Neutral Citation Number: [2020] EWHC 558 (Comm)

Case No: CL-2019-000023

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

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

Date: 12 March 2020

Before :

MR JUSTICE FOXTON

- -

Between :

INTEGRAL PETROLEUM SA

Claimant

- and –

(1) PETROGAT FZE
(2) SAN TRADE GMBH

Defendants

- and –

(1) MR KLAUS SONNENBERG
(2) MS MAHDIEH SANCHOULI
(3) MR HOSSEINALI SANCHOULI
(4) MR KANYBEK BEISENOV

Third Parties

- -
- -

Guy Blackwood QC (instructed by **Vitaliy Kozachenko**) for **the Claimants**
Chris Smith QC (instructed by **Stephenson Harwood ME LLP**) for **the Third Parties**
Hearing dates: 10, 11 and 12 February 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.

Mr Justice Foxton:

1. This is the hearing of the Claimant's ("Integral's") application to commit the Second Third Party, and the Third Third Party, to prison for contempt of court.

2. Integral was represented before me by Mr Blackwood QC and the Third Parties by Mr Smith QC. I am very grateful to them for their submissions, in a hearing which I suspect involved significant logistical challenges for both of them.

3. At the start of the hearing, applications for committal were also pursued against the First and Fourth Third Parties. However, after the evidence had been completed, Mr Blackwood QC for Integral confirmed that the application would not be pursued against those parties.

A The background

A1 The parties

4. Integral, the First Defendant ("Petrogat") and the Second Defendant ("San Trade") are oil trading companies based in Geneva, the UAE and Germany respectively.

5. The Second Third Party ("Ms Sanchouli") is an Iranian national. It is her evidence that she oversaw the day-to-day business of both Defendants, together with her father ("Mr Sanchouli") who is the Third Third Party.

6. The First Third Party ("Mr Sonnenberg") was at all relevant times the sole director of San Trade. The Fourth Third Party ("Mr Beisenov") was the sole director and owner of Petrogat.

A2 The underlying commercial transaction

7. The committal application arises out of a contract for the sale of oil concluded between Integral as buyer and Petrogat as seller on 16 September 2017 ("the Contract"). The Contract was for the purchase of 20,000 MT (+/- 10%) of Medium Sulphur Fuel Oil ("MSFO"), and 40,000 mt (+/- 10%) of Low Sulphur Fuel Oil ("LSFO"). The MSFO and LSFO were to be sourced from the Seyedi Refinery in Eastern Turkmenistan ("the Refinery").

8. San Trade guaranteed Petrogat's obligations under the Contract by a guarantee letter dated 30 September 2017, a guarantee agreement dated 8 November 2017 and a guarantee agreement dated 22 December 2017 (collectively "the Guarantees").

9. The Contract provided for delivery FOB Turkmenbashi Ferry (Western Turkmenistan). Integral was to make partial pre-payments of US$1.5m for the MSFO and $3m for the LSFO, and title was to pass as the product passed the permanent flange at the railway tank car ("RTC") loading place.

10. Difficulties arose in relation to loading the LSFO cargo, for reasons which it is not necessary to determine. The parties agreed in the course of a series of telephone conversations between 1 and 3 November 2017 that $1m would be paid by Integral to the Refinery for MSFO, until deliveries of MSFO to that value had been made by the

Refinery to Integral, at which point another $1m would be paid for MSFO, with this process continuing until the full 18,000 mt of MSFO had been delivered.

11. There was a dispute between the parties as to whether, in assessing what amount of the prepayment had been utilised, regard was to be had to the price under Petrogat's contract with the Refinery (as Integral contended) or the price under the Contract (as the Defendants contended). That dispute was ultimately determined in Integral's favour by the award of an LCIA arbitration tribunal ("the LCIA Award").

12. The first payment of $1m was made to the Refinery on 14 November 2017, and the second $1m on 27 December 2017. By 31 December 2017, some 8,999 mt of MSFO had been loaded (approximately half of the quantity of MSFO provided for in the Contract). Railway bills of lading were issued for the loaded cargo by the Railways Ministry of Turkmenistan ("the Railways Ministry"). These stated that the cargo had been consigned to Integral and they identified the place of delivery as Georgia, which was Integral's nominated destination.

13. By 31 December 2017, the parties were in dispute as to whether the pre-payments were sufficient to cover all of the 138 RTCs which had been loaded by that point. It is the Defendants' case that, against this background, they decided to hold back some of the 138 RTCs to cover the amounts for which Integral had yet to make payment. It was Integral's case, on which it ultimately prevailed in the LCIA Award, that it had acquired title to the MSFO in all the RTCs.

14. It is common ground that the Defendants gave the Railways Ministry instructions to amend the bills of lading for 72 RTCs, to provide for the delivery of those RTCs to San Trade and to change the destination of the cargo from Georgia to Bandar Abbas, Iran. It was Integral's case that this change was effected by San Trade providing a forged letter to the Railways Authority which purported to record Integral's consent to the amendments, when in fact Integral had approved no such letter and had not consented to the changes. The Defendants say that no such forged letter was produced, and that San Trade made it clear that it was requesting the change because it was in dispute with Integral.

15. Integral says it learned through its representatives in Turkmenistan that a substantial part of its cargo was being diverted to Iran. It wrote to San Trade and Petrogat urging them to confirm that the cargo would be shipped to Integral and would in no circumstances be shipped to Iran. There was no response to this correspondence and no such confirmation was given.

16. Accordingly, Integral applied ex parte on notice for injunctive relief (serving the papers on Petrogat and San Trade over the weekend). Following a hearing on the evening of Saturday 13 January 2018, Morgan J granted an injunction which was sealed the following day, and which provided as follows:

> "(1) The First and Second Defendants shall take no steps whatsoever to direct delivery of the cargo to Iran or elsewhere and shall take no steps whatever in relation to the Cargo save for those identified in paragraph (2).
>
> (2) Both of the Defendants shall by 12.00 hours local time in Turkmenistan on Sunday 14 January 2018 sign by a duly authorised representative a letter in the

> form of the draft attached hereto as Schedule C and provide such signed letters to the Claimant's solicitors as soon as signed".

I will refer to this order as "the Morgan Injunction".

17. The letter in question required San Trade and Petrogat to state that:

> "It has come to our knowledge that someone purporting to be a representative of San Trade GmbH wrote to Turkmen Railways on or before 12 January 2018 seeking to give instructions on behalf of Integral Petroleum SA to the effect that the cargo be sent to Iran.
>
> The cargo must not be sent to Iran in any circumstances and must either be delivered to Parto Tskali / Khobi Kulveli via Azerbaijan in accordance with the terms of the unamended bills of lading or alternatively should be preserved pending a further order from Integral Petroleum SA or an order of the Court or Arbitration Tribunal in the competent jurisdiction (England and Wales)".

18. The Morgan Injunction, which contained the appropriate form of penal notice, was served on Petrogat, San Trade, Ms and Mr Sanchouli and Mr Sonnenberg, together with accompanying correspondence informing them of what they needed to do to comply with its terms. However, it is common ground that no letter in the required form was signed within the deadline imposed by Morgan J or at any time prior to 29 January 2018. On 18 January 2018, in the absence of compliance, Integral served a copy of the injunction on two further individuals, Ms Lobis and Mr Beisenov, who were asked to sign the Schedule C letter. There was still no response.

19. On 24 January 2016, two days before the return date, Stephenson Harwood Middle East LLP came on the record for both Defendants and served evidence in support of an application to discharge the injunction on various grounds. Integral served reply evidence on the day of the hearing. When the matter came on before His Honour Judge Waksman QC, he adjourned the hearing in view of the late flurry of evidence. At the hearing, Mr Stephen Cogley QC, counsel for the Defendants, informed the Court that the cargo was "almost certainly going to Iran in any event …. over the weekend" and that "the [Schedule C letter] would not make any difference".

20. His Honour Judge Waksman QC continued the injunction pending the adjourned return date, but paragraph (2) was varied as follows:

> "Both of the Defendants shall forthwith sign by a duly authorised representative a letter in the form of the draft attached hereto as Schedule C (as amended by the order of His Honour Judge Waksman QC dated 26 January 2018) and provide such signed letters to the Claimant's solicitors as soon as signed".

The terms of the draft letter in Schedule C were also amended to provide:

> "The cargo must not be sent to Iran in any circumstances and should be preserved in its present location pending a further order from the Court or Arbitral Tribunal in the competent jurisdiction (England and Wales)".

I will refer to the order as varied by His Honour Judge Waksman QC as "the Waksman Injunction".

21. The Defendants did not provide a letter in the revised form of Schedule C until 29 January 2018, when they provided a copy (but not the original) signed by Ms Sanchouli under cover of a letter from Stephenson Harwood ME LLP. That covering letter stated that:

> "during the course of the morning of Saturday 27 January 2018, the 37 rail cars went over the border to Iran and are now being transported by the Iranian railway authorities to Bander Abas. We are instructed that this was through no fault of our clients following the Order of HHJ Waksman QC and that the Turkmen railway authorities took this decision alone".

Integral does not accept that explanation.

22. The Defendants served a substantial volume of further evidence for the resumed return date. At that hearing, Popplewell J found that there was a good arguable case that the Defendants were in breach of the injunction in multiple respects, but that it made no sense to continue the injunction in circumstances in which all or most of the cargo was now in Iran.

B The procedural history of the contempt application

23. The application notice to commit the Third Parties for contempt was issued on 30 April 2018. On 1 May 2018, Popplewell J gave the Claimants permission to serve that application by alternative means. He also dispensed with the requirement for personal service under CPR 81.10(5).

24. That order required the Defendants and the Respondents to file evidence in answer to the application notice within 22 days of service. Notwithstanding that provision, no evidence was filed until 3 February 2020. The explanation offered for that late service was that Integral, the Defendants and the Third Parties were in negotiations to settle the underlying commercial dispute, as a result of which it was anticipated that the committal proceedings might be disposed of or adjourned. That is obviously not a satisfactory explanation. For so long as the committal proceedings remained live and they wished to serve witness evidence, the Third Parties were required to serve that witness evidence in accordance with the Court's direction, or seek an extension of time for doing so.

25. Integral served reply evidence during the afternoon of the last working day before the hearing, together with a further skeleton argument addressing the Third Parties' case which had been set out for the first time in their evidence. The late service of evidence significantly impeded the orderly preparation for the hearing. In addition, it has led to a number of issues emerging at a late stage in the case, and not receiving the focus they would have received if the evidence had been served in good time for the hearing. However, in view of the serious allegations which the Third Parties face, I have allowed that evidence to be placed before the Court in the usual way.

C The relevant legal principles

26. Applications for committal for contempt of court have become an increasingly common feature of High Court litigation, particularly in the Business and Property Courts. One of the few beneficial consequences of that otherwise unfortunate trend is that there are a number of authorities setting out the applicable legal principles.

27. In JSC Mezhdunarodniy Promyshelnniy Bank v Pugachev [2016] EWHC 192 (Ch) at [41], Mrs Justice Rose summarised the applicable principles as follows:

    i) The burden of proving the contempt that it alleges lies on the Applicant. Insofar as the Respondent raises a positive defence, he carries an evidential burden which he must discharge before the burden is returned to the Applicant.

    ii) The criminal standard of proof applies, so that the Applicant's case must be proved beyond reasonable doubt – or so that the court is sure. A reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another.

    iii) The court needs to exercise care when it is asked to draw inferences in order to prove contempt. Circumstantial evidence can be relied on to establish guilt. It is however important to examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Applicant's case. If, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the claimants fail.

    iv) Where a contempt application is brought on the basis of almost entirely secondary evidence, the court should be particularly careful to ensure that any conclusion that a respondent is guilty is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn.

28. In this judgment, where I make findings of fact or state that I have concluded that an allegation has been proved, I make such findings and arrive at such conclusions on the basis of the criminal standard of proof.

29. While it is necessary for me to be satisfied to the criminal standard that a particular ground of contempt has been made out, it is not necessary for the court to be satisfied to that standard in respect of its conclusion on each disputed piece of evidence before it can be taken into account: see JSC BTA Bank v Ablyazov (No 8) [2018] 1WLR 1331, where Rix LJ cited with approval the following passage in the judgment of Dawson J in Shepherd v The Queen (1990) 170 CLR 573 , 579-580:

> "the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having

> regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

30. The mental element of the criminal offence of contempt of court is that set out by Briggs J in Sectorguard Plc v Dienne Plc [2009] EWHC 2693 (Ch) at [32]-[33]:

> "The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see Adam Phones v Goldschmidt [1999] 4 All ER 486 at 492j to 494j".

31. Where the contempt alleged is the breach of a court order, the principles summarised by Marcus Smith J in Absolute Living Developments Ltd v DS7 Limited [2018] EWHC 1717 (Ch) at [30] are also relevant:

    i) The order must bear a penal notice and (subject to dispensation) have been personally served on the respondent.

    ii) The order must be capable of being complied with (in the sense that the time for compliance is in the future), and it must be clear and unambiguous.

    iii) The breach of the order must have been deliberate, which includes acting in a manner calculated to frustrate the purpose of the order. It is not necessary, however, that the respondent intended to breach the order in the sense that he or she knew the terms of the order and knew that his or her relevant conduct was in breach of the order. It is sufficient that the respondent knew of the order and that his or her conduct was intentional as opposed to inadvertent.

    iv) The standard of proof in relation to each allegation that an order has been breached is the criminal standard. The burden of proof is on the applicant to establish an allegation of breach to the criminal standard.

32. It is clear in this context that the terms of the order should be clear and unequivocal and should be strictly construed. This was emphasised by Lord Clarke in the Supreme Court in JSC BTA Bank v Ablyazov (No 10) [2015] UKSC 64 at [10].

33. There is one further issue of law which merits consideration. The directors or officers of a company can be committed for the breach of a court order made against that company. As to the principles applicable here:

    i) To establish contempt on the part of a director or officer, "it is necessary to show that he/she knew of and was responsible for the company's breach of the court order, undertaking to the court, or other contempt": Dar Al Arkan Real Estate Development Company v Al Refai [2015] 1 WLR 135, [33] (Beatson LJ).

ii) A director's knowledge of the order places him/her under a duty to take reasonable steps to comply. A wilful failure to procure those steps or aiding or abetting a breach is punishable as contempt, even if the individual would not otherwise be liable under the ordinary law of contempt: Westminster City Council v Adbins Ltd [2013] JPL 654, [50]-[51] and *Arlidge, Eady and Smith on Contempt* (5th) para. 12-127.

iii) The requirement for wilfulness excludes only those situations where a director can reasonably believe some other director or officer is taking those steps: Tuvalu v Philatelic Distribution Corp Ltd [1990] 1 WLR 926, 936.

D The Third Parties' application to strike out the committal application

34. The Third Parties have contended before me that the committal application should be struck out on two grounds:

i) First, because it is an abuse of process, because the threat of committal is being used by Integral improperly as a lever to obtain a more favourable settlement agreement.

ii) Second, because Integral has failed to specify the "full grounds" on which the application is made in breach of CPR 81.10(3)(a).

35. Argument on these applications took up the greater part of the first day of the hearing.

E The application to strike out the committal proceedings as an abuse of process

E1 The legal principles

36. Steven Gee QC in *Commercial Injunctions* (6th) at [20-024] states that:

> "The threat of contempt proceedings or of continuing contempt proceedings should not be made for any purpose other than securing compliance with the relevant order of the court. To use such a threat to secure a settlement is a gross abuse of process of the court and itself constitutes a contempt of court".

37. The authority cited for this proposition is Knox v D'Arcy Ltd Court of Appeal Transcript No. 1759 of 1995 (19 December 1995). In that case, a motion to commit was issued on the basis that the plaintiffs had deliberately concealed evidence when obtaining freezing order relief from the court. Millett LJ found on the facts as alleged that "by no conceivable process of reasoning could the respondents' failure to measure up to the high standards required of them be described as a contempt of court". However, he went on to refer to the fact that, on the day before the motion was due to be heard, the applicant's solicitors had written to the senior partner of the respondent's solicitors stating:

> "I enclose a copy of a Without Prejudice letter which had been sent to your firm today. I hope that in all these circumstances there will be a positive response. I make this point particularly as I do not believe that in all the circumstances that by leaving himself in a position where such allegations have to be made, Mr Campion has best served the interests of the good name of Eversheds.

> ….
>
> It is my hope that as a result of this letter that appropriate resolution can be achieved between your firm and your clients and our clients".

38. The accompanying letter contained an offer to settle the entire litigation, stating:

> "In the light of the documents served last Friday [viz the contempt application], we believe that your clients, and in particular Mr Steel [will] wish to reconsider their position. We believe that the same will apply to Mr Campion in view of the serious situation in which he now finds himself. In the circumstances our Clients are prepared to consider to enter a compromise which will have the effect of terminating all the proceedings".

39. Against the background of both letters read together, Millett LJ concluded:

> "It is obvious to me that the threat of committal proceedings against Mr Steel and Mr Campion was being used as a lever in order to obtain a favourable settlement of the litigation. That, to my mind, is a gross abuse of the process of the court. Indeed, I observe that in 1903, in R v Newton 67 JP 453, the obtaining of money in consideration of an agreement to discontinue contempt proceedings was held itself to be a contempt. What was attempted in the present case was not far short of that. It was a plain attempt to obtain a favourable settlement of litigation by threats to bring committal proceedings against the guiding mind behind the plaintiff and their English solicitor".

40. In Ferster v Ferster [2016] EWCA Civ 77, the Court of Appeal upheld the decision of Rose J ([2015] EWHC 3895 (Ch)) that a communication made in the context of a mediation which contains a threat of committal fell within the "unambiguous impropriety" exception to "without prejudice" privilege. The communication in question, sent via the mediator to the respondent ("Jonathan"), involved the withdrawal of an existing offer to settle the dispute, and the making of a less favourable offer, on the basis that the applicant "had become aware of further wrongdoing by Jonathan ... which will also have very serious implications for Jonathan's partner". The wrongdoing in question was said to be the swearing of false evidence as a result of which "Jonathan will face charges of perjury, perverting the course of justice and contempt of court and is likely to be imprisoned". Rose J held that "this was an attempt at blackmail". She stated at [17]:

> "The impropriety consists, in my judgment, in threatening to pursue contempt proceedings, including a committal to prison, unless Jonathan pays his brothers a much higher price for the two thirds share, an extra 25%.... It is quite clear that the increase in price is nothing to do with any increase in the value of the shares or of the company's business, but rather is the price being exacted for the brokers … not causing the company to take action to deal with the supposed wrongdoing they claim to have uncovered".

41. In rejecting the appeal against Rose J's judgment Floyd LJ at [20] agreed that there was a distinction between an offer "which unambiguously exceeds the claim, and one which merely makes an upward adjustment within that value", noting that "in the former case one might infer more readily that improper factors are being deployed".

There were various reasons why, on the facts of that particular case, the Court concluded that the threat made was unambiguously improper which Floyd LJ summarised at [23]: the threats went beyond what was "reasonable in pursuit of civil proceedings", by making the threat of criminal action (not limited to civil contempt proceedings); the threats to Jonathan's family; the threats of immediate publicity; and the fact that the threats sought to procure an advantage for the applicants personally which benefit, if the basis of the threats was correct, ought to have inured to the company in which they and the respondent were shareholders.

42. In the course of his judgment, Floyd LJ referred to the judgment of Flaux J in Boreh v Republic of Djibouti [2015] EWHC 769 (Comm) at [132], in which he held that certain communications in that case fell within the "unambiguous impropriety" exception because they went beyond "the permissible in settlement of hard fought commercial litigation". Flaux J's reference to what was permissible "in settlement of hard fought commercial litigation" is apposite. There is no doubt that committal proceedings are a far more frequent feature of commercial litigation now than previously, and than they were at the time that Knox was decided. Once a committal application has been issued, any settlement of the overall commercial dispute is necessarily going to have to address the position of the committal application, with most respondents being understandably concerned to ensure that the settlement ties up all matters including the contempt, and most claimants themselves wanting to draw a line under the litigation in terms of further costs and management time (in circumstances in which the continuation of the committal application will inevitably involve the claimants in the further expenditure of both). It can never be proper to seek to use a committal application as a lever to bully a respondent into a settlement. However, the practical consideration that resolving an outstanding committal application will in most cases be necessary to achieve a settlement of the commercial dispute means that the court should not jump too readily to the conclusion that references in the settlement communications to the disposal of the committal proceedings or the timing of the committal proceedings evidence an improper purpose on the claimant's part, or involve the use of the committal proceedings as some form of improper threat.

43. Finally, in considering the Third Parties' submission that the committal proceedings were an abuse of process because they were commenced for an improper purpose, I note that the Privy Council in Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17 held that the tort of abuse of civil process would only be established if the proceedings were conducted for a predominant purpose other than those for which they were designed, so as to obtain a benefit other than that for which they were designed. While it is arguable whether the same mental element should be required to strike out civil process as that required to render the civil process an actionable wrong, an enhanced mental element is generally required to make ostensibly lawful steps unlawful because of the purpose for which they are taken. This explains the requirement for a predominant purpose to injure in lawful means conspiracy (Kuwait Oil Tanker v Al-Bader [2000] 2 All ER (Comm 271, [108]) and the requirement that the statutory purpose under s.423 of the Insolvency Act 1986 be "a real and substantial purpose" (Inland Revenue Cmrs v Hashmi [2002] BCLC 489, [25])).

44. In determining whether the committal was commenced or pursued for the improper purpose of forcing a settlement, I will proceed on the basis that the pursuit of an application to commit will not be such an abuse unless the applicant had as a "real and substantial purpose" the use of the threat of committal to force the respondents to settle the claim. While I can see a strong argument in favour of the view that before striking out such an application on the basis that it is abuse of process, it should be necessary to establish a predominant purpose of the Crawford kind, it is not necessary for me to resolve that issue on this application.

E2 The reference to "without prejudice" materials

45. In order to make his abuse of process argument good, Mr Smith QC referred me to some of the "without prejudice" communications between the parties, arguing that the "without prejudice" principle is not engaged by the purpose for which the Third Parties seek to rely on the communications, or that one of the exceptions to this head of privilege (that of unambiguous impropriety) applies. Mr Blackwood QC has not sought to debate the admissibility of that material, but very fairly makes the point that if reference is to be made to it, the Court needs to view it in context.

E3 The chronology

46. In this section, I set out the relevant chronology as it emerges in incontrovertible form from the documents.

47. Integral notified the Defendants and the Third Parties of their intention to seek committal as early as 27 January 2018, in letters from Mr Kozachenko to Mr Sonnenberg, Mr Beisenov, Ms Lobis and Mr and Ms Sanchouli. Those letters provided:

> "I hereby put you on notice that should the relevant cargo be shipped to Iran – as Mr Cogley says it will – or should San Trade fail to remedy its contempt and/or continue to be in breach of injunction, my client will seek your committal to prison for contempt of Court for a term of up to 2 years".

48. The reference to committal proceedings in this letter was clearly intended to incentivise the Defendants to comply with the Waksman Injunction, and as such, was entirely legitimate.

49. On 2 February 2018 Popplewell J discharged the injunction but held that there was a good arguable case that the Morgan and Waksman Injunctions had been breached. He stated:

> "I am also satisfied that there is a good arguable case that there have been breaches of the orders; first, in relation to not providing the letter in the form of letter C as required by Mr Justice Morgan; secondly, in relation to what Mr Lakin describes as having happened in paras 6, 4 and 8 of his second witness statement in relation to cooperating with the Turkmen Authorities to enable the cargo to go to Iran; and thirdly, in failing forthwith to sign the letter C in its revised form as ordered by His Honour Judge Waksman".

50. The application for committal was issued on 30 April 2018. At the hearing before me, it became apparent that Mr Smith QC was seeking to take the point that the committal application had not only been used for an improper purpose, but had been issued for an improper purpose as well. This ground of challenge was not sufficiently taken (or, as Mr Smith QC fairly accepted, "clearly articulate[d]") in his skeleton argument, nor had it been flagged in any other way in advance of the hearing on 10 February 2020. As a result, the point was not specifically addressed in the eleventh affidavit of Mr Kozachenko, itself sworn under very heavy pressure of time on 5 February 2020.

51. Given the prior history of the litigation - the fact that the issue of contempt had been raised by Integral initially for the purpose of procuring compliance with the Waksman Injunction, and given Popplewell J's findings at the return date - I reject any suggestion that it is to be inferred that Integral had as a real and substantial purpose in commencing and conducting the committal application pressurising the respondents to settle (and certainly no predominant purpose of this kind). Against the background of the events which had led Popplewell J to conclude that there was a good arguable case of breach, Integral's decision to commence the contempt proceedings against the Defendants and the Third Parties represented an understandable attempt to follow-through on Integral's earlier statements as to what the consequences of non-compliance would be, and to ensure that there was some sanction for those apparent breaches. The facts of this case are very different to those in Knox, where the attempt to pursue a complaint of non-disclosure in a without notice freezing application through the committal process was a highly unusual course. For these reasons, I have concluded that it would not be appropriate to draw the inference that the contempt application was issued or pursued other than for a proper motive.

52. On 1 May 2018, Integral served its claim in the LCIA Arbitration which it had commenced against the Defendants on 13 January 2018. The amounts claimed included £135,351.20 for costs, another $439,000 for damages for non-delivery, and a further $164,000 for breach of the warranty of quality in respect of delivered cargo (a total of $603,000).

53. On 2 May 2018, Integral's solicitors made a "without prejudice save as to costs" ("WPSATC") offer, proposing:

> "an amicable settlement of all disputes between the parties, including the Claimants' application to commit Mr Sonnenberg, Ms Sanchouli, Mr Sanchouli, Mr Beisenov and Ms Lobis to prison and the LCIA Arbitration".

The settlement proposal sought payment of the full costs of the injunction proceedings (£135,551,20) together with a further £300,000 in return for the settlement of all disputes (both the LCIA Arbitration and the contempt application). The offer was made on the basis that both Defendants and the Third Parties (then including Ms Lobis, against whom the order for service of the committal application was subsequently set aside) would be jointly liable for the payment.

54. Paragraph 3 stated:

> "We would respectfully submit that this is a very reasonable settlement for all parties. The Claimant proposes a discount of at least US$195,000 compared to its

> claims in the arbitration. Petrogat's and San Trade's claims in the arbitration are virtually certain to fail. Petrogat's and San Trade's legal fees to run the arbitration until the end are likely to exceed the proposed settlement sum. The most reasonable solution is therefore to settle the matter and do so as soon as possible, before any arrest warrants are issued and further legal costs are incurred".

Paragraph 4 stated:

> "This offer is open until 11 May 2018".

55. This email provides the high point of Mr Smith QC's submission that Integral maintained and/or used the committal application for the purposes of impermissibly leveraging a settlement, in gross abuse of process. Mr Smith QC asked for this issue to be decided on the documents alone in advance of the evidence (and it was therefore decided without the benefit of oral evidence from Integral as to what its purposes were).

56. First, Mr Smith QC relied on the timing of the letter, which came five days after the witness statement in support of the committal application had been served, and two days after Popplewell J had given permission for the committal application to be served. However, it also came the day after Integral had served its claims submissions in the LCIA Arbitration. In short, it came at a point when various steps had recently been taken to initiate courses of conduct which would involve all parties in substantial further expenditure as they progressed. In these circumstances, the obvious inference to draw from the timing of the letter (and the inference which I do draw) is that it was motived by a desire to settle the parties' entire commercial dispute at a stage when the various strands of litigation were sufficiently identified, but before the further significant costs which those steps would inevitably entail had been incurred. The short deadline for acceptance of the offer – until 11 May 2018 – before any responsive evidence on the committal application was due, and long before the committal application would be heard, supports that view. I note that the first settlement offer made by the Defendants and Third Parties of 7 May 2018, seeking a payment of $1,750,000 "in full an[d] final settlement of all disputes between the parties", was similarly reflective of a desire to wrap up all disputes in a single settlement at that early stage.

57. Second, Mr Smith QC relies upon the fact that the offer was made on the basis that the Third Parties would be jointly and severally liable for the settlement sum. Mr Smith QC submitted that as the Third Parties could have no liability to Integral, the request that they have joint and several liability could only be interpreted as the price of foregoing the committal application.

58. I do not accept this conclusion.

    i) The amount sought was substantially less than the amount claimed in the LCIA Arbitration. In these circumstances, as an opening (if somewhat optimistic) shot in negotiations, it was legitimate for Integral to seek some form of additional commitments to pay the settlement sum as a quid pro quo for its reduced amount. The case is very far removed from that considered in Ferster v Ferster in which the threat of committal and other criminal proceedings was used as a basis for revoking a previous offer and replacing it

with an offer which was much less advantageous from the recipient's perspective.

ii) It cannot be said that there was no possibility of the Third Parties having any direct liability to Integral. One of the benefits for all concerned of resolving matters at this early stage is that it avoided the risk (which Mr Smith QC accepted existed) of a s.51 costs order against some or all of the Third Parties in respect of the costs of the injunction application. Further, in circumstances in which it was Integral's case (upheld in the LCIA Award) that it was the owner of the oil delivered to Iran in apparent contravention of the Morgan and Waksman Injunctions, there was an obvious possibility of those involved in the diversion of the cargo being said to have some liability in conversion or for unlawful means conspiracy (cf JSC BTA Bank v Khrapunov [2018] UKSC 19).

iii) There was potential benefit for the Third Parties in avoiding additional costs in the LCIA Arbitration (to which the letter made express reference), or in subsequent claims brought to enforce any award obtained in the LCIA Arbitration premised on some or all of the Third Parties having diverted funds from the Defendants. In his eleventh affidavit, Mr Kozachenko specifically referred to Integral "running the risk that the Third Parties would dissipate the Defendants' assets and cause the Defendant shell companies to disappear without paying the amounts due from them". Mr Smith QC invited me, in effect, to reject this evidence of Mr Kozachenko (an English solicitor) as untruthful. However, I see no basis for rejecting the evidence of a solicitor on oath that Integral held this (perfectly understandable) concern.

iv) Mr Smith QC made the fair point that there is no evidence of direct claims against the Third Parties being in contemplation on 2 May 2018, and further suggested that there could be no prospect of such claims against Ms Lobis, the operations manager. However, to my mind that involves too granular an analysis of the position when the 2 May 2018 letter was sent. The final resolution of a commercial dispute which, if it continued, might readily develop in ways which could involve the Third Parties entirely independently of the committal application, coupled with the significant reduction of the amount claimed, provided ample justification for an offer at that stage on a basis which would involve joint and several liability on the part of the Third Parties. In circumstances in which Integral had obtained permission to serve the application against all five Third Parties on the basis that they were the defendants' "owners, principals and/or directors", it was understandable at this early stage that no distinction was drawn between the position of different Third Parties. Finally, the request that all the Third Parties agree to joint and several liability was not maintained by Integral after that opening shot, and indeed the issue of settlement was only returned to by Integral at the suggestion of the presiding arbitrator in the LCIA Arbitration over a year later, and then not in terms which involved any request that the Third Parties assume liability for paying the settlement sum.

59. Finally, Mr Smith QC pointed to the reference to "before any arrest warrants are issued" in the third paragraph of the letter. I am unhappy about this language, which was unwise. However, viewed in the overall context of the communication, it does not

lead me to the conclusion either that the committal was being pursued for the improper purpose of leveraging a settlement, or that the threat of committal was being improperly deployed in that paragraph. The overall thrust of the paragraph, which was otherwise expressed in notably temperate language, was that the settlement would save everyone a great deal of legal costs. The reference to arrest warrants was specifically made in the context of timing, was made at a point in time when any prospect of committal would have been many months away, and when all of the Third Parties were outside the jurisdiction in any event. This was far removed from the threats of immediate action and publicity which were found in Ferster. It would be to put too much weight on a single ill-judged phrase in the letter for me to draw the conclusions which Mr Smith QC invites me to draw from it.

60. The second communication which Mr Smith QC relied upon in support of the abuse of process argument was sent on 31 December 2019, some 20 months after the first communication. The lengthy period between the two mails itself weighs very heavily against Mr Smith QC's submission that I should conclude that Integral brought and maintained the committal application for the purpose of improperly pressurising the Defendants and the Third Parties to settle the claim. However, before turning to the terms of the email, it is necessary to provide a little context for it:

i) On 4 April 2019, Ms Helen Davies QC, the presiding arbitrator in the LCIA Arbitration, sent the parties a communication stating:

> "As we approach the hearing, and bearing in mind the further costs and time that will be incurred as a result, the Tribunal feels it ought to raise the question with the parties whether they have respectively given consideration to the possibility of resolving or narrowing the issues between them by means of a mediation or direct settlement negotiations".

ii) The following day, Mr Kozachenko for Integral sent a WPSATC letter offering to settle the arbitration for £100,000 and $200,000. There was no mention of the Third Parties assuming liability nor of the committal application. In response, Stephenson Harwood ME LLP sent their own WPSATC letter seeking $1.1m and $650,000 costs to settle "all disputes between the parties".

iii) On 7 November 2019, Stephenson Harwood ME LLP sent another WPSATC letter. By this time, the Tribunal had awarded USD 459,680.37 and CHF 860,000 plus costs to Integral. The letter confirmed that the Defendants would not pay the sum but would defend the committal proceedings (asserting "they have little concern regarding the result of those proceedings as they have no need to visit England & Wales"). They made an offer to pay $225,000 to "avoid any further spend on the committal proceedings and in order to settle any and all disputes between the parties". It was, therefore, the Defendants' and Third Parties' solicitors, who specifically raised the issue of the committal proceedings as a term of their own settlement offer. That offer was withdrawn on 19 December 2019.

iv) It is clear that meetings between the respective principals took place in December 2019, in which there was discussion, and quite possibly an agreement in principle, of some form of earn-out mechanism by which the

amounts due to Integral would be recouped by profits from future joint business the Defendants would put its way.

v) On 31 December 2019, Mr Kozachenko informed Stephenson Harwood ME LLP that "in view of the potential settlement, we do not believe that it is appropriate, at this stage, to spend further resources on hearings and/or applications" and set out proposals as to how Integral intended to deal with the third party debt order and receivership order.

vi) In response, Stephenson Harwood ME LLP replied:

> "We would agree with your position that it makes little sense to spend time and money preparing for hearings where a settlement might be achieved. As you are no doubt aware, we are also currently preparing for the committal hearing. Please let us know your client's proposals in this regard in the context of the settlement negotiations".

It was Stephenson Harwood ME LLP, therefore, who specifically asked Integral to address the committal hearing in the context of the ongoing settlement proposals.

61. The second email on which Mr Smith QC's abuse of process submission depended was sent in direct response to that request from Stephenson Harwood ME LLP. It provided:

> "In relation to the committal hearing our proposal is this. Our clients have discussed that Mr Sanchouli would procure for them certain transactions as a result of which they will make extra profit and will off-set the losses suffered as a result of your clients' actions and the arbitration. The first such transaction, according to Mr Sanchouli, is to take place shortly. If there is such a transaction, and at least part of our client's losses are covered in January, our clients will be prepared to adjourn the committal hearings as to allow Mr Sanchouli to arrange further such transactions so that our clients' entire loss may be off-set. Once our clients' entire loss is covered, our clients will be prepared to discontinue the committal proceedings".

62. I see no basis for the suggestion that in proposing the adjournment of the committal application until there had been at least part performance of the settlement, Integral or its solicitor were doing anything improper. It was Stephenson Harwood ME LLP who had specifically said that the settlement should address the contempt application and who had asked Integral to explain their proposal in this regard. In circumstances in which the financial terms of the proposal had been agreed in principle in advance of the exchanges, there was nothing objectionable in Integral seeking some demonstration of the Defendants' and Third Parties' seriousness before acting on the Defendants' and Third Parties' request to discontinue the committal proceedings as one of the settlement terms.

63. Finally, I should note that the parties came very close to resolving the entirety of their dispute on the basis outlined in Integral's 31 December 2019 email, without any suggestion from Stephenson Harwood ME LLP that the proposal Mr Kozachenko had put forward was professionally improper or involved an abuse of the Court's process

(something I would have expected an experienced commercial solicitor to raise had it been a genuine concern). Further, on 8 January 2020, Stephenson Harwood ME LLP effectively told Integral that it would suffer an adverse financial consequence from pursuing the committal, namely:

> "If no settlement is reached they will deal with that hearing in February, but it will only result in the cash offer we are making now being withdrawn as our clients will be required to spend roughly the commensurate amount of money on those proceedings".

64. Mr Smith QC, rightly, did not suggest that this involved the offer by his clients of a financial inducement to abandon the committal application or a threat of an adverse financial consequence if they were pursued. The communication reflected the fact that the committal application was an element of the parties' overall dispute, and that any settlement discussion and settlement strategy had to address it. This is what the solicitors for both parties did.

65. In the event, after Stephenson Harwood ME LLP had signed a copy of the consent order which would have adjourned this hearing to allow settlement discussions to continue, the Defendants and Third Parties changed their minds, it would appear largely as a result of alighting on the Knox argument now advanced before me. On 27 January 2020, Stephenson Harwood ME LLP wrote to Integral stating:

> "As we have made repeatedly clear, it is not acceptable for your clients to hold the committal proceedings over our clients' heads in order to force them to reach a settlement. It is a significant abuse of process and our clients find it unfair and unacceptable to meet under those conditions".

66. However, for the reasons I have set out above, the suggestions that Integral was holding the committal proceedings over the Defendants' and Third Parties' heads and had engaged in "a significant abuse of process" are without merit. Mr Kozachenko's conduct did not go beyond that which was permissible in attempting to settle hard-fought commercial litigation. Accordingly, as I informed the parties shortly after the conclusion of the argument, Mr Smith QC's application to strike out the committal application as an abuse of process failed.

F The application to strike out the committal application on the basis that it does not sufficiently particularise the alleged acts of contempt

67. Mr Smith QC's second threshold objection concerned the particularisation of the acts or omissions said to constitute contempt. I gave a summary of my reasons for refusing that application before the evidence began. For the convenience of the parties, I set them out again here.

68. The objections arose at a late stage, being taken in evidence served by the Third Parties on 3 and 4 February 2020 for a three-day hearing beginning on 10 February 2020.

69. The basis of the objection was CPR 81.10(3). This provides:

> "The applicant must:

(a) Set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and

(b) be supported by one or more affidavits containing all the evidence relied upon".

F1 The applicable legal principles

70. Mr Smith QC referred me to a number of authorities emphasising the importance of the requirement that the allegations of contempt be properly particularised in the application notice. These included:

i) Chiltern District Council v Keane [1985] 1 WLR 619, 622 in which Sir John Donaldson MR noted that the notice of motion in that case had specified the grounds of the application in the most general terms. He further stated that the application notice must set out exactly what it is that the person alleged to be in contempt was said to have done or omitted to do which constituted contempt. The Court continued by pointing out that where an injunction permitted of only one type of breach, it might be enough to specify the failure to comply, but that where the order was not in such a simple form, more was required.

ii) The decision of Blair J in Masri v Consolidated Contractors [2010] EWHC 2458 (Comm). Blair J quoted from Nicholls LJ's judgment in Harmsworth v Harmsworth [1987] 1 WLR 1667 (CA) at 1693, stating that it was not sufficient for the application to refer to a wholly separate document for particulars, but that particulars could be "attached to the notice so as to form part of the notice rather than being set out in the body of the document". At [29] of his judgment, Blair J observed that the requirement properly to set out the acts or omissions said to constitute contempt was far from a mere formal requirement, and that the Court should not hesitate to strike out a committal application that did not comply with that requirement.

F2 The terms of the application notice in this case

71. In this case, the application notice provides:

> "The Defendants have breached the injunction of Mr Justice Morgan dated 14 January 2018 and the order of His Honour Judge Waksman QC extending and modifying the injunction dated 26 January 2018. The Third Parties, as the Defendants' owners and/or principals and/or directors caused and/or enabled and/or permitted the Defendants to breach the orders as set out in the attached affidavit".

72. The application referred to an attached draft order. I have concluded that the attached draft order falls on the right side of the line identified by Nicholls LJ in Harmsworth as a document to which regard can properly be had when determining if the allegations of contempt have been properly particularised, although I accept that best practice involves the matters said to place the respondent in contempt appearing in the application notice itself.

73. The draft order:

    i) sets out the terms of the two orders.

    ii) stated that the contempt consisted in "failing to comply with the aforementioned paragraphs of the orders by … (i) causing and/or enabling and/or permitting the cargo to be shipped to Iran; and (ii) failing to provide the Schedule C letter by 12.00 Turkmenistan time on 14 January 2018 (as required by the 14 January 2018 order) and/or forthwith after the 26 January 2018 order".

74. I will address the failure to provide the letter first. In my view this is directly analogous to the example given by Sir John Donaldson MR in Chiltern District Council of an order requiring something to be done by a particular time on a particular day, of which Sir John observed "it would be sufficient to say that he had failed to comply with that order, because it only permits of one breach".

75. However, the same is not true of the plea that the Third Parties caused or enabled and/or permitted the cargo to be shipped to Iran. That was simply too general a formulation of the alleged contempt. In those circumstances, I accept Mr Smith QC's submission that Integral failed to comply with CPR 81.10(3) in this respect.

F3 Were the Third Parties prejudiced by the non-compliance with CPR 81.10(3)?

76. I am satisfied that this defect in the application notice has not caused any prejudice to the Third Parties who were fully prepared at the hearing to meet the case of contempt on which the application was based:

    i) The circumstances in issue involve matters within a limited factual compass.

    ii) The factual basis of the allegations of contempt made against the Third Parties have been known to them since May 2018.

    iii) The essentials of the allegations have always been clear, with the precise detail of the Third Parties' conduct being matters within their exclusive knowledge.

    iv) The interests of the Third Parties have been protected throughout the period since the application notice was issued by Stephenson Harwood ME LLP. My attention has not been drawn to any occasion prior to the service of their evidence on 3 and 4 February 2020 (by which time the intention to take this preliminary objection had already been formed), in which they expressed any difficulty in understanding what the acts or omissions said to constitute contempt were, or in understanding the case that the Third Parties had to meet for the purpose of preparing their responsive evidence.

    v) Albeit at a late stage, the Third Parties have served substantial witness evidence from which it is clear that they understand the case they have to meet and are in no difficulty in responding to it.

    vi) Similarly, Mr Smith QC has been able to prepare a detailed skeleton argument setting out the Third Parties' case in response.

77. On that basis, I was willing to exercise my discretion under paragraph 16.2 of the Practice Direction 81 (Applications and Proceedings in Relation to Contempt of Court) to "waive any procedural defect in the commencement or conduct of a committal application, if satisfied that no injustice has been caused to the respondent by the defect", subject to the following conditions:

    i) Integral was to prepare an amended Application Notice in compliant form before any of the Third Parties gave evidence.

    ii) That amended application form was to be limited to matters which were fairly in issue on Mr Kozachenko's sixth affidavit (to which the Third Parties' evidence had already responded).

78. In this regard, I note the observations of the Court of Appeal in Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd (at p.935) that:

> "It would not, however, be reasonable and would stultify this branch of the law if the same degree of particularity were required in a case where the complainant has not personally witnessed the acts complained of and must rely on inference to establish that non-compliance with a court order was caused by the act or omission of the alleged contemnor. In such a case the complainant must make clear the thrust of the case he will present to the court. The alleged contemnor can then prepare to meet that case.
>
> …
>
> As the judge rejected this submission on behalf of the second defendant it was not necessary for him to consider the powers which he had to deal with as to any defect in the notice of motion, nor has it been necessary for this court to consider what his powers would have been. However, we would regard it as regrettable if it were the law that, if this could be achieved without causing injustice, the lack of particulars in a notice of motion was not capable of being cured. Such a situation would encourage the incurring of the substantial costs which were incurred in this case to no useful purpose".

79. Mr Blackwood QC produced a draft amended version of the Application Notice, which I was satisfied in its final form complied with the CPR 81.10(3) requirements. I gave Integral permission to amend its application notice in terms of the final version of the draft. My reasons for doing so were given in an *ex tempore* judgment in the afternoon of the first day of the hearing, supplemented by a further *ex tempore* judgment on the morning of the second day of the hearing.

80. On this basis, I reject Mr Smith QC's second basis for applying to strike out the committal application notice.

G The evidence

81. Integral's evidence comprised affidavits from its solicitor, Mr Kozachenko, from Mr Saeid Mohseni, a senior trader at Integral, and from Mr Altayev, who was the representative of Integral (and of various other international companies) in

Turkmenistan. Mr Kozachenko was not cross-examined. Mr Mohseni and Mr Altayev were cross-examined by video link from Geneva and Turkmenistan respectively.

82. Mr Mohseni principally gave evidence about the progress of the settlement negotiations with Ms and Mr Sanchouli, and also as to the steps he had taken to inform Mr Sanchouli of the injunction via WhatsApp, Mr Mohseni also offered evidence of what he said was the practice for the amendment of railway bills in Turkmenistan based on his "experience in trading in Turkmenistan".

83. Mr Mohseni was based in Geneva during the period with which this application is concerned and had no direct exchanges with the Railways Ministry himself. The timing and content of his communications with Mr Sanchouli are apparent from the documents.

84. Mr Altayev also gave evidence about the practice of the Railways Ministry in Turkmenistan. His cross-examination was conducted under less than ideal circumstances. There was a significant delay on the video link which, when coupled with the need for questions and answers to be translated into Russian, led to a degree of miscommunication and over-speaking. Time was lost because Mr Altayev did not have access to the hearing bundles and had to find the documents which Mr Smith QC wanted to take him to on his laptop computer. Further, the video link froze, and then cut out, before Mr Smith QC's cross-examination had been completed.

85. There is one matter which was the focus of Mr Smith QC's cross-examination which does give me cause to approach Mr Altayev's evidence with a degree of caution.

    i) In his first witness statement filed in support of the application before Morgan J on 12 January 2018, he stated (at paragraphs 10 to 12):

> "On the same day, i.e. 12 January 2018, I went to the central railway administration in Ashgabad …. The administration informed me that the rerouting of Integral Petroleum's cargo to Iran took place in compliance with the orders contained in correspondence from San Trade and Integral.
>
> When I told them that Integral did not write such letters, they said that this is incorrect and that they had a letter from San Trade, seeking to change the delivery destination. This letter had another letter annexed to it. This second letter in the annex was, as I was told, a letter from Integral Petroleum SA agreeing to what San Trade had proposed.
>
> I have again discussed the matter with Integral's head office in Geneva, who told me that [they] have never written any such letter. It therefore seems that the letter must have been misappropriated by someone trying to steal Integral Petroleum's cargo".

    ii) In his first affidavit sworn in support of the committal application on 26 February 2018, Mr Altayev gave what appears to be an inconsistent account of what he confirmed was the same conversation with the Railways Ministry. He states at paragraph 5:

> "In the morning of 12 January 2018, I learned that of the 138 RTCs loaded at the Seyedi refinery, San Trade and Petrogat were arranging for redirection of 103 RTCs to Iran. I learned this from (i) the Turkmenbashi-I railway station where most of the cargo was located at the time; and (ii) because I spoke to the Head of Freight Transportation Department at the Ministry of Railways, Mr Gurbanov. According to them, the redirection was taking place because San Trade/Petrogat requested it in a letter. I was informed both by Mr Gurbanov and by the Turkmenbashi-1 station that the relevant person from San Trade who was ordering the redirection was Ms Nadia Lobis, San Trade and Petrogat's representative in Turkmenistan. I attach my contemporaneous correspondence with Integral's office in Geneva on this issue".

iii) It will be apparent that this version of the same conversation did not include any reference to Mr Altayev being informed that a letter from Integral had been produced by San Trade. Further, the email from Mr Altayev to Integral of 12 January 2018 made no such reference, stating simply:

> "They brought a telegram to Turkmenbashi station about redirection of all RTCs on the territory of Turkmenistan to Bander Abba (Iran)".

iv) In his second affidavit sworn on 5 February 2020, after the Third Parties had suggested that he appeared to be withdrawing his evidence about the forged letter, Mr Altayev stated:

> "I would like to clarify that I am not withdrawing any evidence. Without waiving privilege, I understand from my lawyers that while 'the forged letter' was important for the injunction proceedings, it was not relevant for the committal proceedings, because the letter was produced prior to the injunction of Morgan J. It is for this reason alone that I do not repeat my evidence in relation to the letter".

v) Mr Altayev was cross-examined about this issue, in the circumstances I have set out above, but no clear answer emerged.

86. I accept that the explanation in Mr Altayev's second affidavit is a possible explanation for his failure to mention this important part of his conversation with Mr Gurbanov, albeit perhaps a surprising one. It is also surprising that there was no mention of this issue in his contemporaneous email to Integral. Mr Altayev clearly did report a conversation to this effect to Integral on 12 January 2018 because it features in Mr Kozachenko's letter of that date. However, the differing accounts may well reflect the fact that the communications which Mr Altayev had had with the Railways Ministry may have involved more than one conversation or may have been inconsistent in their content.

87. I turn to the evidence adduced by the Third Parties. This comprised affidavits from:

i) Ms Sanchouli, who was cross-examined by video link.

ii) Mr Sanchouli who did not make himself available for cross-examination.

iii) Mr Beisenov who did not make himself available for cross-examination.

iv) Mr Sonnenberg who was cross-examined by video link.

88. Ms Sanchouli is a Farsi speaker who, she accepted, had a "reasonably good command of spoken English". To her credit, she gave evidence in English. Her (lengthy) affidavit was also produced in English. I am satisfied that Ms Sanchouli has a good command of English, but I have made allowances in my assessment of her evidence for the fact that she was not giving evidence in her first language.

89. Ms Sanchouli clearly had a close involvement in and good understanding of the underlying commercial dispute, and of the issues in the contempt application. She had a tendency in the course of questioning to fall back on and repeat a number of "prepared lines" rather than answering the question: for example the fact that it was not possible to sign the Schedule C Letter because the first paragraph was not true, or her repeated references to the advice that her UAE lawyers had given her. She was clearly alive in her evidence to a legal argument open to the Third Parties that there had been no contempt because the shipment of the cargo to Iran took place as a result of the Defendants' diversion of the cargo before the Morgan Injunction, rather than any positive steps taken by the Defendants after the Morgan Injunction, and she sought to frame a number of her answers accordingly. In particular, Ms Sanchouli sought to walk this difficult line when asked repeatedly what her understanding was, when giving an instruction on 18 January 2018 that 36 of the RTCs which the Defendants had previously re-routed to Iran should be routed back to Integral, as to what would happen to other RTCs which the Defendants had rerouted to Iran. It was clear to me that Ms Sanchouli fully understood the potential significance of this question, and that she sought to avoid answering it.

90. For these reasons, I have found it necessary to treat Ms Sanchouli's evidence with caution. I have been guided in my assessment of her evidence by the considerations identified by Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) at [15]-[24], but taking account of the fact that this is a committal application in which the subjective state of mind of the respondents has a prominence which it does not ordinarily have in a commercial case, and of the heightened burden of proof which applies in the present context.

91. Mr Sonnenberg is a German speaker but with a very good command of English. I found him to be an honest witness, but someone who had adopted an unduly sceptical attitude to an order of the English court by reference to his own understanding of German law, in circumstances in which the parties had chosen English law and London arbitration in their contracts. It was clear from his evidence that he had very little involvement in this transaction before becoming aware of the Morgan Injunction, that Ms Sanchouli had told him that she was handling the matter and essentially instructed him on behalf of San Trade not to sign the Schedule C Letter, and that he himself took steps to try and ensure the RTCs remained within Turkmenistan in an effort to "hold the ring" in response to the Morgan Injunction. Realistically, in the light of this evidence, and evidence suggesting a similar lack of involvement on the part of Mr Beisenov, Mr Blackwood QC did not pursue the committal application so far as they were concerned in closing.

92. In relation to Mr Sanchouli, I asked Mr Smith QC to confirm whether he had been warned that by choosing not to make himself available for cross-examination, there was a risk of adverse inferences being drawn against him (cf Whipple J's judgment in VIS Trading v Nazarov [2015] EWHC 3327 (QB) at [57]). Mr Smith QC confirmed that Mr Sanchouli had been so advised.

H The position of the Third Parties

93. The committal application against the Third Parties was advanced on the basis that they were either *de jure* or *de facto* directors of one or other of the Defendants. This issue was first aired before the Court when the Third Parties challenged the order giving Integral permission to serve the application for committal on Ms and Mr Sanchouli and Ms Lobis. The challenge in respect of Ms Lobis succeeded and I need say no more about it.

94. In a reserved judgment reported at [2018] EWHC 2686 (Comm), Moulder J rejected the argument that the reference to a director in CPR 81.4(3) was limited to de jure directors ([67]). She also concluded that Integral had the better of the argument that Ms and Mr Sanchouli were de facto directors of both Defendants ([80]). An application for permission to appeal against the judgment was rejected by Flaux LJ on 23 January 2019.

95. Before me, while there was no formal concession of the point, Ms Sanchouli and Mr Sanchouli did not seek to challenge the argument that they were de facto directors of both Defendants. On the basis of their own evidence, I am satisfied to the relevant standard that Ms and Mr Sanchouli were de facto directors of both the First and Second Defendants.

I The need to consider each of the grounds of committal in turn

96. The approach which a judge hearing an application for committal should adopt has been the subject of guidance from the Court of Appeal in Inplayer Limited v Thorogood [2014] EWCA Civ 1511, as commended in Hewlett Packard Enterprise Co v Sage [2017] EWCA Civ 973. In short, the judge should confine himself or herself to the contempts which are alleged in the application notice, and set out each relevant ground of contempt before proceeding to consider whether it is made out on the evidence to the criminal standard of proof.

97. It is also necessary to consider the Third Parties separately. I have decided that the issues in this case are best approached by considering the position of Ms Sanchouli first, by reference to each ground of contempt alleged against her, and then the position of Mr Sanchouli. I do so by reference to the "Particulars of breaches of Third Parties" document which I gave Mr Blackwood QC permission to amend into the Application Notice on the second day of the hearing.

J The position of Ms Sanchouli

J1 Ms Mahdieh Sanchouli, a de facto director of Petrogat and San Trade, failed to sign the letter in the form of the draft attached as schedule C to the Order of Morgan J dated 14 January 2019, whether by the stated deadline of 12:00 hours local time in Turkmenistan on 14 January 2018 or at all

98. I find that by late Saturday night on 13 January 2018 or in the very early hours of the following morning UAE time, Ms Sanchouli was aware that Integral was applying to the English court for an urgent injunction. She received, and replied to a communication from Fortier Law to that effect saying:

> "Legally you shall not give legal notices after midnight, during holidays and expect immediate reply. Also you shall not accuse our company and use inappropriate words without any evidence. Our lawyer will get back to you tomorrow".

99. Ms Sanchouli confirmed in her evidence that she had read the draft order sent to her, but stated that she could not rely on a draft of a document because there was no stamp on it.

100. The Morgan Injunction was served on Ms Sanchouli's email address at 00.54 UK time on 14 January 2018 (03.54 UAE time). Ms Sanchouli's evidence was that she "cannot recall exactly when I first saw the email however it will have been at some point on the morning of 14 January 2018".

101. In these circumstances Mr Smith QC contends that no breach of the order can be made out. His argument proceeded as follows:

i) The time for performing the mandatory order was 11am UAE time on 14 January 2018.

ii) If the order only came to Ms Sanchouli's attention at or after 11am UAE time, or sufficiently close to 11am that Ms Sanchouli did not have enough time to comply with it, there could be no breach of the order.

iii) A failure by Ms Sanchouli to take steps to comply with the order at or after 11am UAE time would not constitute a breach of the order (relying on the judgment of Sir James Munby in In the matter of an application by Her Majesty's Solicitor General for committal of Jennifer Marie Jones [2013] EWHC 2579 (Fam)).

iv) The Court could not be sure that Ms Sanchouli had seen the order before 11am UAE time on 14 January 2018, and sufficiently in advance of 11am UAE time to allow time for considered compliance.

102. Before considering this argument further, I should say something more about the decision of Sir James Munby in In re Jones. That was a case in which a mother had been ordered to "deliver up the children into the care of the father or cause the children to be so delivered up, at Cardiff Railway Station at no later than 4pm on 12 October 2012". This not having happened, the Solicitor General moved to commit Ms Jones for contempt on two bases: in failing to deliver up the children by 4pm on 12 October 2012 and "that she continued to breach the order by failing to deliver up the children after 4pm on 12 October 2012". Sir James Munby (P) said of this argument:

> "[20] There is, in my judgment, simply no basis in law upon which the Solicitor General can found an allegation of contempt for anything done or omitted to be done by the mother at any time after 4pm on 12 October 2012. Paragraph

2(b) of the order was quite specific. It required the mother to do something by 4pm on 12 October 2012. It did not, as a matter of express language, require her to do anything at any time thereafter, nor did it spell out what was to be done if, for any reason, there had not been compliance by the specified time. In these circumstances there can be no question of any further breach, as alleged in the Solicitor General's notice of application, by the mother's failure to deliver up the children after 4pm on 12 October 2012 or, as alleged in the application, any continuing breach thereafter until 17 October 2012 when she and the children were found.

[21] A mandatory order is not enforceable by committal unless it specifies the time for compliance: Temporal v Temporal [1990] 2 FLR 98. If it is desired to make such an order enforceable in respect of some omission after the specified time, the order must go on to specify another, later, time by which compliance is required. Hence the form of 'four day order' hallowed by long usage in the Chancery Division, requiring the act to be done "by [a specified date] or thereafter within four days after service of the order". This is an application of the wider principle that in relation to committal "it is impossible to read implied terms into an order of the court": Deodat v Deodat (unreported, 9 June 1978: Court of Appeal Transcript No 78 484) per Megaw LJ. An injunction must be drafted in terms which are clear, precise and unambiguous. As Wall LJ said in Re S-C (Contempt) [2010] EWCA Civ 21, [2010] 1 FLR 1478, [17]:

"if … the order … was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it meant, and precisely what it forbad both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing".

[22] The present case is a particularly striking example of the impossibility of reading in some implied term. What the order required the mother to do was to:

"deliver up the children into the care of the father … at Cardiff Railway Station at no later than 4pm on 12 October 2012."

Suppose that for some reason she failed to do that. What then did the order require her to do? Deliver the children to the father at Cardiff Railway Station or at some other (and if so what) place? And assuming it was to be at Cardiff Railway Station by what time and on what day? Or was she (to adopt the language of a subsequent proposed order) to return, or cause the return of, the children to the jurisdiction of the Kingdom of Spain by no later than a specified date and time? It is simply impossible to say. Speculation founded on uncertainty is no basis upon which anyone can be committed for contempt.

[23] I do not want to be misunderstood. If someone has been found to be in breach of a mandatory order by failing to do the prescribed act by the specified time, then it is perfectly appropriate to talk of the contemnor as remaining in breach thereafter until such time as the breach has been remedied. But that pre-

> supposes that there has in fact been a breach and is relevant only to the question of whether, while he remains in breach, the contemnor should be allowed to purge his contempt. It does not justify the making of a (further) committal order on the basis of a further breach, because there has in such a case been no further breach. When a mandatory order is not complied with there is but a single breach: Kumari v Jalal [1997] 1 WLR 97. If in such circumstances it is desired to make a further committal order – for example if the sentence for the original breach has expired without compliance on the part of the contemnor – then it is necessary first to make another order specifying another date for compliance, followed, in the event of non-compliance, by an application for committal for breach not of the original but of the further order ….".

103. In this case, there can be no serious dispute that the Defendants, to whom the orders were addressed, were in breach of them by 11am UAE time on 14 January (some 7 hours after service of the orders on a number of directors of the Defendants). Contempt in failing to comply with a court order is a strict liability offence (*Arlidge, Eady & Smith on Contempt* (5th) para. 12-93). It is "no defence for a company to show that its officers were unaware of the terms of the order or that they failed to realise that the terms were being broken by their action" (para. 12-115).

104. However, as a director of the Defendants, Ms Sanchouli can only be liable for the Defendants' contempt if she was aware of the order and wilfully failed to take reasonable steps to ensure that the order was obeyed (AG for Tuvalu v Philatelic Distribution Corpn [1990] 1 WLR 926, 936).

105. On the facts of this case, I am sure that the Morgan Injunction came to Ms Sanchouli's attention early in the morning UAE time on 14 January 2018 for the following reasons:

i) She had, on her own evidence, read the draft order the night before. She would therefore have been aware that, if granted, the Order required compliance by 11am UAE time the following day.

ii) In these circumstances, Ms Sanchouli would inevitably have checked her emails as soon as she woke up to see what had happened, not least to see if the draft order was now stamped (given her evidence that she had attached significance to the lack of a stamp when reviewing the draft order the previous night).

iii) Sunday 14 January was a working day in the UAE.

iv) It is striking that at no stage in the Defendants' response to the Morgan Injunction, or in Ms Sanchouli's evidence, does she suggest that the deadline for compliance had passed before she became aware of the order. Had this been the case, it is inconceivable that Ms Sanchouli would not have noticed that the time for compliance had already passed before she became aware of the order, and the point would then have been taken on her behalf.

v) In fact, it is clear that Ms Sanchouli could not offer this excuse for non-compliance. In his affidavit, Mr Sanchouli stated:

> "I accept that I did not sign the Schedule C Letter by the deadline imposed by the Morgan J Order … The reasons for my not signing the letter are the same as those provided by my daughter in MS1 *and in addition I was unable in any event to sign the Schedule C Letter within the period required".*

vi) Ms Sanchouli and Mr Sanchouli's affidavits are in very similar terms. Paragraph 107(6) of Ms Sanchouli's affidavit and paragraph 45 of Mr Sanchouli's affidavit are in the same terms save that the italicised words appear in only Mr Sanchouli's affidavit:

> "It is correct that I did not sign the Schedule C Letter as provided for in the Morgan J Order. I have however set out the reasons why I did not do so *and in any event I became aware of it too late to comply with the requirement (i.e. to sign the Schedule C Letter by noon Turkmenistan time).* For that I apologise again to the Court and I can assure the Court that no disrespect was intended. I will leave it to my legal representatives to address the consequences of that".

vii) The clear and obvious inference from these paragraphs is that while Mr Sanchouli was saying that he was unable to sign the Schedule C Letter within the period required, the same was not being (and could not be) said by Ms Sanchouli.

106. Given that the terms of paragraph 2 of the Morgan Injunction required Ms Sanchouli to do no more than sign and produce the Schedule C Letter, I am satisfied that Ms Sanchouli had more than sufficient time after becoming aware of the contents of the Morgan Injunction to sign and produce the Schedule C Letter before 11am UAE time, even allowing for some time for reflection. In any event, when an order of the Court is made which requires action to be taken urgently, a corporate defendant and its directors are expected to comply with that order. If a decision is taken deliberately and consciously not to comply by the deadline because of a desire to carry out further investigations, that might be a relevant matter when deciding whether committal was appropriate or what sanction to impose (particularly if compliance followed soon after the deadline). It does not, however, have the effect that no contempt in the form of a deliberate breach of the injunction has occurred.

107. In these circumstances, it is not necessary for me (so far as Ms Sanchouli is concerned) to consider the position of a director who only becomes aware of an order after the company is already in breach of the order, or only becomes aware after that date that no other director is handling the issue. However, I return to that issue when considering the position of Mr Sanchouli below.

108. For these reasons I am sure that the Defendants were in breach of paragraph 1 of the Morgan Injunction, and that Ms Sanchouli, as the de facto director who, on her own evidence, had responsibility for dealing with this matter and familiarity with the underlying transaction, is responsible for that breach, having taken a deliberate and conscious decision not to sign the Schedule C Letter.

109. However, in order to determine the character of the breach, it is necessary to consider the reasons which Ms Sanchouli has given for not signing the Schedule C Letter (and

for failing to do so at any time before 29 January 2018, by which time the overwhelming majority of the cargo had crossed into Iran).

110. The first reason she gave is that signing a letter which contained the statement in the first paragraph would have involved the Defendants acknowledging:

i) a fact which the Defendants neither knew nor believed to be true, namely that "it has come to our knowledge that someone purporting to be a representative of San Trade GmbH wrote to the Turkmen Railways on or before 12 January 2018 seeking to give instructions on behalf of Integral Petroleum SA to the effect that the cargo be sent to Iran"; and

ii) the requirement to deliver all 138 RTCs to Integral "which … [she] did not think they were entitled to".

111. I am willing to accept that the Defendants may have believed the statement in the first paragraph of the Schedule C Letter was untrue (and that it may well have been untrue):

i) The only evidence before me that any such forged letter had been prepared was the evidence of Mr Altayev as to what unnamed representatives of the Railways Ministry said to him.

ii) But even leaving aside the issues which have been raised by Mr Smith QC about Mt Altayev's evidence, that is at best hearsay from an unknown source, with the possibility that the Railways Ministry was offering a justification for the decision to amend the railway bills of lading which was not in fact correct.

iii) No copy of the letter has been produced nor any evidence directly from the Railways Ministry.

iv) By contrast copies of the communications from the Defendants to the Railways Ministry which were produced at a late stage by the Defendants (and the authenticity of which was not challenged) refer to the reason for re-consignment being "in connection with the refusal of the consignee, we are forced to redirect these wagons to Iran" (something scarcely consistent with the Railways Ministry being told that Integral as consignee had agreed to the change).

v) Mr Blackwood QC realistically accepted in closing that there was not sufficient material to justify a finding by the Court that the Defendants had produced such a forged letter.

112. However, I do not find that to be a sufficient reason for the refusal to make any effort to comply with the Morgan Injunction. An important and operative part of the Schedule C Letter was the second paragraph. The issues raised by the Defendants and Ms Sanchouli concerning the first paragraph provided no reason not to provide a letter in the form of the second paragraph. However, it was the second paragraph which was the principal reason why the Defendants refused to engage with the Morgan Injunction. It is striking that when Stephenson Harwood ME LLP came on the record for the Defendants, they wrote on 24 January 2018 explaining why the Defendants

had refused to sign the Schedule C Letter. No mention was made of the issue now raised with regard to the first paragraph. The only point taken concerned the second paragraph, of which Stephenson Harwood ME LLP stated:

> "Paragraph 2 of the Order compels the Defendants to execute a letter in the form of the draft attached at Schedule C thereof. This letter is clearly highly inappropriate in that it requires the Defendants to confirm that:
>
> > 'The cargo must not be delivered to Iran in any circumstances and must either be delivered to (Parto / Khobi Kulveli) via Azerbaijan in accordance with the terms of the unamended bills or should be preserved pending further order from Integral Petroleum SA or an order of the Court of or Arbitration Tribunal in the competent jurisdiction'.
>
> The Claimant clearly intends that this letter be used to redirect the remaining 37 railway cars to Georgia (or wheresoever the Claimants chose). Nowhere have you drawn the Judge's attention to the fact that the Claimant has not paid for these cargoes".

113. Mr Smith QC points to Ms Sanchouli's evidence that she told Stephenson Harwood ME LLP about her concerns about the first paragraph, and submits that in those circumstances the fact that this point did not feature in their letter was the result of a decision of Stephenson Harwood ME LLP, and not Ms Sanchouli. I am willing to accept that Ms Sanchouli mentioned her concern about the first paragraph of the Schedule C Letter to Stephenson Harwood ME LLP. But I have no doubt that their letter, the first substantive step taken by Stephenson Harwood ME LLP in the dispute, reflected the Defendants' and Ms Sanchouli's principal concern as communicated to them, and that this was the driving consideration behind Ms Sanchouli's refusal to sign the Schedule C Letter.

114. I am sure that Ms Sanchouli was determined to ship the RTCs which the Defendants maintained Integral had not paid for to the UAE via Iran, and to do so notwithstanding the Morgan Injunction. I find that the failure to sign a letter containing at least the second paragraph of the Schedule C Letter involved a deliberate breach of the Morgan Injunction, and did not result from the concern which I accept may have applied to the first paragraph.

115. The second reason put forward for not producing any letter was that Ms Sanchouli had been advised by UAE lawyers that Mr Kozachenko had no authority to represent Integral because he had not produced a power of attorney ("POA"), and that the Morgan Injunction was invalid as a result.

116. As to this:

i) Ms Sanchouli instructed the UAE law firm of Waleed Al Marzooqi & Khalid Mohammed Advocates ("Waleed Al Marzooqi") who corresponded with Mr Kozachenko. The Defendants maintained privilege in that advice, but Ms Sanchouli stated that she had been advised that Mr Kozachenko could not obtain a valid order from the English court without a power of attorney ("POA").

ii) I am prepared to accept that such advice may have been given. Certainly, the issue of a POA features in Waleed Al Marzooqi's letter to Mr Kozachenko of 14 January 2018.

iii) However, the Defendants had contracted with Integral on the basis of English law and knew that Integral intended to apply and had applied to the English court.

iv) Further, Mr Sanchouli and (I find) Ms Sanchouli (who was in regular contact with her father) knew that Mr Kozachenko was acting for Integral. In a WhatsApp message with Mr Mohseni of Integral of 13 January 2018, Mr Sanchouli stated "I just saw your attorney's email this morning" (which can only have been the email from Mr Kozachenko and which Ms Sanchouli said she had bought to Mr Sanchouli's attention). Mr Sanchouli said, "we will just respond to your attorney" and that "it is better [for] issues to be resolved in their proper channel" (i.e. through lawyers). It was Mr Sanchouli's position, therefore, that Mr Kozachenko was Integral's lawyer, and that the appropriate channel of communication with Integral was through Mr Kozachenko. In the same WhatsApp exchange, Mr Sanchouli said that Mr Kozachenko had started proceedings, and it was "better for him to continue".

v) In these circumstances, it was not reasonable for Ms Sanchouli to refuse to comply with the Morgan Injunction based on the advice of Waleed Al Marzooqi that there was an additional requirement for production of a POA. An individual who decides to ignore a court order on the basis that there is a technical objection to the order acts at their own peril if that objection proves to be unfounded, particularly when they have taken no steps to obtain advice from lawyers qualified in the relevant jurisdiction.

vi) Finally, it is striking here that when Ms Sanchouli did instruct English lawyers, on 21 January 2018, no signed copy of the Schedule C Letter in any form was forthcoming (and indeed none until the greater bulk of the cargo had crossed into Iran).

J2 In breach of paragraph 1 of the Order of Morgan J, Ms Mahdieh Sanchouli, a de facto director of Petrogat and San Trade, took steps in relation to the Cargo as defined by the Order of Morgan J, and took steps to direct the cargo to Iran

117. It is important to note that paragraph 1 of the Morgan Order takes the form of a negative (and not a mandatory) injunction. The paragraph placed no obligation on the Defendants to undertake any positive act but did require the Defendants to refrain from taking any steps to direct the cargo to Iran.

118. In the "Particulars of breaches" document, Mr Blackwood QC referred to three specific paragraphs of Mr Kozachenko's sixth affidavit setting out the matters said to constitute this contempt which I consider in turn.

Permitting the cargo to be shipped to Iran, even though pursuant to the injunction it must not have been shipped to Iran under any circumstances

119. I agree with Mr Smith QC that this conduct, even if established, would not constitute a breach of paragraph 1 of the Morgan Injunction. It does not specify an act which the Defendants took which they were injuncted from taking, but (at best) a failure to take positive steps which the Morgan Injunction did not order the Defendants to take. Accordingly, no contempt to this effect is made out.

Procuring the cargo to be shipped to Iran by taking active steps to convince the Turkmen Railways that the order of Mr Justice Morgan was invalid (when it was not invalid) and to ship the cargo to Iran in breach of the injunctions

120. In relation to the first part of this paragraph, no evidence was adduced before me that the Defendants took active steps to convince the Turkmen Railways that the order of Mr Justice Morgan was invalid and no such case was put to Ms Sanchouli in cross-examination. Accordingly, this alleged ground of contempt is not established.

121. The second part of this paragraph – that the Defendants took active steps to ship the cargo – is considered below in the context of Mr Blackwood QC's final particular under this head of contempt.

Procuring the cargo to be shipped by taking active steps to enable the cargo to be shipped to Iran, by supplying documents (including bills of lading) to the various authorities in Turkmenistan and finalising the customs procedures to enable the cargo to be so shipped

122. It is not in dispute that the Defendants took active steps *before* the Morgan Injunction to divert the cargo to Iran. In particular, acting on Ms Sanchouli's instructions, on 9 and 10 January 2018 Ms Lobis sent letters to the Railways Ministry requesting the reconsignment of 73 RTCs, leading the Railways Ministry to issue orders to that effect on 10 and 11 January 2018 (Orders Nos. 15 and 16). A further request was sent on 12 January 2018 stating:

> "The company San Trade … asks you to help and re-consign the tankers in quantity of 73 pcs … Payment in accordance with instruction No. 33 d/d 10.01.2018 has been completed. In the AIGTR … consignment note please indicate"

(and then various information was set out). Orders Nos 15 and 16 provided that the consent of the Customs Department was required.

123. The issue is whether any such steps took place after the Morgan Injunction, or whether the position may be that no further steps were taken by the Defendants, but the Railways and Customs Ministries acted after that point on their own initiative in taking the steps by which part of the Cargo was diverted to Iran.

124. There are essentially two issues to consider.

125. First, Mr Blackwood QC submitted that the Defendants took identifiable active steps after the Morgan Injunction to divert part of the cargo to Iran. The following matters are clear from Ms Sanchouli's evidence:

i) By 15 January 2018, the letters sent by Integral on 12 January, the Morgan Injunction and Integral's dealings with the Railways Ministry and Customs Department had resulted in the cargo being stopped.

ii) On 16 and 17 January 2018, Ms Sanchouli performed calculations to work out how many RTCs should go to Integral on the basis of the Defendants' approach (i.e. using the Contract price). She concluded that a further 36 RTCs should be re-routed back to Integral.

iii) Ms Sanchouli then instructed Ms Lobis to send a letter to the Railways Ministry requesting the re-consignment of 36 of the 47 RTCs which were the subject of Order 15 to Integral.

iv) By 21 January 2018 this instruction had been acted upon.

126. The terms of the letter sent by Ms Lobis to the Railways Ministry on 18 January 2018 provided as follows:

> "Earlier the company asked you to forward 47 of its own wagons (SAN TRADE GMBH) loaded at station Seyidi with fuel oil from the station Turkmenbashi-1 to Iran … We ask you to cancel the request for the readdressing of 36 wagons and send the wagons to the original destination of the cargo. The remaining 7 wagons will be redirected to Iran. Consent of Iran is obtained".

127. Ms Lobis also sent a letter to the Customs Authority on 18 January 2018 which made the following request:

> "The company San Trade asks you to help and reconsign tankers in quantity of 38 ps which are going with fuel oil M-100 according to the Contract No B-016579 dd 17.072015, Annex 1 d.d. 24.12.2016, EKC 361171 (10.08.15) to dd 26.01.2017 to the Parto Tskali station to the address of "Intergral Petroleum" by order from "SAN Trade GmH". Reconsignment should be carried out by old documents to the station Banderabas Iran via Akyayla to the address of company "San Trade".

As well as repeating the request for reconsignment of these 38 RTCs from Integral to San Trade via Iran, the letter asked the Customs Authority to make a series of amendments to the Customs' Declaration which were clearly intended to facilitate the delivery of the 38 RTCs to Iran. The letter also confirmed that payment in accordance with instruction No 38 dated 11 January 2018 had been completed.

128. Mr Smith QC suggested that the letter did no more than partially countermand the document previously sent to the Customs Department on 12 January 2018. That letter had concerned the re-routing of 79 RTCs from Integral to the Defendants, whereas the 18 January 2018 letter was limited to 37 of those RTCs. On this basis, Mr Smith QC submitted that there had been no positive act in breach of the Morgan Injunction, merely a failure to re-route all (as opposed to some) of the RTCs. However, it is clear that the 18 January 2018 letter went beyond this:

i) The 12 January 2018 letter had given instructions in relation to the amendment of the consignment note but made no reference to the Customs Declaration. It was sent to the head of the customs post of the Ferry Crossing.

ii) The 18 January 2018 letter requested amendments to the Customs Declaration as well as the consignment note, referred to a consignment note of a different date and number, and was addressed to the head of the Lebap Customs.

iii) The statement of the Customs Department of 25 January 2018, to which I refer below, records a meeting concerned with "making amendments in relevant cells of Cargo Customs Declaration" in which the deputy chief of the Lebap Customs participated. That meeting identified the request made in the 18 January 2018 letter as the reason for amending the Customs Declaration.

129. I have concluded that the 18 January letter was sent to the Lebap Customs to facilitate the transfer of 38 RTCs to Iran. The 38 RTCs comprised:

i) 37 of the 73 RTCs which had originally been diverted by the Defendants from Integral (i.e. all the remaining RTCs in this category after 36 RTCs had been re-routed back to Integral); and

ii) an additional RTC loaded following a separate payment by San Trade using its own funds.

130. As I have mentioned, Ms Sanchouli exhibited a statement signed by senior employees in the Customs Department (and others) on 25 January 2018 entitled "on making amendments in relevant cells of Cargo Customs Declaration". It stated:

> "For the reasons stated in the letter No 36 dated January 18, 2018 from company "San Trade" under the contract number B-016579 … which was concluded on 17th July 2018 between the Turkmenbashi Complex of Oil Refineries and the company 'San Trade' … in the cargo customs declaration [numbers given] which was formalized at the customs post "Seydi" of the Lebap Region Customs, according to the terms of the contract, in cell 8 replace the entry … "Integral Petroleum …. on behalf of San Trade GMBH in Shore Tanks of Black Sea Terminal Georgia … with the entry "San Trade GMBH (Germany), UAE Dubai ……. Via Bander Abbas-Iran and the entry 07226 in the cell 29 replace with the entry 07324".

131. It is clear from this evidence that it was only on 25 January that the Customs Declaration for the 37 RTCs was amended to remove Integral and the reference to Georgia, and that this was done because of the letter sent by Ms Lobis on 18 January 2018 requesting such a change. In these circumstances, I cannot accept Ms Sanchouli's evidence that "the Customs Department themselves ordered amendments to the Customs Declaration so [as] to send the RTCs to Iran and this was not done at San Trade's request". The statement expressly states the contrary.

132. There can be no doubt, therefore, that the communications sent by Ms Lobis on 18 January 2018 involved a breach of paragraph 1 of the Morgan Injunction. The issue which then arises is whether I can be sure Ms Sanchouli instigated or failed to take reasonable steps to prevent Ms Lobis sending a letter in such terms.

133. I have no doubt that this is the case:

i) Ms Sanchouli accepted that the instructions which she did give Ms Lobis involved a distinction between the 36 RTCs which (on the Defendants' case) Integral had paid for, and the 37 RTCs which (on the Defendants' case) they had not.

ii) However, the terms of the Morgan Injunction did not allow for any such distinction.

iii) Ms Sanchouli's evidence that she only gave an instruction to Ms Lobis to re-route the 36 RTCs and gave no thought or instruction as to the remainder is, in my view, incredible. It is inconceivable that Ms Sanchouli did not have firmly in mind the 37 RTCs that the Defendants asserted Integral had not paid for – this was, as I have noted, one of their major grounds of objection to the Morgan Injunction.

iv) It is equally incredible that when being given these instructions, Ms Lobis would not have asked, or been told, what was to happen to the other 37 RTCs. The clear message from Ms Sanchouli must have been that it was, in effect, to be "business as usual" so far as these 37 RTCs were concerned, and an instruction that Ms Lobis should carry on doing whatever had to be done to send the 37 RTCs to Iran.

v) The instructions given by Ms Lobis in relation to the 7 RTCs to the Railways Ministry and the amendment to the Customs Declaration for all 37 cars implemented the instructions which Ms Sanchouli gave Ms Lobis even if (which I accept) Ms Sanchouli did not see a copy of Ms Lobis' communications until February 2018.

vi) Further, it is noteworthy that Ms Sanchouli did not suggest that Ms Lobis had been instructed *not* to take any steps in relation to the other 37 RTCs. It must have been obvious to Ms Sanchouli, in the absence of such instructions, that Ms Lobis would carry on taking whatever steps were necessary to ship the 37 RTCs to Iran.

134. Second, Mr Blackwood QC submitted that, although prohibitory in form, the injunction required the Defendants to take steps to stop the cargo being shipped to Iran because, for so long as the Railways Ministry were carrying it pursuant to the Defendants' instructions, this involved an act by the Defendants in breach of the Morgan Injunction.

135. Mr Smith QC challenged this submission, both as a matter of principle, and having regard to the way in which Integral's case has initially been put. I am persuaded by both of those submissions, and I am not prepared to find that Ms Sanchouli was in contempt of court on this ground. There is a clear difference both legally and practically between a prohibitory and a mandatory injunction. The former does not generally require the respondent to incur any expenditure, and ordinarily creates no difficulty in supervision of performance. A mandatory injunction requires a respondent to take positive steps, and is much less readily granted. Paragraph 1 of the Morgan Injunction was prohibitory in form and could legitimately have been read and

understood by the recipient as only requiring the Defendants to refrain from taking further positive acts.

136. Construing the Morgan Injunction with the strictness appropriate in this context, I have concluded that paragraph 1 should not be read as requiring the Defendants to take positive steps such as interrupting a shipment which had already been consigned to a particular destination or requesting the Railways Ministry to change that destination. Either this would involve making an order which was prohibitory in form but mandatory in substance (cf Dowty Boulton Paul Ltd v Wolverhampton Corporation [1971] 1 WLR 204, 212), or an order of sufficiently uncertain scope that it could legitimately be interpreted by a respondent as not requiring it to take any positive steps, however easily accomplished.

J3 Ms Sanchouli, a de facto director of Petrogat and San Trade, failed to sign the letter in the form of the draft attached as Schedule C to the Order of Waksman J dated 26 January 2018 forthwith

137. There can be no dispute that Ms Sanchouli did not sign the Schedule C Letter forthwith as required by the Waksman Injunction. Ms Sanchouli was made aware of the Waksman Injunction in the early hours of 27 January 2018. The draft letter was not signed until the morning of 29 January 2018. On no view can this be described as "forthwith".

138. Ms Sanchouli's evidence was that she was at her sister's wedding in Iran when she received notice of the Waksman Injunction, that she had poor telephone and internet connectivity, and that in signing the Schedule C Letter when she got back to the UAE on 29 January 2018, she acted reasonably and as soon as she reasonably could.

139. I accept that Ms Sanchouli was at a wedding in Iran at the relevant time. However, I do not accept that she procured the signing of the amended Schedule C Letter as soon as she reasonably could. I am sure that it suited Ms Sanchouli and the Defendants that the Schedule C Letter be signed as late as possible, and that in taking no steps to ensure that the Schedule C Letter was signed before 29 January 2018, Ms Sanchouli was deliberately flouting the Waksman Injunction.

140. I have reached this conclusion for the following reasons:

i) In the run-up to the hearing before His Honour Judge Waksman QC, Ms Sanchouli had instructed Stephenson Harwood ME LLP to appear at the return date, at which it was clear that Integral would be seeking a further order in relation to the Schedule C Letter, and at which the Defendants would be seeking to set the Morgan Injunction aside. For example, on 24 January 2018, Mr Kozachenko had informed Stephenson Harwood ME LLP that "the situation is even more urgent … bearing in mind that your clients have done nothing to comply with paragraph 2 of the order for almost two weeks".

ii) It must have been clear to Ms Sanchouli that matters were very urgent and that the RTCs were or might well be on the move. At the hearing before His Honour Judge Waksman QC, Mr Cogley QC, representing the Defendants, stated on instructions that the cargo was likely to go over the border to Iran over the weekend (i.e. 27 to 28 January 2018).

iii) In these circumstances, it was clearly incumbent on Ms Sanchouli to take steps to ensure that the Schedule C Letter was signed as soon as possible after the hearing before His Honour Judge Waksman QC. If Ms Sanchouli's personal commitments made this difficult, she need only have instructed Mr Beisenov or Mr Sonnenberg to sign on the Defendants' behalf.

iv) I reject any suggestion that it was not possible for Ms Sanchouli to organise the signature of the Schedule C Letter while in Iran. It was Ms Sanchouli's own evidence that during the course of the dispute, she was in regular phone and WhatsApp contact with her father who was located in Tehran. Stephenson Harwood ME LLP clearly had no difficulty in communicating the result of the hearing before His Honour Judge Waksman QC and in obtaining instructions from Ms Sanchouli when she was in Iran.

v) I am sure that, in circumstances in which she knew that RTCs were crossing into Iran over the weekend, it suited Ms Sanchouli to put off signing the amended Schedule C Letter until 29 January 2018.

K Mr Sanchouli

141. I turn to Mr Sanchouli. He produced an affidavit but did not make himself available for cross-examination. There was no evidence before me which explained his failure to attend for cross-examination, even if only by video link. As I have explained above, Mr Sanchouli was aware that it would be open to the Court to draw an adverse inference against him by reason of his non-attendance.

142. The legal principles for drawing an adverse inference from the absence of a witness are set out in an oft-quoted passage from Brooke LJ's judgment in Wisniewski v Central Manchester HA [1998] PIQR 324, 340:

"From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

143. When addressing the evidence relating to Mr Sanchouli, I have considered whether there are grounds for drawing such an adverse inference on each issue.

K1 Mr Hosseinali Sanchouli, a de facto director of Petrogat and San Trade, failed to sign the letter in the form of the draft attached as schedule C to the Order of Morgan J dated 14 January 2019, whether by the stated deadline of 12:00 hours local time in Turkmenistan on 14 January 2018 or at all

144. It was Mr Sanchouli's evidence that he was not aware of the terms of the Morgan Injunction until after the deadline for compliance had expired. While Mr Sanchouli has not made himself available for cross-examination on that evidence, I am nonetheless unable to find to the relevant standard that Mr Sanchouli was aware of the Morgan Injunction in advance of the deadline for compliance, and certainly not sufficiently in advance of the deadline to have provided him with a meaningful opportunity to respond.

145. I have reached this conclusion for the following reasons:

i) Mr Sanchouli does not speak English and would have been dependent on Ms Sanchouli to translate the terms of the Morgan Injunction to him.

ii) It was Ms Sanchouli who had principal responsibility for dealing with the letters coming in from Integral's lawyers (which were in English). Mr Sanchouli could reasonably have proceeded on the basis that Ms Sanchouli would deal with the matter and keep him informed.

iii) The timing on 14 January 2018 is tight. While I am sure that Ms Sanchouli would at some stage on that day have informed her father about the Morgan Injunction and how she was dealing with it, I cannot be sure that this occurred before, and certainly any significant period before, the deadline for compliance.

146. By contrast, I am sure that at a very early stage in the period between the expiry of the deadline for compliance, and the hearing before His Honour Judge Waksman QC, Mr Sanchouli was made aware of the terms of the Morgan Injunction, that the injunction was not being complied with, and that he knew of and supported Ms Sanchouli's decision not to provide a letter in any form. On the evidence of both Mr and Ms Sanchouli:

i) Ms Sanchouli was in regular contact with Mr Sanchouli about the dispute with Integral and kept Mr Sanchouli up to date.

ii) Ms Sanchouli took all significant management decisions following discussions with her father, who was involved in all key-decision making.

iii) The dispute with Integral was clearly highly significant for the Defendants in financial terms. It was a dispute with which Mr Sanchouli was closely involved (as evident from his exchanges with Mr Mohseni).

iv) It was Mr Sanchouli's evidence that "all the actions taken by my daughter in relation to the transaction with Integral the subject of this dispute were taken in consultation with me".

v) It is, therefore, highly likely that Ms Sanchouli would have kept Mr Sanchouli up to date with developments and her strategy, including her approach to the Schedule C Letter, even if I cannot be sure that this had happened before the time for compliance.

147. In these circumstances, the issue arises as to whether Mr Sanchouli can be liable in contempt for failing to take reasonable steps to ensure compliance with paragraph 1 of the Morgan Injunction after the time for compliance had expired.

148. I am not satisfied that Mr Sanchouli can be found to be in contempt of the Morgan Injunction on this basis:

i) The authorities which hold that a director can be committed for a breach of an injunction made against the company are generally premised on the director's involvement in *the company's breach.* In Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd at p.936, the Court of Appeal stated that if the director "wilfully fails to take [reasonable] steps and the order or undertaking is breached" he can be punished for contempt. The Court of Appeal referred at p.938 to the issue of whether the second defendant was "party to the breaches". In Dar Al Arkan v Al Refai [2014] EWCA Civ 715 at [33], Beatson LJ observed that "for a director or officer to be liable, it is necessary to show that he or she *knew of and was responsible for the company's breach of the court order*, undertaking to the court or other contempt". Similarly, in IPartner PTE Shipping Ltd v Panacore Resources DMCC [2014] EWHC 3608 (Comm), [24]-[25], Hamblen J also defined the principle as one concerned with the director's role in relation to the company's breach, as did Warren J in Phonographic Performance Ltd v Nightclub (London) Ltd [2016] EWHC 892 (Ch), [28].

ii) CPR Part 81.4(3), which provides the procedural basis for making a committal order against a director for the company's breach of a mandatory injunction, provides for committal when the company is "required by a judgment or order to do an act" and "does not do it within the time fixed by the judgment or order". In circumstances in which it is the company's failure to do the act within the time ordered which provides the basis for committing the directors, the conduct on the part of the directors which makes committal appropriate would naturally be expected to be conduct relating to the company's failure to perform the required act within the required time, rather than conduct occurring after the time for compliance has expired.

iii) If a director could be committed for contempt for failing to take steps to purge the company's existing breach of a court order, the ambit of the contempt enquiry would be significantly widened not simply in time (for how long a period after the breach would the director remain exposed to an allegation of contemptuous failure to redress the company's contempt?) but also in the considerations which might be relevant to the issue of the director's liability (for example how far it was still possible to procure compliance, whether the

breach in question was of a one-off rather than recurring in nature or whether circumstances had changed since the stipulated time for compliance).

iv) When a mandatory injunction requires a company to do a particular act by a particular date and this is not done, it is always open to the party who has obtained the mandatory order to seek a fresh order with a fresh deadline for compliance (which Integral did here through the Waksman Injunction), or to obtain an order which provides for a time for compliance but expressly provides that the obligation to comply continues thereafter.

149. The law of contempt rightly places a significant premium on certainty and precision, and points which might be regarded as unattractive in the conventional cut-and-thrust of commercial litigation must be approached with particular care in the committal context.

150. In any event, the suggestion that Mr Sanchouli was guilty of contempt for failing to take steps to cure a breach which had already occurred was one which only emerged clearly in closing submissions (for example the draft order served on the Defendants contains no such suggestion). In these circumstances, I am not satisfied that this ground of contempt is one of which Mr Sanchouli can fairly be said to have had notice when preparing his affidavit and taking his decision not to make himself available for cross-examination. This provides a further reason for my decision not to find that Mr Sanchouli had committed this head of contempt.

K2 In breach of paragraph 1 of the Order of Morgan J, Mr Hosseinali Sanchouli, a de facto director of Petrogat and San Trade, took steps in relation to the Cargo as defined by the Order of Morgan J, and took steps to direct the cargo to Iran

151. I am satisfied that Mr Sanchouli committed this act of contempt, essentially for the reasons why I am similarly so satisfied in relation to Ms Sanchouli.

152. There can be no dispute that Mr Sanchouli was aware of the terms of the Morgan Injunction prior to 16 January 2018. As I have stated, I am sure that over the period 16 to 18 January 2018 Ms Sanchouli took the decision that cargo which, on the Defendants' case, had not been paid for by Integral, should continue to be shipped to Iran. I am also sure that the instruction which Ms Sanchouli gave to Ms Lobis were that it was, in effect, "business as usual" so far as that part of the cargo was concerned, and that Ms Lobis was to take such steps as might be necessary for that part of the cargo to continue its journey to the UAE via Iran.

153. It is inconceivable that Mr Sanchouli was not involved in formulating this strategy, and that he did not approve of it. I have already set out the evidence as to his involvement in and approval of all key decisions taken by Ms Sanchouli in relation to the Cargo and the dispute with Integral. On Mr Sanchouli's own evidence, on 16 January 2019 he discussed the decision to re-direct *some* of the cargo back to Integral, including sending "the necessary communications to the Railways Ministry and the Customs Department", with his daughter. The belief that Integral's entitlement to cargo was to be measured using the Contract rather than refinery price, and that, English court-orders notwithstanding, that was all they were to get, was one which I find to have been strongly held by Mr Sanchouli and Ms Sanchouli. While I have reached this conclusion without needing to draw an adverse inference from Mr

Sanchouli's failure to make himself available for cross-examination, my conclusion is reinforced by that inference, which I am satisfied it is appropriate to draw on this issue.

K3 Mr Hosseinali Sanchouli, a de facto director of Petrogat and San Trade, failed to sign the letter in the form of the draft attached as Schedule C to the Order of Waksman J dated 26 January 2018 forthwith

154. I am also satisfied that Mr Sanchouli committed this ground of contempt. It is clear on his own evidence that he was aware of the hearing before His Honour Judge Waksman QC on 26 January 2018 because he gave instructions to the Defendants' lawyers to tell the judge that "to [show] respect to his order we still kept some of the rail cars in Turkmenistan". On his own evidence, he was with his daughter in Iran when Stephenson Harwood ME LLP relayed the outcome of the hearing. He would, therefore, clearly have been aware at around the same time as Ms Sanchouli about the Waksman Injunction, as he appeared to acknowledge.

155. He was also aware of how urgent matters were. On his own evidence, he knew that several rail cars were still in transit from Turkmenbashi and had yet to cross the border at that point.

156. I am sure that the decision that the letter would not be signed until 29 January 2018, notwithstanding the requirement to produce the amended Schedule C Letter forthwith and the obvious urgency of the situation, was a joint decision of Mr and Ms Sanchouli taken together, and that the reason for adopting this course was to play for time while more RTCs passed the point of no return.

L Is an order for committal appropriate?

157. I accept that committal orders are exceptional orders, only to be used in exceptional cases (*Arlidge, Eady & Smith* para. 12-20). However, I am satisfied in respect of the three grounds of contempt which I have found to be established against Ms Sanchouli, and the two grounds of contempt I have found to be established against Mr Sanchouli, that these represented deliberate breaches of the Morgan and Waksman Injunctions for which committal is appropriate.

158. I accept that Ms and Mr Sanchouli were acting at all times on the basis of what they genuinely believed to be their rights in their commercial dispute with Integral (albeit the effect of the LCIA Award is that their belief was mistaken). Further, the contempt occurred within a relatively narrow time period (14 to 29 January 2018) against a background of fast-moving events, with developments occurring in a number of different countries at or around the same time. Finally, both Ms Sanchouli and Mr Sanchouli have offered their apologies to the Court. These matters are likely to be material at the sentencing stage. However, they do not remove the essential seriousness of Ms and Mr Sanchouli's contempt, which involved seeking to pre-judge the commercial dispute in the Defendants' favour, in breach of orders of this Court intended to hold the ring while those issues were determined.

159. I will ask counsel for further submissions on the issue of sentence, and any consequential matters.