (17 May 2019);

b) the necessary documentation was sent to the management company of the Special Administrative Region (20 May 2019);

c) the necessary documentation will be sent to the Russian Central Bank (expected 27 May 2019);

d) the Central Bank approves the Continuance (expected 27 June 2019);

e) En+ is registered in Russia as a Russian legal entity (expected 4 July 2019); and

f) the Continuance to Russia is complete (expected 12 July 2019) (after step (e) and before the completion of this step, En+ will be dual registered in both Jersey and Russia).

7. We are instructed that:

a) once the Continuance of En+ takes place, its shares will be held in dematerialized form, i.e. share certificates will not be issued to shareholders;

b) the existing shares and share certificates in respect of Jersey-domiciled En+ will be automatically cancelled (including the share certificates held by RPC pursuant to the undertakings previously given by Mr Deripaska, B-Finance and Rupert Boswall of RPC in respect of 45.5m

certificated shares in En+ owned by B-Finance (the Undertakings));

c) *all shareholders in Jersey-domiciled En+ will, at the point the Continuance is completed, automatically be granted new shares in Russia-domiciled En+ on a one-to-one basis; and*

d) *En+'s listed Global Depositary Receipts will continue to be traded on the London Stock Exchange as before (as well as the Moscow Stock Exchange).*

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

…

13. In light of the above [namely, the US sanctions and the increased GDR price as against June 2018], ***your clients are adequately protected from an enforcement perspective independently of the Undertakings. Our client therefore does not consider it necessary for there to be put in place any alternative form of security*** *in place of the Undertakings.*

.."

(my emphasis twice, for the provocative elements)

73. The claimants reasonably took the position, and pursued it vigorously, that it was unsatisfactory for the Undertakings to be discharged and replaced with nothing, as proposed by the May 2019 Letter. It was in my judgment ill-advised of Mr Deripaska to suggest, through RPC, that the Redomiciliation warranted the discharge of the Undertakings with nothing to replace them, and that suggestion may indeed have been a shock to the system for the claimants and Clifford Chance. But that suggestion was not pursued; by the time the parties were back before the court Mr Deripaska accepted that the Undertakings would continue to have application to B-Finance's shares in Russian-domiciled En+ after the Redomiciliation completed; and in my judgment Ms Berard was unable to identify what effect, therefore, she now thought the Redomiciliation had that she or her clients were unaware of long before the May 2019 Letter.

74. I do not accept Ms Berard's evidence if she meant by it that she and her clients had no understanding of what a corporate continuance of En+ from Jersey to Russia was or how it would operate. My primary assessment of her evidence, however, is that that is not what she was saying, but rather that it had not occurred to her or her clients that it might be suggested that after the Redomiciliation the Undertakings would be worthless, and I have sympathy for that. The difficulty I have is that matters moved on from that

initial shock quite quickly, still months before the contempt application was issued, and in my judgment the claimants, and Ms Berard, effectively did not.

75. Observing Ms Berard being taken by Mr Pillow QC, step by step, through the effects of the Redomiciliation, it was my assessment that she was confronting properly for the first time how, once the errant idea in the May 2019 Letter that the Undertakings should be thrown away had itself been discarded, there was or may well have been nothing for the claimants to complain about as regards the Redomiciliation; how indeed it had been or may well have been significantly to the claimants' benefit that it took place as it did, as an element of the saving of En+ from collapse and/or Russian nationalisation. That was a self-critical analysis of the idea of prosecuting Mr Deripaska for contempt that ought to have been undertaken well prior to cross-examination at a committal hearing. Had it been undertaken properly, there is in my view a real chance the view may have been taken that a contempt application need not and should not be made.

76. On one specific, important, point I do not accept Ms Berard's evidence, namely that Mr Chernukhin did not know prior to the May 2019 Letter that the December 2018 En+ shareholders' meeting had taken place and that the Redomiciliation had been approved by a shareholders' vote at that meeting. Ms Berard asserted as much but, with respect, cross-examination showed her to have no sufficient basis for putting it forward as fact. It is highly implausible that Mr Chernukhin did not inform himself or ensure that he was informed of the public information available at the time as to the outcome of the vote, especially in circumstances where, it was grudgingly accepted through the Part 18 Responses, he was staying abreast of developments, at least as reported in the media, up to and including the end of November when the En+ Board approval was reported, including reference to the fact and date of the shareholders' meeting to follow. If there was to be a credible case that Mr Chernukhin was surprised to learn from the May 2019 Letter that the Redomiciliation had been approved by the En+ shareholders in December 2018, it was a case that required evidence to that effect from Mr Chernukhin that he could readily have provided, were it true, but chose not to provide.

Jersey Proceedings and Payment into Court Application

77. Prior to the 3 July 2019 hearing before Teare J, on 28 June 2019 the claimants pursued a Representation before the Royal Court of Jersey seeking enforcement of the arbitral awards in Jersey. The skeleton argument prepared on behalf of the claimants set out the purpose of the Representation as follows:

> "*The Representors wish to proceed with enforcement against the Shares at the earliest possible juncture because En+ is on the cusp of being continued as a Russian company, something which is understood to take effect on or shortly before 4 July 2019. The Shares have been expressly made available as security by Mr Deripaska and his companies for the purpose of enforcement of the Arbitral Awards pursuant to undertakings to the High Court of Justice. The legal owner of the Shares will, it is understood, receive equivalent shares in the new Russian entity.*
>
> *Owing to the underlying risk of dissipation on the part of Mr Deripaska, and the lack of confidence in judicial process in Russia, the Representors are in no doubt that their position will*

> *be irretrievably prejudiced unless enforcement measures are ordered as a matter of urgency. It is recognised that, while the urgency of the situation necessitates* ex parte *relief, this may mean that there is limited opportunity for an* inter partes *hearing to confirm the orders made prior to 4 July 2019. The Representors therefore seek interim relief* ex parte *which will, in effect, preserve the status quo.*"

78. Later in the skeleton argument, it was said that:

> "*A key attraction of the Undertakings was the ability to enforce against Jersey situs assets. The Undertakings would not have been agreed to had there been any suggestion of the Company redomiciling to Russia.*"

79. The Representation was supported by an affidavit of Ms Berard, and she saw and approved the skeleton argument. Ms Berard's Jersey affidavit exhibited and relied on a copy of her fourth affidavit in this court, paragraph 68 of which was presumably the basis for the skeleton argument submission. There Ms Berard said this: "*For the avoidance of doubt, the Applicant would never have accepted undertakings in respect of the Shares had it been understood that they would be unable to enforce the Shares whilst EN+ was a Jersey company*". It would be possible to read that as meaning that in June/July 2018, Mr Chernukhin knew of the Redomiciliation as being in prospect, but was not concerned *because he did not think it would happen quickly enough to be relevant to him*. But Ms Berard approved the skeleton argument submission based on it, and the case there was that in June/July 2018 Mr Chernukhin was unaware of any possibility of En+ moving to Russia; and the factual position stated orally to the Jersey court, with a Clifford Chance colleague of Ms Berard present as the Jersey advocate's instructing professional client, was also to that effect.

80. Since the Representation was initially heard on an *ex parte* basis, the claimants had a duty of full and frank disclosure. Given the argument just quoted, it was obviously material to disclose to the Jersey court that in fact the possibility of En+ being redomiciled to Russia was (a) public and (b) known to at least Mr Chernukhin before the Undertakings were finalised and provided to the English court. But that was not disclosed. In cross-examination, Ms Berard did not give the possible explanation I identified in the previous paragraph, but nonetheless I am prepared to accept that she did not realise that what was being put to the Jersey court was misleading or involved a failure to provide full and frank disclosure. However, in my judgment she ought to have realised that Mr Chernukhin's awareness prior to the May 2019 Letter of En+'s plan to redomicile to Russia, without objection or complaint, was a very material matter in circumstances where the Jersey court was being asked to grant relief *ex parte* and being told that there was huge urgency created by the recentness of the revelation that En+ might be leaving Jersey for Russia.

81. Ms Berard, in her affidavit to the Jersey court, addressed in terms the possibility that her clients might be said to have delayed unduly in going to court, but said nothing about and, I find, made no proper effort to consider, the extent of Mr Chernukhin's prior awareness. Instead, the Jersey court was given what was, as Ms Berard should have realised, the misleading impression that neither Mr Chernukhin nor anyone advising him knew anything of the planned Redomiciliation until the May 2019 Letter.

Furthermore, since (as I have found) Mr Chernukhin was in fact aware of the planned Redomiciliation before the Undertakings were lodged with the English court and the WFO discharged, it was specifically misleading (even if Ms Berard failed to see this at the time) for the Jersey court to be told, as it was, that the claimants would not have treated the Undertakings as acceptable if they had known that redomiciliation to Russia was a possibility. The true position is the exact opposite: Mr Chernukhin *did* know that Russian redomiciliation was a possibility; he treated the Undertakings as acceptable nonetheless.

82. The outcome of the Representation, different from and better for the claimants than the relief they had sought, was an order that the Shares be transferred into the name of the Viscount of the Royal Court of Jersey ("the Viscount"). On 19 November 2019, after the buyout to give effect to the arbitration award had been completed even though Mr Deripaska's appeal was still pending in the Section 67 Proceedings, as described earlier in this judgment, the Royal Court of Jersey ordered that the Shares be restored to B-Finance. This means, incidentally, that when the Redomiciliation completed, the Shares were owned not by B-Finance but by the Viscount, who will have been the shareholder registered as such in both jurisdictions on or as of 9 July 2019, the date when En+ moved domicile from Jersey to Russia.

83. Meanwhile, in this court, the claimants' primary application before Teare J on 3 July 2019 was for an order for payment into court of the amounts that Mr Deripaska would ultimately have to pay pursuant to the arbitration award if his appeal in the Section 67 Proceedings failed. Mr Deripaska issued a cross-application seeking "*permission to lift/withdraw the Undertakings*" on the basis that "*the current Undertakings will (upon completion of the Continuation) no longer be workable in the manner contemplated … because of the Continuance (under which the Jersey certificated shares are replaced with Russian dematerialized shares) … this aspect of the Undertakings will become ineffective*". (It will be noted how this fitted with Mr McGregor's explanation of the position summarised in paragraph 40 above.)

84. In a paragraph of Ms Berard's fourth affidavit, supporting Mr Chernukhin's application (and relied on also before the Jersey court, as mentioned above), Ms Berard explained the shareholder vote that was required as part of the Redomiciliation process and Mr Deripaska's alleged role in that vote. Ms Berard said this:

> "*… according to the representations made by his lawyers in the summer of 2018, Mr Deripaska has de facto control over B-Finance Limited. As at that time, B-Finance held a 53.86% stake in En+. Today, it holds a 44.95% stake, with 35% of the voting rights. In that capacity, Mr Deripaska has had the power to, and must therefore be assumed to have known of and directed the actions of B-Finance, in its capacity as a significant shareholder in En+, to vote in favour of the resolution for the Continuance from Jersey to the Russian Federation. In the absence of a full explanation, I believe that this constitutes a serious breach of the Undertakings given by and on behalf of Mr Deripaska. The Applicants will rely upon this as further compounding the risk of dissipation in this case.*"

85. The point was repeated in the claimants' skeleton argument:

> "*It may be noted that, as admitted in RPC's letter of 29 June [sic., May] 2019 (at §5), B-Finance itself voted in favour of the proposed redomiciliation of En+ to Russia. Given his ultimate ownership of both B-Finance and its shares in En+, it is inconceivable that this was done without Mr Deripaska's knowledge and approval and, in any event, B-Finance was aware of the terms of Mr Deripaska's undertakings. On any view, this was a serious and significant breach of the Undertakings and has created the very reason now relied upon to be discharged of the Undertakings altogether.*"

86. During the hearing, Paul McGrath QC, then appearing for the claimants, argued that a freezing order would not achieve the same purpose as a payment into court. He submitted that:

> *"where we were before the undertakings were given is a situation before assets were moved back into Russia and so any movement of assets back into Russia would have been the subject of careful supervision of this court. They have been able to take place without that supervision because and solely because of the undertakings having been given in respect of the En+ shares and we say, my Lord, that the cost to Mr Deripaska, an extremely wealthy individual, of putting up security of £90 million or £100 million for a short period of time for the hearing of the appeal which is due in four months would be a very small price to pay for being released from the undertakings, not to mention for encouraging [or] procuring steps to be taken which rendered those very undertakings valueless, so all it would do at the end of the day is ensure that we get the money that we are told we will get anyway and, in the meantime, it is held safely by the court.*"

87. On that occasion, Richard Millett QC appeared for Mr Deripaska. The stance adopted by Mr Deripaska through his submissions was the relatively narrow one that ordering a payment into court would be unjustified betterment of the claimants' position; if Mr Deripaska was right that the Undertakings should be discharged, the only issue the court might properly entertain would be whether therefore the WFO needed to be reimposed. An "*interesting [and] potentially quite difficult*" point arose, Mr Millett QC argued, whether the order obtained from the Jersey court rendered it necessary to discharge the Undertakings come what may, because they were premised on B-Finance being the shareholder which it no longer was since title to the Shares had been transferred to the Viscount.

88. Leaving aside any question whether this might mean any of the Undertakings had been or might be about to be breached, as I have noted already, by the time of the hearing before Teare J the parties were *ad idem* that the Redomiciliation would *not* have the effect provocatively suggested by paragraph 8 of the May 2019 Letter that "the Shares", as defined in the B-Finance Undertaking, were destroyed so that the Undertakings no longer had any meaningful application.

89. In the course of the argument before Teare J, Mr Millett QC described Mr Deripaska as having faced the option, when the WFO was granted, of choosing to "*live with the freezing order, discharge the freezing order or replace the freezing order with an undertaking …, or payment into court. [He] chose to replace it with an undertaking. … By reversing the option, one reverts back to the freezing order. So my learned friend is really trying to improve his position by saying, "We do not like a freezing order very much so can we have something better than a freezing order which is better security than the security we had has turned out to be?"* ***If he wants to apply for something else because he says we breached the undertaking that is a different matter. He does not do that.*** …" (my emphasis).

90. That prompted Teare J to note that Ms Berard's affidavit and Mr McGrath QC's skeleton had talked of Mr Deripaska being in breach of his Undertaking. Mr Millett QC noted in response that Mr McGrath had not developed that allegation at the hearing "*and particularly [he] has not developed it as the basis – this is the point – of the exercise of jurisdiction*". That prompted this exchange:

> "*MR JUSTICE TEARE: It seems to me a relevant consideration. I mean I look at the terms of the undertakings and, when I ask myself has what has taken place to an order [sic., in order for?] re-domiciliation to take place tomorrow come about by reason of a breach of one or more of these undertakings, it looks to me likely that there has been a breach.*
>
> *MR MILLETT: My Lord, I am not going to get into that. The point I am making is a jurisdiction point.*"

91. That was in the morning. When Mr Millett QC returned to this aspect of the argument after the short adjournment, his instructions had changed. It had been clear from the argument that even if Mr Deripaska's narrow argument might otherwise have force, he plainly vested in the court power to order him to make a payment into court as a condition of granting his application to be released from his Undertaking. Mr Millett QC's instructions were therefore not to move that application. Teare J held that he had jurisdiction to order payment into court, as sought by the claimants, notwithstanding that tactical ploy by Mr Deripaska.

92. In his *ex tempore* judgment, [2019] EWHC 1846 (Comm), Teare J said this at [27]-[28]:

> "*27. … Although it is not said that a breach of the undertaking is the source of jurisdiction, the court should in my judgment take into account that it seems likely that the mechanism by which the redomiciliation is permitted to take place in fact involves a breach. …*
>
> *28. In circumstances where the shares in the Jersey company are to be extinguished, it is difficult to understand how there could not have been a breach of the undertakings. It seems to me that in circumstances where there are grounds to believe that there has been a breach that must be a relevant factor to bear in mind in resolving this question. That question is whether, in*

> *those circumstances, the court has no inherent jurisdiction to order alternative security in the form of payment into court.*"

93. Commenting on Mr Deripaska's tactical ploy, Teare J said this at [34]:

> *"It would be odd if a tactical decision of that nature were sufficient to deprive the court of its inherent jurisdiction to make what it regards as a fair and just order, where there has been a material change of circumstance, and where there is good reason to believe that the change of circumstance has involved a breach of the undertakings given to the court. In my judgment in circumstances where there were, at the outset of this hearing, two applications, one, by the Deripaska parties for release from the undertakings, and, two, by the claimants for the imposition of a further order, the court in those circumstances has an inherent jurisdiction to order the release of the undertakings on terms that there be a payment into court, and that is the order that the court makes. I will ask the parties to agree the appropriate terms of the order.*"

94. The Order drawn up on that hearing required payment into court of c.£90.6 million as soon as reasonably practicable and in any event by 4 pm on 31 July 2019, and provided that upon the payment into court being made, the Undertakings "*shall be discharged*".

95. Clifford Chance wrote to RPC on 4 July 2019 seeking various information about Mr Deripaska's and RPC's role in the Redomiciliation and the steps they had undertaken, if any, to satisfy themselves that the Undertakings were not being breached. That was the first time that the potential for contempt proceedings was raised by Mr Chernukhin's solicitors. Further correspondence as to that followed over the next weeks.

Private Prosecution and Personal Animus

96. The final aspect of the facts to mention is that Mr Deripaska pursued a private prosecution against Mr Chernukhin for allegedly perverting the course of justice. The private prosecution related to a 2004 declaration of trust that Mr Chernukhin had tendered as evidence in the Section 67 Proceedings. Teare J found that Mr Chernukhin's name had only been added to that document in 2015, a fact which Mr Chernukhin had failed to disclose.

97. In her evidence to me, Ms Berard accepted that Mr Chernukhin was 'furious' about the private prosecution, and described the litigation as a 'war' and a 'long-running battle'. I have no doubt it cemented and aggravated what had become a fierce and intense dislike of Mr Deripaska on the part of Mr Chernukhin. That feeling may have been mutual, but in the present context that is not so relevant.

98. The timing of the private prosecution was inflammatorily unfortunate. On or about 10 May 2019, Mr Chernukhin was summonsed to appear at a Magistrates Court on 31 May 2019 to answer the criminal charge. The May 2019 Letter was sent on 29 May 2019.

99. Mr Chernukhin took out an application to set the criminal Summons aside, which was initially given a date of 8 July 2019 but which (if I understood the evidence correctly)

was not disposed of then, so that when the contempt application was issued in November 2019, it was still outstanding and due to be heard in January 2020.

100. In late July and early August 2019, through Clifford Chance, Mr Chernukhin sought to use the commercial negotiations over the civil proceedings, the arbitration and the buyout of Navio, to put pressure on Mr Deripaska to drop the private prosecution. Ms Berard said she did not see the relevant correspondence in that way, but in my judgment that was its gist, so far as material. RPC rightly rebuffed the effort, *inter alia* on the basis that they had taken the view that the two matters should be treated completely separately so a separate RPC team, and different counsel, were instructed in the private prosecution, and Mr McGregor's team dealing with the civil proceedings would not get involved.

101. On 24 March 2020, the CPS gave written notification that the Director of Public Prosecutions had decided to take over the conduct of the criminal proceedings and to discontinue them, stating that:

> "*The decision to discontinue these charges has been taken because a prosecution is not needed in the public interest.*
>
> *It is considered that the alleged act does not fall within the CPS charging guidance for an offence of this nature.*
>
> *The harm to the victim is considered marginal as the High Court Judge expressly stated that even the late revelation of the true nature of the document did not alter the finding that the ultimate beneficial owner was Mr Chernukhin. Mr Deripaska was ordered to buy Mr Chernukhin's share of the company and also pay his legal costs.*"

102. The legal and factual merits of the allegation against Mr Chernukhin, put as a criminal charge of perverting the course of justice, were thus never tested, and I am in no position to make any assessment of them. I note though, as regards any possible criticism of Mr Deripaska for instituting the private prosecution, that the discontinuance was founded upon the public interest limb of the CPS prosecution test, and it was not the DPP's assessment that there was no case to answer on the merits.

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

Discussion – Breach?

104. I deal now with the question whether Mr Deripaska acted in some way, in relation to the Redomiciliation, so as to be in breach of his Undertaking. The conclusions I have reached on that, I emphasise, I had not reached when dismissing the contempt application as an abuse of the process. When I ruled the contempt application out at the

start of the third day of the hearing, I retained an open mind on the question of breach, having not yet heard the oral argument on it and not knowing how much, if any, of the witness evidence filed primarily for the contempt application would be relied on for the defence of the damages claim. Since there had been mention of the possibility of a submission of no case to answer on the contempt charge, I did not pre-read for the hearing the affidavits of Mr Deripaska, Igor Makarov, Marina Kaldina and Timur Valiev served in defence. After my ruling on the abuse application, Mr Pillow QC confirmed that for the damages claim he would not seek to rely on Mr Deripaska's evidence and I read those of Mr Makarov, Ms Kaldina and Mr Valiev before the argument on the final day. Nothing in any of those three affidavits was challenged by the claimants and they had not asked for those deponents to be made available to be cross-examined.

105. There was no dispute as to the applicable principles:

(i) Mr Deripaska's Undertaking represented a solemn commitment to the court, provided so as to purchase the discharge of an injunction and intended to have the same force and effect for Mr Deripaska as an injunction. Therefore, its meaning and effect is to be construed strictly, as would have been that of an injunction in like terms; and see *JSC BTA Bank v Ablyazov* [2015] 1 WLR 4754, *per* Lord Clarke at [16]-[19], for the approach to construing an injunction.

(ii) If in this case there was between the parties any contract, the material contractual promise made by Mr Deripaska would be a promise to give his Undertaking to the court and then to abide by it as given. The first part of that promise, if made, was performed – the Undertaking was given to the court in the agreed terms – and there is no complication here of possibly owing to the claimants and to the court obligations to do or refrain from doing something that might come to be interpreted in different ways although articulated in the same or similar language. If what Mr Deripaska was alleged to have done, or omitted to do, in the contempt charge, did not put him in breach of the Undertaking *vis-á-vis* the court, it did not put him in breach of contract if there was one.

106. Mr Deripaska's Undertaking obliged him (a) not to do or procure anything "*which has the effect of preventing, impeding or obstructing the fulfilment of*" the B-Finance Undertaking ("Undertaking A"), and (b) to take "*all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares owned by B-Finance in En+ Group Plc) remain available for direct enforcement*" ("Undertaking B"). I propose to consider them in that order; and one cannot sensibly consider Undertaking A without looking first at the B-Finance Undertaking and whether the Redomiciliation had the effect of "*preventing, impeding or obstructing the fulfilment of*" any promise to the court made there by B-Finance.

107. The terms of the B-Finance Undertaking are set out in paragraph 37 above. Taking each sub-paragraph in turn:

(i) Firstly, B-Finance undertook to arrange for original share certificates in respect of the Shares to be deposited with RPC. It did so. No question of breach arises.

(ii) Secondly, B-Finance undertook not to dispose of or otherwise deal with the Shares, pending the final determination of the Section 67 Proceedings (or further order or agreement between the parties in the meantime). I return to this below.

(iii) Thirdly, B-Finance undertook irrevocably to instruct RPC: (a) to hold those share certificates, and not to deal with or dispose of the Shares, pending the final determination of the Section 67 Proceedings (or further order or agreement between the parties in the meantime); and (b) to give the RPC Undertaking to the court. There is no suggestion that B-Finance did not do so; and the RPC Undertaking was duly provided. No question of breach arises.

(iv) Fourthly, B-Finance undertook to take all necessary steps to sell enough of the Shares that the proceeds, in respect of which it undertook that it would give irrevocable instructions such that they would be received by RPC and paid by RPC to the claimants or their order, would meet any balance more than 42 days overdue owed to them by Mr Deripaska following a final judgment (after any appeal) in the claimants' favour in the Section 67 Proceedings. That undertaking never fell to be performed, since Mr Deripaska discharged his obligations arising out of the award before his appeal to the Court of Appeal resulted in a relevant final judgment. So no question of breach by B-Finance arises, but this fourth undertaking is relevant to Mr Deripaska's position since his Undertaking related to a possible future call for B-Finance to fulfil this undertaking that still existed when, it is said, Mr Deripaska acted so as to be in breach.

(v) Fifthly, B-Finance undertook that it had not incurred and would not incur any liability that would have the effect of preventing, impeding or obstructing the fulfilment of its fourth undertaking. There was no suggestion of breach of that fifth undertaking.

108. Once it is appreciated, contrary to the stance initially adopted by the May 2019 Letter but from soon thereafter and still now common ground, that the Shares were not extinguished, rather they were continued from Jersey to the Russian SAR, it can be seen that there was no disposal of or dealing with the Shares by B-Finance in voting in favour of the Redomiciliation of En+. The only disposal or other dealing to which I have referred in setting out the facts was the transfer of title from B-Finance to the Viscount pursuant to the order of the Jersey court. The claimants could hardly complain of that in the circumstances even if their complaint was against B-Finance; there was and could be no suggestion that Mr Deripaska procured that 'dealing' with the Shares, if strictly that is what it was. To deal with the Shares required B-Finance to part with or create in another some ownership interest in them adverse to its own: see *The General Electric Co plc v The Plessey Co plc* (C/A, 22 March 1989) [1989] WL 1720499, at pages 9 to 12 of the Thomson Reuters print of the judgment. Voting in favour of the Redomiciliation did no such thing.

109. Any allegation of breach by Mr Deripaska of Undertaking A by reference to the second undertaking by B-Finance therefore fails *in limine*. Even if Mr Deripaska did something, having given Undertaking A, directly or indirectly to cause B-Finance to vote in favour of the Redomiciliation, he did not thereby take or procure the taking of any step that had the effect of preventing, impeding or obstructing the fulfilment by B-Finance of its undertaking not to dispose of or otherwise deal with the Shares pending the final resolution of the Section 67 Proceedings.

110. In any event, Mr Deripaska did not concede that he did anything to procure B-Finance's vote in favour of the Redomiciliation after having given Undertaking A. The unchallenged affidavit evidence of Mr Makarov, Ms Kaldina and Mr Valiev all support that case, and more specifically the proposition that Mr Deripaska was in favour of redomiciliation and had made that known before his Undertaking was given, but had no involvement in B-Finance's decision-making. The claimants had no contrary evidence, save to alight upon an ambiguous turn of phrase used by Mr McGregor in his witness statement for the hearing before Teare J on 3 July 2019; their allegation that Mr Deripaska must have taken some relevant step after his Undertaking had been lodged with the court was speculative, in my view.

111. That led Mr Mill QC to put the case instead on the basis that Mr Valiev, at the time General Counsel of En+, was acting as an authorised representative of Mr Deripaska when he confirmed to Mr Vishnevskiy in the run-up to the shareholder vote (including when they travelled to Paris together for the 20 December 2018 EGM) that he (Valiev) thought that B-Finance should vote in favour of the Redomiciliation. Mr Valiev did not consult Mr Deripaska about that, his evidence being that since Mr Deripaska had made clear back in April/May 2018 that he was in favour of the Barker Plan and a continuance of En+ to Russia, "*It did not cross my mind that Mr Deripaska might not have agreed*". In my judgment, this does not provide any basis for a conclusion that Mr Valiev was acting as an agent for Mr Deripaska, rather than or as well as being General Counsel of En+, in his conversations with Mr Vishnevskiy. The fact that he understood the wishes of the ultimate beneficial owner of the company and took that into account in seeing the Redomiciliation through is understandable and proper without implying any agency relationship. It is therefore unnecessary to consider two further complications, namely whether it would be sufficient, for Mr Deripaska to be held in breach for indirectly 'procuring' the vote, if he had given Mr Valiev an authority to represent him that would extend to such matters prior to giving the Undertaking and Mr Valiev under that authority said what he said to Mr Vishnevskiy six months or so later, and whether it was open to the claimants to put the allegation of breach on this Valiev agency basis when it is not mentioned in their Application Notice.

112. The absence of any basis for a finding against Mr Deripaska that after having given Undertaking A he himself did anything to procure that redomiciliation occurred is also a complete answer to any allegation of breach by Mr Deripaska of Undertaking A by reference to B-Finance's fourth undertaking. The allegation would arise if the Redomiciliation had the effect of preventing, obstructing or impeding B-Finance from fulfilling its undertaking to sell enough of the Shares to cover Mr Deripaska's default on monetary obligations, if there were a default following a final resolution of the Section 67 Proceedings in the claimants' favour. There is no foundation for a finding of breach of Undertaking A on that basis because the claimants have nothing beyond speculation that Mr Deripaska did anything at any material time to bring the Redomiciliation about.

113. The claimants would be wrong in any event in the necessary premise that the Redomiciliation had effect to prevent (etc) B-Finance from selling enough of the Shares to make good a relevant Deripaska default if there was one. That is because – and this will bring me to Undertaking B and the only argument of any possible substance – prior to the intervention of the Jersey court, B-Finance was as free to sell its shares after as before the Redomiciliation. What is more, in as much as the Redomiciliation was *de*

facto a necessary element of ensuring that En+ was de-listed as regards US sanctions, B-Finance was better placed to fulfil its undertaking to stand surety for Mr Deripaska, selling as many of the Shares as might be required to do so, following the Redomiciliation, than it was when its Undertaking was given to the court, and with them Undertaking A from Mr Deripaska.

114. The claimants' only concern of substance here has been not whether B-Finance was freely able to see them paid, thanks to the value realisable in its hands of the Shares it owned, if its fourth undertaking fell to be performed and B-Finance wanted to fulfil it, but how readily, if at all, the claimants might force the sale of the Shares, by court process if required, against B-Finance's wishes, if that fourth undertaking fell to be performed and B-Finance defaulted on it. The possible concern of substance could be that whereas an English court order directing B-Finance to sell some or all of the Shares might be expected to be readily enforceable in Jersey, not so in the Russian SAR if the claimants would need to go there to procure a court-directed sale. But none of B-Finance's undertakings said anything about that. In short, B-Finance did not promise the court, either in terms or by any of the language of any of the promises it did give the court, that En+ would remain a Jersey entity and not be continued to another host jurisdiction.

115. That does now bring me, as advertised, to Undertaking B. By that undertaking, in contrast to Undertaking A, Mr Deripaska did not promise anything referable to ensuring that B-Finance could or would fulfil its undertakings, but rather that the Shares would "*remain available for direct enforcement*", whatever that may mean. Furthermore, Mr Deripaska's promise was mandatory in form, so that it could be broken by a failure to take action that he was in a position to take and therefore the claimants' difficulty in showing that Mr Deripaska did anything of relevance after he had given his Undertaking may not be a difficulty, indeed it may be the very point, when it comes to Undertaking B.

116. Thus, Mr Deripaska promised by Undertaking B to "*take all steps as are necessary to ensure*" that the Shares remained "*available for direct enforcement*". I could not dismiss out of hand a suggestion that Mr Deripaska was in a position, directly or indirectly, to instruct Mr Vishnevskiy to vote B-Finance's shares against the Redomiciliation, stopping it in its tracks. Therefore, if the Redomiciliation had the effect that the Shares were no longer "*available for direct enforcement*", there would be a real issue to consider whether Mr Deripaska was in breach for failing to stop it. It would have been commercially reckless for Mr Deripaska to block the Redomiciliation, and not in the claimants' interests either; but if nonetheless the language of Undertaking B required Mr Deripaska to block it, then his proper course was to come back to court, on notice to the claimants, to explain the predicament and seek a solution, rather than break his promise because of a view he may have had that it was better for all concerned that he do so.

117. So the question of breach comes down to whether, given its terms, Undertaking B required Mr Deripaska to instruct Mr Vishnevskiy to use B-Finance's voting rights to block the Redomiciliation. That in turn depends on whether the Redomiciliation would have the effect, and so has had the effect in the event, of making the Shares no longer "*available for direct enforcement*". In my judgment, it did not. The insuperable difficulty for the claimants' case is that Undertaking B does not say that the Shares had to remain shares registered in Jersey. If that is what the claimants wanted Mr Deripaska

to promise before being willing to withdraw their application to continue the WFO, and since Robin Knowles J had indicated that he would accept undertakings concerning En+ shares *in lieu* of taking a decision whether to continue or discharge the WFO only if they were in terms agreed between the parties, the claimants should have made that clear. Undertaking B could readily have been in those terms, if proposed by the claimants and acceptable to Mr Deripaska. Far more likely, though, as it seems to me, those terms would not have been acceptable to Mr Deripaska, for good reason, and so would not have been agreed.

118. Furthermore, objectively, what mattered to the claimants, was:

(i) Having access to B-Finance, the relevant En+ shareholder. They had that because B-Finance had submitted to the jurisdiction and was providing its Undertaking. B-Finance was a BVI company. The claimants would rightly expect to have no difficulty over enforcement against B-Finance in the BVI of any Order of this court, for example (if it came to it) by having receivers appointed to ensure that the Shares were sold if required, or appointing an officer of the (BVI) court to complete a sale.

(ii) The Shares remaining in B-Finance's unencumbered ownership. That was addressed by the B-Finance Undertaking and Undertaking A. For better or worse, the claimants chose to be content with the strength of those undertakings as their 'security' as to the continuity of B-Finance's unencumbered ownership of the Shares.

(iii) The Shares being ultimately beneficially owned by Mr Deripaska, so that they could stand behind what mattered to the claimants, *viz.* payment obligations under or consequent upon the arbitration award they had won, if it survived the Section 67 Proceedings, as in the event it did. Objectively, that provides sufficient reason for Undertaking B to exist as an additional undertaking from Mr Deripaska. That is particularly so, though I do not think this necessary to the conclusion, if regard may be had to this element of the immediate context, namely that the claimants' initial resistance to the proposal that undertakings relating to the Shares would warrant the discharge of the WFO was founded precisely in the fact that they were not Mr Deripaska's shares but were owned by B-Finance and held, ultimately but indirectly, for Mr Deripaska's benefit.

119. It cannot be suggested that shares being "*available for direct enforcement*" is a term of art or a phrase with one clear and obvious meaning. The ambiguity is whether the "*enforcement*" in question is enforcement of Mr Deripaska's monetary obligations, should he default, or enforcement of the B-Finance Undertaking, should it default, and in substance the argument comes down to this: the claimants say it is the former and suggest that therefore "*available for direct enforcement*" means "*registered in Jersey*", or perhaps "*registered in a jurisdiction where English court judgments are enforceable*"; Mr Deripaska says the latter, so that the phrase means "*assets still owned and held in such a way that there can be direct enforcement of Mr Deripaska's obligations against the owner of the assets via the B-Finance Undertaking*". I do not say the claimants give the phrase a meaning its language cannot bear. But nor does Mr Deripaska. In the context in which Undertaking B was provided to the court, it is possible, I think, to envisage either meaning being understood to be intended by a reasonable observer, or (if this is anything different) by the court receiving Undertaking

B or by reasonable parties in the claimants' or Mr Deripaska's shoes in June 2018. If I had to make a choice of this kind, I would say Mr Deripaska's proposed meaning is the better reading. But given the approach to construction (paragraph 105(i) above), it is sufficient for him that his is not clearly the wrong reading.

120. In my judgment, on its terms construed strictly as they must be, Undertaking B did not require Mr Deripaska, assuming he was in a position to do so, to procure that B-Finance as shareholder in En+ block the Redomiciliation by voting it down.

121. I confess I am glad to have reached that conclusion, because I think Mr Pillow QC was right also that on the claimants' construction of Undertaking B, Mr Deripaska may have been put in an impossible situation. It is clear on the evidence, including in particular the unchallenged evidence of Mr Deripaska's witnesses, that without the Redomiciliation, since it had become essential to the de-listing of En+ by OFAC, the hugely valuable primary businesses owned through En+ faced ruin or nationalisation by the Russian State, or both. It would have been entirely understandable, to my mind, if Mr Deripaska had come to a view that he needed B-Finance to vote *for* the Redomiciliation so as to ensure the continued value and, it may be, effective availability of the Shares, for the purpose ultimately of seeing the claimants paid if required, i.e. if Mr Deripaska defaulted.

122. The conclusion of this part of my judgment, therefore, is that Mr Deripaska did not act, or fail to take steps required of him, in such a way as to be in breach of either Undertaking A or Undertaking B. The damages claim will be dismissed.

123. I have been able to find that there was no breach of the Undertaking without the need for a close dissection of the particulars of breach by which the claimants sought to charge Mr Deripaska with contempt, those being also of course their particulars for any allegation of breach of contract. For completeness, I should take those particulars now and show my conclusions in relation to them. They were set out in paragraph 22 of the Application Notice for the contempt application, which alleged that Mr Deripaska had breached his Undertaking and was in contempt of court, in that (with my findings added after each):

a. *At a meeting of En+ shareholders held on 20 December 2018 Mr Deripaska, being the ultimate beneficial owner of B-Finance, procured B-Finance to vote in favour of a special resolution to approve the Continuance.*
The claimants did not prove this allegation. In fact, there was no real evidence that could support a finding in their favour on it.

b. *Mr Deripaska procured B-Finance to vote in favour of the special resolution in circumstances where the affirmative vote of B-Finance was determinative of whether the Continuance would take place.*
Likewise, this was not proved, because the allegation that Mr Deripaska procured B-Finance to vote for the Redomiciliation was not proved. It is an overstatement of the position anyway. More accurately, I would say the Redomiciliation required shareholder approval by special majority that could not be achieved without B-Finance's vote in favour, but shareholder approval was far from determinative, given the number and nature of the remaining hurdles that had to be crossed. It is not necessary to lengthen this judgment further by considering whether B-Finance's vote should be regarded as one of

several effective causes of the Redomiciliation, or merely a 'but for' event without which it could not have taken place but which was not effectively causative; or whether I would have allowed the claimants to seek a judgment for damages now on the basis only of a finding of several effective causes, given that the damages claim was piggy-backed onto the contempt allegation and the contempt allegation was 'determinative'.

c. The effect of the Continuance was:

i. That the shares in En+ secured pursuant to the Undertakings (and defined therein as "the Shares"), would be "automatically cancelled" and all prior shareholders in En+ granted new shares (on a one-to-one basis) in a new Russian-domiciled company.

That is not correct, although it is true that the language of cancelling old shares and issuing new shares can conveniently, if loosely, be used in relation to the Redomiciliation and has been used in the case, not least by RPC in the May 2019 Letter. The part of this allegation that, if true, would or might have engaged questions of breach of the Undertakings is the claim that Russian-domiciled En+ is a new company. But it is not, it is the same legal person that existed when the Undertakings were given.

ii. That the share certificate in respect of the Shares … would be "automatically cancelled" to be replaced with shares in the new Russian-domiciled company to be in dematerialised form.

That is likewise not correct. Again, the basic error is that there was no "*new Russian-domiciled company*", there was a continued En+ (the same company), redomiciled in the Russian SAR. It is also nonsensical on its face to talk of a share certificate being replaced by shares. It is true that En+ shares after the Redomiciliation were kept in dematerialised form, but the Undertakings did not contain any promise that that would not occur.

d. By procuring the affirmative vote of B-Finance at the shareholders meeting on 20 December 2018, Mr Deripaska thus …:

The allegations that follow fail without more ado, since the claimants had no proof that Mr Deripaska procured B-Finance to vote, as it did on 20 December 2018, for the Redomiciliation.

i. Took a step which had the effect of "preventing, impeding or obstructing the fulfilment of" the undertaking given by B-Finance to "not dispose of the Shares or otherwise deal with them" … . The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) amounted to a dealing and/or disposal of the shares within the meaning of [that] prohibition.

Not so. The claimants did not have any proof that Mr Deripaska procured B-Finance's vote and the Redomiciliation did not cause B-Finance's shares in En+ to be cancelled. Again, I pass over without determining the question of causation, because it does not arise and because in any event there was no disposal or other dealing, there was only a movement of the Shares from Jersey to Russia.

ii. Took a step which had the effect of "preventing, impeding or obstructing the fulfilment of" the undertaking given by B-Finance [to sell some or all of the Shares in due course if required to cover a default by Mr Deripaska]. The

> *cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) meant that the Shares … would no longer be available for sale and/or would not be capable of realising any value capable of meeting the outstanding balance of any judgment sum.*
> Not so. There are all the same problems with the complex premise alleging that Mr Deripaska procured a vote that caused a cancellation of the Shares; and again, the conclusion was not made out in any event. The Shares remained available for sale and were at all times well capable of realising far more than Mr Deripaska might ever have been liable to pay as a result of the arbitration award and the Section 67 Proceedings. In that regard, the Redomiciliation, in as much as it was a key ingredient of securing the lifting of the US sanctions against En+, was part of a major preservation and enhancement of the value of the Shares, benefitting the claimants.
>
> *iii. Failed to "take all steps as are necessary to ensure that the underlying assets … remain available for direct enforcement" by failing to procure B-Finance to vote against the proposal to move the domicile of En+ to Russia at the shareholders meeting on 20 December 2018. The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) meant that the Shares … would no longer remain available for direct enforcement.*
>
> Again, there is the premise that the claimants did not establish. Again, there is an unsound conclusion in any event. After the Redomiciliation as before, the Shares were available to be treated as effectively assets of Mr Deripaska's, indirectly held via B-Finance. There would have been a breach associated with the Redomiciliation if, for example, the Shares had been amongst the shares given away by Mr Deripaska as part of reducing the extent of his effective (indirectly held) stake in En+, but nothing of that sort has ever been alleged.

124. For the reasons given in this section of my judgment, Mr Deripaska was never in breach of his Undertaking. Stepping back from the detail, and remembering that the allegation of breach was raised primarily in the context of a contempt application, I agree with a submission by Mr Pillow QC, that it was "*hardly contemptuous for Mr Deripaska to seek (or fail to prevent action) to <u>preserve</u> the value and even existence of the underlying assets in the face of an existential threat to the company [i.e. En+]*" (emphasis in the original).

Discussion – Contract?

125. In the circumstances, I shall take this relatively briefly. I shall refer throughout only to Mr Deripaska's Undertaking and consider whether there was a relevant contract between Mr Deripaska and the claimants. That may involve a generous assumption in favour of the claimants. Mr Deripaska's Undertaking was one of three that the litigating parties, i.e. the claimants and Mr Deripaska, agreed between them would be a mutually acceptable basis for the withdrawals by them of their respective applications to continue the WFO, or to discharge it or set it aside, and the dismissal of the claimants' application under s.70(7) of the 1996 Act. I do not regard it as arguable that B-Finance or RPC (or Fidelitas, in and about its letter of comfort covering the B-Finance Undertaking) were engaged in the making of promises to the claimants. It is not then the most obvious of analyses to say that Mr Deripaska, in and about the giving of his Undertaking to the court, was entering into a contract with the claimants, when those other parties were

not. But I discount that possible objection and take the claimants' case at its highest by focusing just on Mr Deripaska and his Undertaking.

126. I deal first with a defence *in limine* to the contract claim asserted by Mr Pillow QC. He submitted that as a matter of law, even if there had been a contract in the terms of the Undertaking, i.e. even if (other things being equal) Mr Deripaska made contractual promises to the claimants in the same terms as the promises made to the court by the Undertaking, "*that contract fell away on the Undertaking… being accepted by the Court when the … Order was sealed*". The contractual promises, if there were any, Mr Pillow QC argued, "*were replaced by the Undertaking… given to the Court*". He cited *Kensington Housing Trust v Oliver* (1998) 30 HLR 608, a housing possession case, *per* Thorpe LJ at 615:

> "*The legal effect of these two stages is clear enough. On August 30, the parties entered into a contract for the compromise of an outstanding application to the court. On the later date one of the parties presented the contractual compromise to the judge and called evidence to satisfy the judge that the requisite statutory provisions were sufficiently satisfied to enable the compromise to be made the subject of an order. Thereafter the rights of the parties cased to be in contract. The contract was subsumed into the more solemn bond of the order giving rise to all the court's powers of enforcement and all the court's sanctions for breach.*"

127. The view that any rights in contract were in that case terminated by the making of the court order was *obiter*. The point for decision was whether the fact that the undertaking in question was part of a consent order, in particular a consent order the court was asked to make pursuant to a contractual compromise, deprived the court of jurisdiction to release the applicant Housing Trust from its undertaking. The Court of Appeal held that it did not. Whether any relevant contractual promise to like effect survived the making of the court order or the later release of the Housing Trust from its undertaking, as given to the court, was not necessary to that conclusion. In any event, I do not understand Thorpe LJ's *dictum* to have been intended as a rule of law rather than an analysis of the position in the case then before the court. Nor does anything like it appear in the judgment of Butler-Sloss LJ, with which Thorpe LJ expressed entire agreement, saying that "*What I add relates to the particular facts of this case and explains my conviction that the conclusion reached [below, that the undertaking could not be released] was particularly inapt*".

128. Judge LJ (as he was then) agreed with the judgment of Butler-Sloss LJ, said nothing about Thorpe LJ's additional observations, and in his own additional observations appears to have taken the view, to the contrary, that any contractual effect may well have persisted beyond the drawing up and sealing of the consent order, saying at 617 that:

> "*To the extent that the undertaking in the present case might be regarded as having contractual effect (Purcell v. F C Trigell Limited [1971] Q.B. 358; Chanel Limited v. F W Woolworth & Co. [1981] 1 W.L.R. 485) in which each party offered promises to the court, such mutuality disappeared when the defendant, before seeking to be released from her undertaking, broke it. Thereafter she had in my judgment no sensible basis for insisting on the performance by the plaintiffs of their undertaking when she had ceased to regard her own promises as binding on her. It would be quite unjust for her to continue to enjoy the benefits of the undertaking*

> *given by the plaintiffs when she disregarded the corresponding (and not very onerous) burden involved in her own. There is no principle which requires this injustice to continue. The plaintiffs should be released from their undertaking.*"

129. In my judgment, there is no principle of law to dictate, for every case where an undertaking is given to the court following or pursuant to an agreement between the litigating parties, whether the party giving the undertaking has or has not made, or makes thereby, a promise to the other side enforceable as a contract, or whether, if it has or does, that promise continues to have effect as a contract after the undertaking has been given to the court and/or recorded on the face of an order (as typically it will have been, although as it happens not in this case). Any such question falls to be judged, objectively, upon the particular facts and circumstances of any given case, applying ordinary principles as to the formation and construction of binding contracts.

130. I would however add this. Context is always important when assessing whether a contract has been concluded and, if so, what are its terms. The disposal on terms proposed jointly by the parties of contested interlocutory applications, particularly where they have been argued or part-argued and the final disposal emerges out of that process, is a very particular context, quite far removed from ordinary commercial negotiations for or relating to business transactions. The proper conduct of litigation demands constructive co-operation between the litigating parties, and their legal representatives if they are represented, and that involves frequent calls for parties to seek to agree things within and for the purpose of the proceedings.

131. A prime example of that is a case like the present, where the outcome, or one or more possible outcomes, of a contested hearing has been identified by or with the court in argument, sometimes but not always accompanied by a short *ex tempore* ruling amounting to a decision or a decision in principle by the court, and the parties are invited to agree the terms for an order. The parties and their representatives when they negotiate and agree those terms, or agree some but not others and leave points of difference to be settled on the papers by the judge, would not generally be understood to be negotiating a contract with each other. Any such agreement on the terms to be proposed to the court is, generally, just that and no more, the joint creation of a draft Order the terms of which the parties are mutually content to propose to the court for approval. There may be agreement, but the parties generally do not intend thereby to create private contractual relations between them. The negotiation towards and achievement (if achieved) of a *consensus ad idem* as to terms is readily and naturally explicable without the need to imagine that the parties were making to each other promises intended to have contractual effect.

132. In the present case, Mr Mill QC emphasised particularly that Robin Knowles J indicated that he would not *qua* broker engage in a negotiation between the parties of detailed terms for undertakings relating to En+, and was only minded to consider the discharge of the WFO in return for such undertakings if their terms were agreed (see paragraph 47 above). In my judgment, that did not affect the nature of what the parties were doing or, therefore, the relevant gist of what their words and conduct in finalising agreed terms for the Undertaking reasonably conveyed. They were negotiating so as to agree, and to their credit did manage to agree, the terms by reference to which they were able then to go back to the court as they did, jointly to invite the court to make an order in the agreed terms.

133. Since there was agreement, it is easy to articulate what the parties were doing in the language of agreement, including the language of offer and acceptance. Thus, for example, Mr Deripaska was offering to give and procure the giving of undertakings; Mr Crow QC reported to the court that the claimants were "*minded to accept*" the arrangement proposed (paragraph 47 above). Mr Mill QC's argument emphasised that what happened, happened by agreement on the part of both sides, including as to the detailed terms, but in substance said no more than that.

134. What the process engaged in here conveyed, by its nature and given the terms of the draft Order put before Robin Knowles J for approval, was simply this, namely that in the light of the partial argument of the rival applications before the court, and the parties having had additional time to explore the detail, they were happy jointly to tell the court that:

(i) they were each content not to pursue their respective primary application (for the WFO to be continued, or for it to be discharged or set aside) if Mr Deripaska gave the court an undertaking in certain terms (*viz.* in the terms of the Undertaking);

(ii) counsel for Mr Deripaska would undertake that he (Mr Deripaska) would lodge such an undertaking with the court;

(iii) on the basis of that undertaking, and assuming the court was content with this disposal, the primary applications would be withdrawn and the court would be invited to dismiss the s.70(7) application; and

(iv) if the court was thus content, the joint proposal was that the Order be in the form agreed between counsel and provided to the court.

135. With respect to Mr Mill QC's contrary argument, that is simply not the stuff of contract. It is correct that the courts have long recognised the possibility that if an undertaking is given as part of or pursuant to a bargain struck between the parties to litigation, it is possible that the bargain is or involves a promise taking effect as a contract between the parties such that breach is capable of sounding in damages (which confirms that *Kensington Housing Trust v Oliver*, *supra*, is not authority for any general proposition to the contrary): see *Midland Marts Ltd v Hobday* [1989] 1WLR 1143 at 1143-1146, citing *inter alia In re Hudson* [1966] Ch 209 at 214-215; *Phonographic Performance Ltd v Reader* [2005] FSR 42 at [11]; *Independiente Ltd v Music Trading On-line (HK) Ltd* [2008] 1 WLR 608 at [37]; *JSC BTA v Ablyazov (No.14) (a.k.a. Khrapunov)* [2018] 2 WLR 1125 at [23]. But in my judgment, that is just not what was involved in this case. In particular, I agree with Mr Pillow QC that even if an undoubted contract including a promise to give an undertaking to the court might often be construed as extending to a contractual promise to abide by the undertaking once given or include an implied term to that effect (see the *Independiente* case), that does not mean that the process of agreeing wording for an Order that will be acceptable to both sides after a contested interlocutory hearing is by nature contractual so as to bring that question of construction or implication into play. It is a bootstraps argument to suggest otherwise, as the claimants here effectively did.

136. For that reason, the damages claim would have fallen to be dismissed even if, contrary to my conclusion, Mr Deripaska had acted or failed to act so as to be in breach of his Undertaking.

Discussion – Abuse?

137. The operative part of my *ex tempore* ruling at the start of the third day of the hearing was as follows (with paragraph numbers now added):

> 1. I am not persuaded that the contempt application infringes the principle in *Henderson v Henderson* by reference to the hearing before Teare J on 3 July 2019. In my view, on a fair reading of the materials for and transcript of that hearing , it was not the occasion for the pursuit of any contempt application or risk losing any right to bring one, or for any more explicit reservation of rights in that regard by the claimants.
>
> 2. However, the approach that the judge took means that significant care was required on the claimants' side if a later brought contempt application was to be fair to the defendant, especially so where the claimants left it until after any private interest they might have in the fulfilment of the defendant's undertaking and indeed their private interest in the enforcement of the underlying arbitration award had become spent, before they issued their application, so that it is only brought, or purportedly brought, in the public interest to mark and see punished, if appropriate, the historic alleged breach of the undertaking. It was neither necessary nor appropriate to launch a contempt application merely to raise the issue whether the undertaking had force as a contract so as to found a damages claim, so the damages claim does not provide any ongoing private interest in the claimants in the prosecution of a contempt charge, nor, to be fair on that specific point, is the contrary suggested by the claimants.
>
> 3. At all events in those particular circumstances of this case, I am persuaded that it was incumbent on the claimants to prosecute the contempt application dispassionately as guardians of the public interest.
>
> 4. I find that the claimants have not done so in respects that, in my view, render the process they have chosen to conduct unfair to the defendant. For that and other reasons, in my judgment the proper inference to draw is, and I find, that the contempt application was issued and has been pursued by the claimants out of and in pursuit of the second claimant's deep-rooted personal animosity towards the defendant.
>
> 5. Attractively and skilfully as the argument on the objective question whether the defendant acted in breach of his undertaking was being developed, as I can see from the claimants' skeleton argument, and will no doubt be presented orally by Mr Mill QC assuming the damages claim is pursued, so far as the contempt application is concerned in my judgment that argument has been and is being deployed by the claimants to vex and harass the defendant, not in order to draw serious misconduct to the attention of the court so as to allow the court to take its own view on what, if any, sanction it should attract in the public interest.
>
> 6. I conclude that this contempt application is an abuse of the court's process and it must be dismissed.

A Quasi-Prosecution

138. A contempt application may be struck out if brought for an improper purpose. Indeed, as it was put by Briggs J, as he was then, in *Sectorguard plc v Dienne plc* [2009] EWHC

2693 (Ch) at [53], contempt proceedings in relation to alleged breaches of an injunction or undertaking may be struck out as abusive if brought "*otherwise than for the legitimate motive of seeking enforcement [of the injunction or undertaking], or bringing to the court's attention a serious rather than purely technical contempt*". Thus, for example;

(i) "*The court should be astute to detect when contempt proceedings are not being pursued for legitimate aims*", *per* Hamblen J, as he was then, in *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2014] EWHC 4370 (Comm) at [22].

(ii) "*There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance, whether justified or not …*", *per* Moore-Bick LJ in *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406 at [17].

(iii) Most simply, "*an application must not be brought for an illegitimate purpose*", *per* Sir Michael Burton in *Super Max v Malhotra* [2019] EWHC 2711 (Comm) at [10].

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

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.

140. There is a question whether a finding of abuse by reference to motive or purpose requires an improper or illegitimate *predominant* motivation or whether it may be sufficient for there to be a "*real and substantial*" improper purpose: see *Integral Petroleum v Petrogat FZE* [2020] EWHC 558 (Comm), *per* Foxton J at [43]-[44]. Given my conclusions below, it is not necessary to determine that question on this occasion.

141. Contempt proceedings have a particular and distinctive character. They are civil proceedings but bear several important hallmarks of criminal proceedings. They have been described, I think aptly, as quasi-criminal in character: *Jelson Estates v Harvey* [1983] 1 WLR 1401 at 1408C-G; *Masri v Consolidated Contractors International Co Sal et al.* [2010] EWHC 2640 (Comm) at [22]. The hearing is not to be equated with a criminal trial and the process is not to be equated with a private prosecution (*Masri* at

[21]). But the quasi-criminal character of this particular species of civil litigation process has important consequences.

142. One consequence I have already identified, namely that the court recognises the particular capacity of contempt applications or the threat of contempt applications to be used vexatiously by litigants to further interests that it is not the function of the contempt jurisdiction to serve. That leads to the obvious materiality, at all events if there is some reason to question it on the facts of a given case, of the 'prosecutorial motive' of a claimant / applicant pursuing a contempt charge. It is troubling that in this case Ms Berard appears not to have understood that relevance, and that the claimants adopted their misguided stance that it was irrelevant in order to seek to justify being unforthcoming and evasive about the extent of Mr Chernukhin's knowledge of the Redomiciliation prior to the May 2019 Letter.

143. A further consequence is that the claimant / applicant pursues a contempt charge as much as quasi-prosecutor serving the public interest as it does as private litigant pursuing its own interests in the underlying dispute. The claimant / applicant needs to understand that; and if it is legally represented, as here, the legal representatives need to understand that their role as officers of the court is acutely pertinent, even if (to repeat) the process is not to be equated with a private prosecution in a criminal court. Thus, it appears to have struck Teare J as obvious in the long-running *Ablyazov* litigation that the quasi-prosecutorial role of the claimant / applicant in pursuing a contempt charge means its proper function is to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment: *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm) at [15].

144. I agree that should be the approach, at all events in a case like the present (which is all that matters for this judgment) where any private litigation interest the claimants may have had in the enforcement of Mr Deripaska's Undertaking was spent before they launched their contempt application in November 2019. Indeed, I infer from the chronology, reinforced by Mr Chernukhin's failure to give evidence to explain his thinking, that the claimants deliberately chose to wait until the Navio buyout had been completed and paid for by Mr Deripaska before launching the attempt to have him committed for contempt.

145. The only proper purpose that might be served by issuing and prosecuting the contempt application, in those circumstances, was so as to invite the court in the public interest to identify, pronounce and punish, if appropriate, an historic contempt. The contempt application ought to have been pursued dispassionately by the claimants as parties with no interest in the outcome. It was instead pursued in aggressive, partisan fashion, as if it were just the latest round in this long-running, 'no-holds barred', commercial litigation wrestling match. That was especially inappropriate where, without doubt, Mr Deripaska had been very much on the wrong end of the dispute to date, with adverse findings, including as to his honesty in certain respects in relation to the dispute and the proceedings arising out of it, both from the arbitrators and also in the Section 67 Proceedings. His was therefore a paradigm example of a case where an alleged contemnor needed the protection of a scrupulously careful and even-handed prosecution of the charge against him.

The 3 July Hearing

146. The rule in *Henderson v Henderson* (1843) 3 Hare 100 is a rule serving the important public interest "*that there should be finality in litigation and that a party should not be twice vexed in the same matter*", *per* Lord Bingham in the classic modern formulation of the rule in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 31A-D. It applies in respect of *inter partes* interlocutory proceedings and not only following final trials, although there has been some debate over whether it is to be applied as 'strictly' in the former context: *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485 at 492H, *Koza v Koza* [2020] EWHC 654 (Ch) at [66], *Woodhouse v Consignia plc* [2002] 1 WLR 2558 at [56].

147. For the purpose of the present case, as I expect will be true in most cases where the point arises, the recent statement of the principle by Popplewell J, as he was then, in *Orb arl v Ruhan* [2016] EWHC 850 (Comm) at [82], will suffice:

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

In particular, therefore, the court will be astute to strike down as an abuse an attempt to 'upgrade' interlocutory relief through successive applications based on materially the same facts and circumstances: see *Holyoake v Candy* [2016] EWHC 1718 (Ch) at [21]. That is not to say that an applicant may not without abuse return to court for additional relief arising out of earlier relief; for example, supplementary orders the better to render effective interlocutory relief previously granted are a staple feature of litigation, particularly in relation to freezing orders or other interlocutory injunctions. But the essential message is clear: why this particular order, why now, and why not when the applicant came before, should always be closely considered; and good answers are needed if the successive applicant is not to be at risk of a finding that the process is being abused by the successive application.

148. Having said that Popplewell J's formulation of the rule will often be sufficient, I should add that the principle is not confined to cases of a successive action or application seeking the same or similar relief, as mentioned in that formulation since that was the position in *Orb v Ruhan*. The foundation for the possibility of abuse at least to be considered is simply that the claimant or applicant was or should have been in a position, acting reasonably, to bring within an earlier claim or application the claim or application in fact brought separately and later. That is because "*a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. ... putting his cards on the table does not mean simply warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to*

be fair to both sides", *per* Sedley LJ in *Stuart v Goldberg Linde (a firm) et al.* [2008] 1 WLR 823 at [77]. Of course, in the interlocutory context particularly, the less similar the relief sought or the less there is other overlap between earlier and later applications, it may be the less risk that the court will find the later one to be abusive; and often the later application will be seeking the exercise of a discretion and it may be academic to debate whether the failure to bring the application at the earlier stage renders it abusive or simply a powerful factor against exercising the discretion in question in favour of the applicant.

149. Thus, it was not without more an answer to the complaint in the present case that the contempt application brought in November 2019 was an abuse, given the proceedings before Teare J on 3 July 2019, that it is different in kind to the applications being made by the claimants on that occasion. But at the same time, that difference in kind calls for particular caution to be exercised before any leap is made from a degree of overlap between the two, or between matters put forward in both, to a finding that the contempt application should have been brought, or threatened and an intention to bring it later stated and explained, before Teare J made the order he did at that hearing for payment into court.

150. The claimants, through Ms Berard's evidence and Mr McGrath QC's skeleton argument, made clear for and at the hearing before Teare J that their position was that Mr Deripaska had (must have) acted so as to be in breach of his Undertaking. However, on a fair reading of the materials for and transcript of that hearing, in my judgment Mr Millett QC for Mr Deripaska was right to say to Teare J, as in effect he did, that whether there was any breach of the Undertaking was a matter for another day and another application, if brought, and had not really been relied on as affecting the outcome on that day.

151. I accept, therefore, a submission by Mr Mill QC that forming, expressing and relying on a provisional view, having heard no argument on it, that Mr Deripaska appeared to be in breach of his Undertaking, was something introduced by Teare J of his own motion that was not necessary to the decision made on the matters before the court on 3 July 2019. With the benefit of the hindsight that I have, in particular having seen how this strand of the abuse of process argument came to be put by Mr Pillow QC, it respectfully seems to me that it would have been better for Teare J not to have said anything on the point. The fact that, after proper argument, the conclusion has been that there was no breach perhaps illustrates the point; but the point arises because the possibility of that conclusion existed, not because it has in fact been reached in the event.

152. Speaking again with the benefit of hindsight, I would say also that it may have been better if Mr Millett QC had been more direct and explicit than "*My Lord, I am not going to get into that*" in a submission that it was not the proper occasion to be debating any question of breach of the Undertaking, and if the claimants had discouraged the judge. The latter all the more so given that the claimants seized upon Teare J's comments by striking up the theme of possible contempt, in correspondence, from immediately after the hearing. The judge could, and in my view with hindsight should, have been invited when perfecting and approving a transcript of his judgment to reconsider the appropriateness of expressing any view on whether Mr Deripaska was in breach of his Undertaking.

153. To be completely clear, I do not mean by that to criticise the claimants for, as I just put it, seizing upon Teare J's comments after the hearing. But there was a real risk of unfairness if they did so and did not treat Teare J's remarks as merely historic, a trigger to them perhaps to consider a contempt application but in substance unguarded remarks, made without argument on a point that did not arise, that would be irrelevant at a subsequent contempt hearing. Teare J having expressed the views he did, it would not have appeared right for any contempt application to be listed before him. In my respectful judgment, his views were better not referred to at all, and certainly should not have been relied on as important or persuasive, in the contempt application.

The Abuse

154. Adopting the approach, then, that this contempt application ought to have been prosecuted dispassionately and even-handedly as an application brought solely in the public interest and not to serve any partisan agenda of the claimants', and that particular care was called for not to allow an appearance of unfairness to be created because of what was said in court on 3 July 2019, I can now set out the features that I concluded had come together to render the application an abuse of the process of the court.

155. Firstly, the claimants refused to be open with Mr Deripaska or with the court as to the extent of their awareness of the Redomiciliation from time to time, and as a result failed to explain to the court why they were content with the Undertakings although Mr Chernukhin knew the Redomiciliation was in prospect, as I find he did, before they were lodged with the court and the WFO was discharged. Allied to that, there was no dispassionate, self-critical appraisal of the possibility of pursuing Mr Deripaska alleging contempt once the errant notion initially promulgated by RPC that the Undertakings would need to be discarded following the Redomiciliation had been put to bed. Mr Deripaska was deprived thereby of a real prospect that a fair decision might have been taken not to pursue committal proceedings.

156. Secondly, the claimants' evidence in support of the contempt charge was in material respects misleading or not the whole truth, or both of those together. For example:

(i) There was no mention of the involvement of Quinn Emanuel, although their involvement was plainly relevant (even if the claimants were not waiving any legal advice or litigation privilege), or Mishcon de Reya.

(ii) It failed to mention Ms Berard's own personal knowledge of the (proposed) Redomiciliation prior to the May 2019 Letter. Further, it gave the very clear impression that neither Mr Chernukhin nor any of his advisers knew anything about it prior to that letter. That was seriously misleading. Ms Berard in cross-examination refused to accept as much and I am not prepared to say she was not being honest in her answers. I note that the same wrong impression, that the claimants knew nothing of the Redomiciliation prior to the May 2019 Letter, had been given to the Jersey court and to Teare J in June/July 2019 via Ms Berard's fourth affidavit. I do not find it possible to see how she failed to see that what she was saying was misleading, unless it be because she saw her and her affidavit's function, as I regret to say in my judgment she did, as being to advance as forcefully as possible the best case she could argue for her client why Mr Deripaska should be found to have been in contempt.

(iii) Even on Ms Berard's explanation of that last matter, namely that she had not meant to convey a lack of prior knowledge of or understanding about the Redomiciliation, only a failure to appreciate that it might be said to impact on the Undertakings, (a) her affidavit was thus not the whole truth she should have given to the court, and (b) the lack of candour was significant, since her explanation was substantially exculpatory for Mr Deripaska. That would have been so in any event, but especially in circumstances where the case to be presented to the court was to include claims that Mr Deripaska's breach was obvious, flagrant, egregious, and compounded by his failure to admit his supposedly self-evident guilt.

(iv) The Further Information provided under Part 18, as RPC sought to probe on behalf of Mr Deripaska this question of what the claimants or their advisers knew, when, about the Redomiciliation, was variously incomplete, incorrect, misleading, or lacking a sufficient foundation for the statement of truth Ms Berard signed under it. As a result, a ninth affidavit of Ms Berard came to be sworn that claimed, inaccurately, that there were no undisclosed known adverse documents (other than three documents exhibited). This was all in a context where, as cross-examination revealed, there had been no disclosure effort by Clifford Chance beyond trusting Mr Chernukhin's instructions, though he had at least some history in the litigation of being untrustworthy in relation to disclosure. As Mr Pillow QC submitted, I could not be confident that the claimants had provided a full or truthful account about Mr Chernukhin's knowledge, understanding and (it would appear) lack of concern about the Redomiciliation prior to the May 2019 Letter. I could not say that Mr Deripaska was being given a fair or sufficient opportunity to test that important aspect of the case.

(v) The case for Mr Deripaska being in contempt naturally led the claimants to say, as Ms Berard felt able to say in a seventh affidavit in August 2019 in support of an application, in effect, to interrogate Mr Boswall for the purpose of what became the contempt application, that "*It was extremely important to the applicants that the shares, which were the subject of the undertakings, were physically held in RPC's offices and related to a Jersey company*". Yet the claimants' position in June 2018 had been, and Ms Berard's third affidavit had then said in terms, that it did not matter where the share certificates were.

(vi) In that same seventh affidavit (and again in her tenth affidavit), Ms Berard gave the court the impression that the Shares had been tradeable on the London Stock Exchange when En+ was domiciled in Jersey, but no longer after the Redomiciliation. The truth, however, as Ms Berard knew, was that (a) the Shares had never been tradeable, because they were not part of the GDR programme and (b) the GDR programme had been unaffected by the Redomiciliation (the shares that were tradeable through that programme on the London and Moscow Stock Exchanges remained so after En+ became Russian-domiciled), and indeed the lifting of the US sanctions, in which the Redomiciliation played an important role, triggered a substantial bounce-back in the GDR price and therefore, indirectly, in the value of the Shares. I do not find that Ms Berard intended to mislead the court. It may be, as she suggested, this was "*sloppy drafting*" but, as Mr Pillow QC rightly, with respect, put to her in response, it was sloppy

drafting in sworn evidence intended to put a man's liberty at risk, and had the capacity to mislead the court. My conclusion in sub-paragraph (ii) above applies also here.

(vii) Ms Berard was driven in cross-examination to accept, rightly, that knowing of the (proposed) Redomiciliation did not make it obvious that the Undertakings would be affected. Yet her sworn evidence for the hearing before Teare J on 3 July 2019 was that it *was* obvious, indeed so obvious it was difficult to see how the Undertakings were not infringed, and that incorrect assessment of the position, it is clear from the transcript of that hearing, influenced Teare J towards the observations he made to similar effect.

157. Thirdly, there is real reason to suppose that Mr Chernukhin instructed Clifford Chance to issue and pursue the contempt charge as an act of revenge for Mr Deripaska's twin moves in May 2019, i.e. the May 2019 Letter with its seeming attempt, short-lived in the event, to get rid of the Undertakings, and the private prosecution. More particularly in relation to the latter, there is real reason to think that Mr Chernukhin was further incensed by RPC's refusal to treat it as a matter to be bargained over as part of the resolution of the underlying business dispute, but waited until after the Navio buyout had been completed before then attacking. Mr Chernukhin having refused to offer for himself any explanation for the contempt application, let alone be willing to be tested on it where there was a substantial basis for cross-examination, in my judgment it is right to draw against him the adverse inference that revenge and personal animosity towards Mr Deripaska was the real reason for the contempt application, not any public-minded desire to bring matters to the court's attention for it to consider the issue of breach and, if relevant, sanction. In my judgment, Ms Berard was honest in her belief that that was not the motivation, but I am not content to treat her assessment of the situation as objective or reliable.

158. Fourthly, the contempt application was presented to the court in a heavy-handed, aggressively partisan fashion, that was inappropriate, vexatious and unfair to Mr Deripaska.

159. Ms Berard's eighth affidavit, sworn and served as the claimants' only evidence in support of the contempt application, was replete with tendentious comment, argument, and irrelevant but prejudicial material, including multiple references to and quotations from findings of dishonesty made against Mr Deripaska by the arbitrators and in the Section 67 Proceedings that had no place in this contempt trial on the charges relating to Mr Deripaska's Undertaking. Having presided over her cross-examination, I regret to say I formed the clear view that Ms Berard had come to argue the case for Mr Deripaska to be found guilty of contempt and had a poor, or at any rate variable, grasp of the difference between evidence she could give, evidence she could not fairly give but Mr Chernukhin might have given if it were to be evidence at all, but had chosen not to give, and advocacy.

160. The claimants' skeleton argument presented the case to the court as one in which there was "*no conceivable defence to the core allegation that Mr Deripaska breached the terms of undertakings given by him and others to the Court*" on the supposed basis that the Redomiciliation involved a vote by the shareholders "*to export the value of EN+ to an entirely new corporate vehicle situated in a special administrative zone set up within Russia and thus effectively beyond the reach of the English High Court*". But that was

not the effect of the Redomiciliation, and when explored it was not even the claimants' case as to its effect. Further, there was barely a word of how the Redomiciliation had been an instrumental element of a plan that saved En+ from ruin to the very significant benefit of the claimants, though I infer that was appreciated at all events by Mr Chernukhin and explains his lack of concern about the Redomiciliation in prospect until RPC erroneously suggested it would damage the Undertakings. Further examples of the claimants' clumsy, unfairly partisan, approach include:

(i) It was said to be "*now common ground*" that Mr Deripaska procured the passing of the shareholder resolution in December 2018, when it was not. That comment relied upon the ambiguous turn of phrase by Mr McGregor to which I referred in paragraph 110 above. Even if the claimants had in mind to argue that it was unambiguous, that paragraph was not in the evidence served in the committal proceedings; and it had been extracted from Mr McGregor with no warning that what he said then might be treated as an admission by his client on a quasi-criminal charge, i.e. without any heed to Mr Deripaska's rights as putative defendant in committal proceedings. I do not suggest this was some deliberate tactic by the claimants to extract evidence unfairly and then use it against Mr Deripaska, but I do say it was unfair to try to use this evidence as support for a contempt charge. All the more so where the claimants knew from the evidence that *was* later served in the contempt application that Mr McGregor (had we got to him) would have explained what he had intended to convey by the earlier comment. It may be the claimants had in mind to challenge that explanation, but it was therefore evidently <u>not</u> common ground that Mr Deripaska procured the B-Finance shares to be voted in favour of the Redomiciliation.

(ii) Similarly, it was said to be common ground, when plainly it was not, that the Undertakings were rendered valueless by the Redomiciliation, indeed (again), upon analysis, that was not even the claimants' case.

(iii) It was trumpeted that neither Mr Deripaska nor RPC gave notice to the claimants of the Redomiciliation until the May 2019 Letter, without acknowledging that there was nothing in that Letter that came as news or was of concern for the claimants except for the errant suggestion, long historic before the contempt application, that the Redomiciliation fatally undermined the Undertakings.

(iv) Wholly inappropriately,

  (a) the US Treasury's allegations of serious criminal behaviour by Mr Deripaska, as recorded in a press release it issued when OFAC imposed sanctions on him in April 2018, were quoted as if relevant to the question of contempt now before the court,

  (b) particular adverse conclusions about Mr Deripaska personally within the findings of the arbitrators and of Teare J in the Section 67 Proceedings were replayed, as they had been by Ms Berard in her affidavit, although on the contempt charge they were but inadmissible bad character opinions, and

  (c) Teare J's unguarded observations were paraded as if they were some *prima facie* proof of contempt, with Mr Millett QC's signal to the judge

> that it was not the occasion to consider questions of breach of the Undertaking characterised as Mr Deripaska being "*apparently unable and/or unwilling to dispute*" Teare J's "*clear view as to [his] conduct*".

I am not conscious of having been influenced by this, indeed I have now concluded that there was no breach of undertaking by Mr Deripaska, having had the benefit of a proper argument about that for which the 3 July 2019 hearing was not the occasion. That does not render the approach other than oppressive.

(v) Mr Deripaska was castigated for consistently refusing to accept in the face of Teare J's observations that his conduct involved breach of his Undertaking. This means the claimants invited the court to say that Mr Deripaska was *prima facie* convicted of contempt by those unguarded remarks on a matter not argued, and that his contempt was then confirmed and aggravated by his failure to plead guilty.

(vi) The obviously serious possibility on the evidence that Mr Chernukhin was aware of enough to raise an alarm, had the Redomiciliation really been a problem, yet sat by and did nothing, and that the court might find that relevant, was dismissed out of hand as Mr Deripaska "*concocting an elaborate conspiracy theory*".

(vii) As to sanction, the skeleton opened with a submission that if there were a finding of contempt the court should deal with sanction at a separate hearing on a later date. That would have been my approach, had it arisen, and I would have made that clear in advance if asked. Despite that, and without making any enquiry whether sanction should be addressed in the skeleton (the answer would have been no), detailed submissions were outlined about sentence, with a partisan passion that is inappropriate in that context, extending to what were in effect anticipatory reply submissions, where there would be no right of reply, on matters of mitigation likely to be advanced on Mr Deripaska's behalf. This was epitomised by a submission that if Mr Deripaska prayed in aid the Redomiciliation's role in freeing En+ from the US sanctions, "*any pressure arising from sanctions … was the result of his own status as an international pariah*", one of a number of individual submissions that in my judgment should never have been advanced.

161. In the working generation of 30 years or so during which I have been engaged in commercial dispute resolution in this jurisdiction, principally in this court and in London arbitrations, there has been a significant general increase in hostility and aggressiveness in the conduct of disputes. The taking of any and every point, good or bad, and other failures to display proper independence from the litigating client, is treated too often as if it were a normal or appropriate adjunct of well funded, hard fought, business disputes, particularly if there are issues of dishonesty involved. Where ultimately the court is asked only to decide the outcome of the business dispute, usually to be expressed in terms of a party or parties being told to pay money to another party or other parties, there may be nothing too unfair about that modern style, regrettable though I regard it nonetheless. But when the court is being asked by a private litigant to consider a charge of contempt of court against the other side, especially against an individual whose liberty the applicant therefore seeks to put at risk, a better standard of conduct is not merely desirable, it is essential to the fairness and the appearance of

fairness of the process. Though I do not suppose that this is how the claimants' legal team saw what they were doing, the appearance in this case was of claimants not seeking to put Mr Deripaska fairly on trial for contempt, but of claimants seeking to load the dice against him.

162. Although Ms Berard would not accept this when Mr Pillow QC put it squarely to her, and I am willing to accept from her that she indeed did not see it this way, in my judgment she had lost, or never had, that degree of objectivity and detachment from her client that a fair prosecution of this contempt application, with its quasi-criminal character, required. That lack of objectivity infected also the presentation of the case to the court through the skeleton argument. It was also confirmed by what cross-examination demonstrated to be a willingness on Ms Berard's part to allege dishonesty against Mr Deripaska in a new claim that has been issued by the claimants, under s.68 of the 1996 Act, seeking to reopen the arbitrators' finding as to the price that should be paid for the Navio buyout, on the basis of a document obtained by Clifford Chance in circumstances she had not investigated properly and in respect of which she could not say she had evidence for its authenticity. (I do not mean by that to indicate any view at all whether in that s.68 claim, if pursued, the claimants may ultimately be able to establish the authenticity of the document in question. The point for now is only that the launching of the s.68 claim, when examined, illustrates a lack of detached scrutiny in respect of allegations that Mr Chernukhin wishes to make.)

163. It would have been better, in my judgment, if the contempt application had not been handled by the same Clifford Chance team that had had conduct of the arbitration, the Section 67 Proceedings and the WFO application (and its various follow-on hearings). Irrespective of any view that might be formed as to the bringing of the private prosecution against Mr Chernukhin, the appropriateness of which would not have been a matter for this court, I commend RPC for setting up separate representation for it. It would have been better if Clifford Chance had done the same for the contempt application, assuming the claimants did not want to use a different firm with no prior involvement. I do not say that is a legal or procedural requirement, but that course having not been taken it was hugely important that judgments to be made on how to prosecute the contempt charge not be clouded by the prior conduct of the dispute, the huge animosity between the lay clients, and the claimants' prior successes in securing damning findings about Mr Deripaska. With regret, but with the full argument I had the benefit of hearing and in the light of Ms Berard's cross-examination, it was and is my clear view that quasi-prosecutorial judgment here was clouded in just that way, leading to a process that was, and might reasonably be thought by an impartial observer to be, unfair to Mr Deripaska.

Conclusions

164. For the reasons given briefly at the hearing (paragraph 137 above) and now set out in fuller detail in the final section of this judgment, I dismissed the claimants' contempt application as an abuse of the process of the court. Thus Mr Deripaska's cross-application to strike out the contempt application was successful, as recorded by the Order dated 10 June 2020 that was drawn up prior to the argument of the damages claim on the final day of the hearing.

165. For the reasons given in paragraphs 104 to 136 above, I have now concluded and find that Mr Deripaska neither entered into, nor if he did acted or failed to act so as to breach,

any relevant contract with the claimants. Their damages claim fails and falls to be dismissed.