IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 0070 OF 2023

BETWEEN:-

(1) GLOBAL MINING DEVELOPMENT L.P.

(2) GERALD METALS LLC

Claimants / Applicants

- AND -

(1) CHINA NATIONAL GOLD GROUP HONG KONG LIMITED

(2) SOREMI INVESTMENTS LIMITED

Defendants/Respondents

-AND-

(3) SOCIETE DE RECHERCHE ET D'EXPLOITATION MINIERE SA

(4) JIANG LIANGYOU

(5) TONG JUNHU

(6) WANG WANMING

(7) HE SHUIQING

(8) CHENG SHENGHONG

Additional Parties

Mr Peter De Verneuil Smith KC and, with him, Ms Judy Fu (instructed by Harney Westwood & Riegels (BVI) LP) and, with them, Mr Jonathan Addo and Ms Natasha Guthrie, both of Harney Westwood & Riegels (BVI) LP, for the Claimants

Mr Stuart Adair (instructed by Walkers) and, with him, Miss Rosalind Nicholson and Ms McKay Drigo of Walkers, for China National Gold Group Hong Kong Limited

Ms Eleanor Morgan and Mr Dan Griffin of Mourant Ozannes for Mr Cheng Shenghong

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2025: 26 to 29 May

16 July 2025

JUDGMENT

INTRODUCTION, BACKGROUND, AND ISSUES

[1] The Claimants in these proceedings are Global Mining Development LP ("Global") and Gerald Metals LLC ("Gerald"). For the sake of convenience, I will also refer to them individually or collectively as the Claimants.

[2] The Claimants bring various applications in these proceedings against one or more of the Defendants or third parties who have been joined into these proceedings. Those applications

include the following applications that I heard over the period from 26 to 29 May 2025 ("the Omnibus Hearing"):

(a) an application ("the Contempt Application") by the Claimants against China National Gold Group Hong Kong Limited ("CNG"), Société de Recherche et d'Exploitation Minière SA ("Soremi SA"), and Cheng Shenghong ("Mr Cheng")[1] for a declaration that they are and continue to be in contempt of court for breaching the terms of an injunction made by this Court ("this Court" or "the Court") on 28 March 2024, as continued by this Court on 9 April 2024, and varied by it on 3 July 2024. For the sake of convenience, I will refer to CNG and Soremi SA collectively or individually as the Defendants, even though Soremi SA is not strictly a defendant to the claim.

(b) an application by CNG to have the injunction granted by the Court on 28 March 2024 (and subsequently continued and varied, as aforesaid) discharged or set aside ("the Discharge Application"); and

(c) an application dated 13 June 2024 made by the Claimants against CNG and SIL to have the Register of Members of SIL rectified to show Global as the registered holder of the entire issued share capital of SIL ("the Rectification Application").

[3] This judgment only deals with the Contempt Application.

[4] For the sake of convenience and, unless the context otherwise requires, any reference I make to:

[1] The Claimants' application for breach of the injunction at the Omnibus Hearing was against CNG, Soremi SA and Cheng Shenghong ("Mr Cheng") only. The former directors of SIL, Messrs Jiang Liangyou, Tong Junhu, Wang Wanming, and He Shuiqing, have challenged service. The Claimants say that they may pursue contempt proceedings against them ("the Additional Parties") and SIL once the issue of service has been finally determined.

(a) "the Order", "the 28 March Order" or "the Orders" shall include a reference to the order dated 28 March 2024, whether as initially granted or as continued and varied as aforesaid;

(b) "the Mandatory Injunction" or "the Mandatory Order" shall be to the mandatory injunction referred to in the provisions of the Order; "the Freezing Injunction" or "the Freezing Order" shall be to the freezing provisions of the Order; and the "Disclosure Order" shall be to the disclosure provisions of the Order;

(c) "the Application", "Notice of Application", or "Contempt Application" shall include a reference to either or both of the Claimants' notice of application for the contempt of the Respondents and others, dated 1 May 2024, and the amended notice of application for their contempt dated 10 July 2024;

(d) "the Respondents" shall mean any one or more of CNG, Soremi SA, and Mr Cheng; and

(e) "this Judgment" or "the Contempt Judgment" shall be to this judgment.

[5] The background leading to the making of the Contempt Application need only be stated briefly.

[6] This is a long-running dispute between the Claimants and CNG concerning the ownership of SIL. The Claimants are part of the "Gerald Group" of companies, a commodities business founded in the US, which has its headquarters in London. CNG is part of the China National Gold Group Corporation, a Chinese state-owned entity.

[7] Prior to the dispute between the parties, the Claimants and CNG had been joint venture partners in SIL, a BVI company. Global held 35% of the shares in SIL. CNG held the other 65%.

[8] SIL is a holding company, owning some 90% of the issued share capital of Soremi SA, a Congolese company. The majority of the rest of that shareholding is owned by the Congolese state. Soremi SA operates a significant polymetallurgical (copper-zinc) mine in the Republic of Congo.

[9] Pursuant to clause 5 of a shareholders' agreement dated 17 March 2014 ("SHA") made between CNG, Global, SIL, and Gerald, Global was given a right of first refusal ("ROFR") if and when CNG wished to dispose of its shares in SIL.

[10] In March 2020, CNG sent a letter to Global, by which it gave formal notice of its intention to transfer its shareholding in SIL to another company, as it was required to do under the terms of the SHA. Global elected to exercise its right to purchase CNG's shareholding under the terms of the SHA, as it claimed to be entitled to do.

[11] A dispute arose between Global and CNG about the right of Global to purchase CNG's shareholding in SIL pursuant to the notice that Global served upon CNG. The parties could not come to any agreement about Global's entitlement to purchase SIL's Shares, and that dispute (together with other disputes that arose between them) was referred to a HKIAC arbitration for determination, as required under the terms of the SHA.

[12] The Claimants and CNG have been engaged in the HKIAC arbitration since August 2020. The arbitral tribunal (presided by Peter Leaver KC, with Dr Michael Moser and Rimsky Yuen GBM SC JP) ("the Tribunal") found that CNG had triggered Global's ROFR by its notice exercising its right to purchase CNG's shareholding in SIL. The Tribunal also found that CNG's offer was irrevocably accepted by Global when it exercised its notice to purchase that shareholding.

[13] The Tribunal has issued two arbitral awards recognising Global as having exercised its ROFR in March 2020 and entitled to the transfer of CNG's 65% shareholding in SIL, thereby making Global the 100% shareholder of SIL. These awards have been referred to in these proceedings as the First Partial Award ("the FPA") and the Specific Performance Award ("the SPA"). They were made on 8 February 2023 and 21 November 2023, respectively. I will adopt the meanings and abbreviations given by the parties to those awards in this Judgment.

[14] The FPA and SPA are registered in the BVI as New York Convention Awards. They are, therefore, binding and fall to be enforced in this jurisdiction.

[15] Pursuant to the FPA, CNG was ordered to transfer its 65% shareholding in SIL ("the FPA Shares") to Global. CNG has refused to do so to date.

[16] By an order dated 25 April 2023, **Wallbank J** recognised the FPA made in favour of the Claimants against CNG and SIL by the Tribunal as a New York Convention Award in the BVI. SIL made an application to have the 25 April 2023 Order set aside. **Wallbank J** dismissed that application.

[17] On 18 December 2023, **Wallbank J** made an order, *inter alia*, recognising the SPA as a New York Convention Award in the BVI.

[18] CNG also made an application to have the 25 April 2023 Order and the 18 December Order set aside. The applications to set aside both orders were heard on 9-11 April 2024 and were dismissed by **Wallbank J** on 15 April 2024.

[19] Under the terms of the SPA, the Tribunal declared, *inter alia*, that the Defendants were in breach of the terms of the FPA; and required CNG to provide to the Claimants:

(a) bank account details for the payment of funds pursuant to the FPA (so payment could be made by the Claimants to give effect to the legal transfer of the FPA Shares);

(b) a signed and executed instrument effecting the immediate transfer of the FPA Shares; and

(c) a copy of the SIL's register of members, recording Global as the holder of the FPA Shares.

[20] The Claimants claim that, in breach of the HKIAC Rules, CNG failed to comply with the Awards. CNG issued challenges to set aside the FPA and SPA to the Hong Kong Court of First Instance. The challenge to the FPA was dismissed by **Mimmie Chan J** on 30 August 2023, with indemnity costs, and the challenge to the SPA was withdrawn on 6 May 2024.

[21] As stated above, CNG also challenged the registration of the two Awards in the BVI, which culminated in a 3-day hearing before **Wallbank J**. The challenge was dismissed by him in a decision given orally on 15 April 2024, with reasons to follow. **Wallbank J** handed down his reasons in a lengthy judgment on 6 December 2024. CNG's challenge was rejected on all counts. It did not appeal.

[22] After the 3-day hearing in April, CNG was ordered, on 15 April 2024, by **Wallbank J** to comply immediately with the FPA and SPA and transfer its 65% interest in SIL to Global. In handing

down his decision, **Wallbank J** emphasised that CNG "should understand that … this Court's order is binding, and it is final … it must be obeyed immediately."

[23] The events that led to the making of the Order, which forms the basis of the Claimants' Contempt Application, may be summarised briefly.

[24] The Claimants maintain that, following the FPA and SPA, they sought information from CNG about SIL's affairs, which they claim they were entitled to obtain both because, even disregarding the FPA and the SPA, they were 35% shareholders of SIL and were entitled to the information under the SHA anyway. They were not provided with the information that they wished to see.

[25] On 12 March 2024, the Claimants' nominated directors of SIL applied for disclosure of SIL's books and records under **s. 100 of the BCA 2004** ("the s. 100 Disclosure").

[26] The Claimants assert that the s. 100 Disclosure uncovered that SIL had been stripped of all, or substantially all, its cash assets. The Claimants believe that some USD 140 million (the "SIL Funds") had been moved in September 2023 from SIL's bank accounts at the Bank of China in Paris to a bank account in Soremi SA's name at EXIM Bank (in China). They claim that the transfers were unusual as they featured the holding company transferring cash back to the operating company, which had no operational need for the cash.

[27] The Claimants also maintain that the transfers were: (a) in breach of the SHA; (b) in breach of an undertaking given by CNG on 10 March 2023 to the Tribunal by which CNG had undertaken not to cause SIL to dissipate assets or take any action that would be detrimental to its value; and (c) unlawful because they were contrary to SIL's best interests to transfer away its own assets. The transfers had taken place after CNG had failed in its application to set aside the FPA before the Hong Kong Court. The Claimants state that the true motivation for the transfers was to asset-strip SIL so that when the Claimants obtained full ownership of SIL, there would be nothing left in SIL and the value of their shares would be substantially reduced.

[28] On 28 March 2024, this Court made the 28 March Order at an *ex parte* hearing brought on at short notice. Paragraph 11 of that order contained a repatriation provision ("the Repatriation Provision") that stated:

> "SIL and Soremi SA shall take and CNG shall procure within 5 days of the date of this Order being 2 April 2024, all necessary steps to repatriate any sums that are liquid that

have been moved from any SIL Bank Accounts in Paris, France and shall provide confirmation to the Applicants that such repatriation has been made and shall confirm the precise amounts."

The 28 March Order was served on CNG and SIL on 28 March 2024, and on Soremi SA on 5 April 2024.

[29] The Claimants claim that Soremi SA, CNG, and SIL breached the terms of the Order in several ways. Specifically, in relation to the Repatriation Provision, instead of attempting to comply with the Order, on 4 April 2024, Soremi SA caused an injunction (the "First Congolese Injunction") to be issued against itself in the High Court of Madingou, in the Republic of Congo, ordering itself not to return the SIL Funds to SIL.

[30] The 28 March Order also froze the assets of CNG, SIL, and Soremi SA in the terms set out in paras. 6-10 of the Order and required the disclosure of all their worldwide assets with a value above USD 100,000.00, and the provision of the terms and conditions of certain bank accounts, together with affidavit evidence in support of the same, as specified at paras. 14-17 of the Order.

[31] The Claimants allege that Soremi SA did not attempt to comply with the terms of the Order. No disclosure was received from CNG, other than one letter dated 23 April 2024, sent by Walkers, who act for CNG, that said, *inter alia*:

> "4 CNG's assets primarily consist of shares in various companies. In addition to holding a 65% share in Soremi Investments Limited, CNG's main portfolio includes the following:
>
> 4.1 A 40.01% shareholding in China Gold International Resources Corp. Ltd ("CGG"), a company incorporated in British Columbia, Canada and listed on the Hong Kong and Toronto Stock Exchanges), the value of which is around HK$ 8.18 billion (approx.US$ 1.04 billion), based on CGG's total market capitalisation of HK$ 20.45 billion (calculated from CGG's share price on 3 April 2024 and the total number of shares that CGG issued).
>
> 4.2 A 51% shareholding in China Gold Hong Kong Buchuk Mining Company Limited, a private company incorporated in Hong Kong. The company's paid up (or regarded as paid up) share capital is around HK$ 1 million plus US$ 15 million plus CNY 204 million as of 16 May 2023. 51% of the company's paid up (or regarded as paid up) share capital is around HK$ 510,000 plus US$ 7.7 million plus CNY 104.1 million (**totalling approx. US$ 22.1 million**).
>
> 4.3 A 30% shareholding in China Gold Hong Kong Holding Corp. Limited: a private company incorporated in Hong Kong. The company's paid up (or regarded as paid up) share capital is US$ 14,220,000 as of 25 August 2023. 30% of the

company's paid up (or regarded as paid up) share capital is **approx. US$ 4.3 million**.

4.4 A 45% shareholding in Zhongxin International Finance Leasing (Shenzhen) Co., Ltd.*(*no official English name, for identification purpose only*): a private company incorporated in the People's Republic of China. The company's paid up share capital is CNY 500 million. 45% of the company's paid up share capital around CNY 225 million (**approx. US$ 28.7 million**).

4.5 A 70% shareholding in West-Klyuchi Joint Stock Company* (*no official English name, for identification purposes only*): a private company incorporated in the Russian Federation. The company's total share capital is around RUB 23 million. 70% of the share capital is approximately RUB 16 million (**approx. US$ 175,000**).

4.6 A 100% shareholding in Sino Mining Guizhou Pty Ltd: a proprietary company incorporated in New South Wales, Australia. The company's total paid up share capital as of 25 September 2014 is around AU$ 146 million (**approx. US$ 97 million**)."

(Emphasis underlined supplied; other emphasis included by the author of the letter).

[32] The purported disclosure given by CNG failed to comply with the requirement for providing disclosure specified in the 28 March Order by not setting out CNG's assets worldwide. The disclosure provided was limited by the references in Walkers' letter to what CNG's assets "primarily" consisted of and what the "main portfolio" of those shares included. At no stage has there been any further disclosure by CNG of its assets or any further attempt to comply with the disclosure requirements of the Order.

[33] By an affidavit sworn on 29 May 2024, Mr Wanming Wang, a director of SIL, purportedly provided full details of the assets of SIL in compliance with the disclosure requirements of the 28 March Order. There was no suggestion by the Claimants, for the purpose of the hearing before me at any rate, that this affidavit was not fully compliant with the disclosure requirements of the 28 March Order.

[34] The 28 March Order was amended on 3 July 2024. The application to amend was made by the Claimants on notice to CNG. CNG did not object to the amendment. **Wallbank J** granted the amendment at the hearing on 3 July. The relevant terms of the amended order were as follows:

"3. Paragraphs 11-13 of the March Order be varied to read as follows:

a) That the First Respondent is, by no later than 5 days of the date of this order, to take all necessary steps to procure, cause and/or direct the Second and/or Third Respondents to pay any sums that are liquid that have been moved from any SIL Bank Accounts without the consent of one of the First Applicant's nominated SIL directors, to an account of the Eastern Caribbean Supreme Court with details to be confirmed in writing by the Applicants' legal representatives, to be held until further order;

b) The Second Respondent is, by no later than 5 days of the date of this order, to take all necessary steps to procure, cause and/or direct the Third Respondent to pay any sums that are liquid that have been moved from any SIL Bank Accounts without the consent of one of the First Applicant's nominated SIL directors, to an account of the Eastern Caribbean Supreme Court with details to be confirmed in writing by the Applicants' legal representatives, to be held until further order; and

c) The Third Respondent is, within 5 days of the date of this order, to pay any sums that are liquid that have been moved from any SIL Bank Accounts without the consent of one of the First Applicant's nominated SIL directors, to an account of the Eastern Caribbean Supreme Court with details to be confirmed in writing by the Applicants' legal representatives, to be held until further order."

[35] The 3 July order made it necessary for the SIL Funds to be paid into this Court until further order.

[36] The Claimants assert that Soremi SA, CNG, and SIL continue to flout the 28 March Order, as amended by the 3 July Order. Some 23 days after the date of the 3 July Order (during which time, again, no effort was made to comply), Soremi SA applied and obtained an injunction against itself in the Republic of Congo (the "Second Congolese Injunction"), ordering itself not to make payment as required by the 3 July Order.

[37] The Claimants' case is that Soremi SA, CNG, and SIL (together with the Additional Parties) are in contempt of court for refusing to take the steps specified in the Order to repatriate the SIL Funds.

[38] The Contempt Application was issued on 1 May 2024.

[39] On 16 July 2024, the Contempt Application was listed to be heard on 2 October 2024, followed by the Rectification Application on 24 October 2024. The parties' counsel travelled to the jurisdiction. Then, mid-morning on the Monday (30 September 2024) before the start of the Contempt Application hearing (on Wednesday, 2 October 2024), CNG issued an application to

recuse **Wallbank J** from hearing the Contempt Application and Rectification Application. CNG demanded that the Recusal Application be heard before the Contempt Application. No prior warning was given of CNG's intentions to the Claimants or the Judge.

[40] The Claimants contend that, having been caught out asset-stripping SIL and desperate to avoid a contempt finding followed by the loss of SIL by rectification, the Recusal Application was mounted at the last moment to derail the Contempt Application and the Rectification Application.

[41] The Recusal Application was heard and dismissed and is currently the subject of an appeal. Until the final determination of the appeal, the Court of Appeal has directed that any application in these proceedings must be heard by another Judge of this Court.

[42] Receivers were appointed by this Court over the FPA Shares, at the behest of the Claimants. Those receivers ("the Receivers") are Messrs Cosimo Borelli and Colin Wilson, both of Kroll.

[43] In March 2025, the Receivers were provided with Soremi SA's financial accounts for 2023, showing that Soremi SA had not recorded receipt of the SIL Funds and had only USD 80.3 million in cash deposits – less than the total of the SIL Funds. The Claimants claim they have no information about the transfers to or from Soremi SA, and what portion of those cash deposits belong to SIL and are from the SIL Funds. As matters currently stand, the SIL Funds (or a significant portion thereof) are unaccounted for. The Claimants claim to have no knowledge of their whereabouts.

[44] In the meantime, the Claimants say that matters on the ground in the Republic of Congo have been highly concerning. Despite being the registered 35% (and the beneficial 100%) shareholder of SIL, the Claimants have no information about the operation of Soremi SA. The Claimants understand that several individuals (as CNG proxies) have been attending Soremi SA's general meetings in the Congo purporting to represent SIL's interests, despite receivers being appointed by the Court over the FPA Shares.

[45] In addition, the Claimants were recently made aware by the Receivers of what they say were numerous unexplained payments being made from Soremi SA to CNG's parent company. The Claimants maintain that, in addition to being clear breaches of the 10 March 2023 undertakings, and the 28 March Order, there is no legitimate reason why Soremi SA would be making payments

to CNG's parent company, which is not a supplier or lender to Soremi SA. They say that Soremi SA and CNG appear to be actively engaged in siphoning off the SIL Funds.

[46] I do not need to say much more about the background facts and circumstances, other than to mention three matters: first, a slightly more detailed chronology of the relevant events is included in the appendix to the skeleton argument filed on behalf of the Claimants by Mr Smith; second, I make it clear, of course, that the assertions of the Claimants are disputed by the Respondents; and third, while I have considered the comments of **Wallbank J** in the various transcripts to which I have been referred, I have largely disregarded the views that he reached at the various hearings that took place before him in these proceedings. In addition, I have not read his judgment in which he refused to accede to CNG's application to recuse him. I do not consider that it would be appropriate for me to do so, given that the determination of the application to recuse him is still outstanding.

SUMMARY OF THE CHARGES

[47] The Claimants rely upon the following breaches of the Order, it being undisputed by the Respondents that they knew of the Orders at the relevant times and that their conduct was intentional:

(1) **As against CNG**:

Breach 1: alleged breach of para. 11 of the 28 March Order (as amended by the 3 July Order)

The Claimants allege that CNG did not make any effort to take all necessary steps to repatriate the SIL funds to the Second Respondent in accordance with either the 28 March Order or 3 July Order.

Breach 2: alleged breach of para. 14 of the 28 March Order

The Claimants allege that CNG did not inform the Claimants' legal representatives of all assets within its control located worldwide with a value in excess of $100,000, whether

in their own names or not, and whether solely or jointly owned, providing the value, location, and details of all such assets.

Breach 3: alleged breach of para. 16 of the 28 March Order

The Claimants allege that CNG failed to inform the Claimants' legal representatives of the details of the terms and conditions on which various funds were transferred to the bank accounts as set out in Schedule C to the Order.

Breach 4: alleged breach of para. 17 of the 28 March Order

The Claimants allege that CNG failed to procure one of its directors to swear and serve on the Claimants' legal representatives an affidavit setting out the information specified in the Order.

(2) **As against Soremi SA**:

Breach 1: alleged breach of para. 11 of the 28 March Order

The Claimants allege that Soremi SA did not make any effort to take all necessary steps to repatriate the SIL funds to the Second Respondent in accordance with either the 28 March Order or 3 July Order

Breach 2: alleged breach of para. 14 of the 28 March Order

The Claimants allege that Soremi SA did not inform the Claimants' legal representatives of all assets within its control located worldwide with a value in excess of $100,000, whether in their own names or not, and whether solely or jointly owned, providing the value, location, and details of all such assets.

Breach 3: alleged breach of para. 16 of the 28 March Order

The Claimants allege that Soremi SA failed to inform the Claimants' legal representatives of the details of the terms and conditions on which various funds were transferred to the bank accounts as set out in Schedule C to the Order.

Breach 4: alleged breach of para. 17 of the 28 March Order

The Claimants allege that Soremi SA failed to procure one of its directors to swear and serve on the Claimants' legal representatives an affidavit setting out the information specified in the Order.

(3) As against Mr Cheng:

Breach 1: alleged breach of para. 29 of the 28 March Order

The Claimants allege that Mr Cheng knowingly assisted in or permitted a breach of the Order by participating in the decision of Soremi SA to seek the First and Second Congolese Injunctions.

[48] The Respondents do not challenge that they have been properly served with the Contempt Application and supporting documents. Service, therefore, is not in issue between the parties.

SUMMARY OF THE STATUTORY AND OTHER LEGAL PROVISIONS GOVERNING CONTEMPT APPLICATIONS

[49] The main provisions governing contempt applications in the BVI are to be found in the **Contempt of Court Act 1898** (the "1898 Act") and under the common law jurisdiction, based on the common law jurisdiction in England and Wales, to punish those who breach court orders in a summary manner. It is contended on behalf of the Respondents that the reliance on "**Part 26.1(2)(w), Part 26.1(3), Part 26.1(4)(d), and Part 26.4(1)-(6) of the EC CPR 2000**" in the Contempt Application is incorrect and that **Part 53 of the ECSC CPR**, which deals with committal to prison and sequestration of assets for failure to comply with an order of the Court, are not relevant because

the Claimants do not seek these remedies, which is why the Claimants have not referred to it the contempt documentation.

[50] I do not accept what the Respondents say. But, even if they are correct, that point seems to me to be entirely irrelevant in the context of this case.

[51] Contempt applications brought in the civil courts are of a special nature. They are criminal proceedings in all but name. There are several principles that govern such applications, which are of crucial importance. They come from several cases which have been referred to by the parties' representatives. There is no need to set out those cases, but the principles that can be derived from those and other cases on the subject may be summarised as follows. Many of these principles are specifically set out in the **ECSC CPR Part 53**. In the context of contempt proceedings in England and Wales, most of these principles are specifically set out in **E&W CPR Part 81** and the practice direction supplementing it. The summary is not exhaustive:

(A) Every contempt application must be supported by written evidence given by affidavit or affirmation: **ECSC CPR 53.7(2)**.

(B) A contempt application must include statements of all the following:

(1) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court): **ECSC CPR 53.2(4) and 53.3**;

(2) the date and terms of any order allegedly breached or disobeyed: **ECSC CPR 53.7**;

(3) confirmation that any such order was served in accordance with **ECSC CPR 53.3 and 53.4**, and the date it was served, unless the court dispensed with or the parties agreed to dispense with personal service: **ECSC CPR 53.3, 53.4, and 53.5;**

(4) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service: **ECSC CPR 53.2(4) and 53.3;**

(5) confirmation that any order allegedly breached or disobeyed included a penal notice: **ECSC CPR 53.3**;

(6) if the order requires the defendant to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date: **ECSC CPR 53.3(c);**

(7) (if applicable) the date and terms of any undertaking allegedly breached: **ECSC CPR 53.7**; and

(8) the exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor; and the precise term or terms of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken: **ECSC CPR 53.7(1)**.

(C) It is trite law that a person against whom a contempt application is brought:

(1) must understand its terms and the consequences of failure to comply with it;

(2) has the right to be legally represented in the contempt proceedings;

(3) is entitled to a reasonable opportunity to obtain legal representation. In England and Wales, the defendant also has the right[2] to obtain legal aid, which may be available without any means test;

(4) is entitled to the services of an interpreter;

(5) is entitled to a reasonable time to prepare for the hearing; and

[2] This right reflects the provisions of **art. 6(2) of the ECHR**.

(6) is entitled to know his fate (i.e., whether the allegations have been proved or dismissed) as soon as the court determines the contempt application.

[52] The **ECHR** applies to a contempt application. Specifically, a defendant will have the benefit of the rights specified in both **art. 6** and, if appropriate, **art. 8** of **the Convention**.

[53] In the context of the above safeguards that exist in favour of a defendant to a contempt application, it is vital to set out what some of these safeguards entail.

[54] First, it is for the Claimants to establish that the ingredients of each of the charges brought against the Respondents are made out. In other words, the burden of proving the allegations is upon the Claimants. A respondent to a contempt application does not have to prove his innocence.

[55] Second, the standard of proof is the criminal standard of proof. That means that the Claimants must prove, so I am sure beyond a reasonable doubt, that the charges against the Respondents are made out. Nothing less than that will do.

[56] Although the primary burden of proving a fact will invariably lie with the party asserting that fact, i.e., the Claimants in the present case, there may be situations where the onus of proving certain facts and matters on which reliance is placed by a defendant would lie upon him. As the authors of **Halsbury's Laws of England** state[3]:

> "The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts … Where there is a rebuttable presumption of law in favour of one party, the burden of rebutting it lies upon the other. Therefore, a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are

[3] **See Halsbury's Laws of England, 5th Edition, Reissue, Civil Procedure, Volume 12, 2020, paras 699 and 700.**

> presumptions to this effect in his favour. Similarly, a presumption of death may assist a party. In negligence claims, a claimant may be able to rely upon the doctrine of *res ipsa loquitur* to introduce a presumption of fact, or in claims where it is relevant to any issue that a person did or did not commit a criminal offence, previous convictions may be pleaded. Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter, but there is no general rule of law to this effect. There is authority contrary to this exception, but it certainly exists and has frequently been applied by the courts. This is particularly the case in magistrates' courts and in criminal proceedings based on statute, and in some employers' liability situations. In civil cases, the incidence of the burden of proof may be determined by agreement between the parties, so far as not prohibited by statute."

Where the evidential burden passes to the Respondents, the standard of proof required to prove those matters will be the usual civil standard of proof – the balance of probabilities. However, for the reasons that are referred to below, my factual findings are not based on the niceties of where the burden of proof lies. I am clear that wherever the burden lies, the evidence supporting the findings that I have made is clear to the standard of proof that I need to apply.

[57] Third, the Respondents have decided not to give oral evidence. That is their absolute right. There is no basis upon which any adverse inference can be made as a result of that failure. The burden remains on the Claimants to prove their case against them.

[58] Fourth, while, of course, it is the absolute right of a respondent to a contempt application not to give oral evidence, it is perfectly permissible for a court to come to common sense conclusions based on the evidence that has been adduced by the parties in deciding whether the allegations against the respondent are made out. But it is necessary to sound a word of caution in this context: the court must not jump to conclusions on the material before it, i.e., indulge in speculation about what evidence there might be.

[59] Fifth, the Claimants will be confined to the evidence and material included in the contempt application and the written evidence in support of it.

[60] Sixth, the Respondents have the full benefit of the privilege against self-incrimination, which is quite independent of their right to remain silent and may be of particular importance where a suspended committal order is made: see, for example, **Phillips v Symes [2003] EWCA Civ 1769**.

[61] Finally, it is not necessary for the Court to decide every point that the Respondents have advanced to determine the outcome of the Contempt Application. It need only decide such matters as are necessary to determine whether the allegations against the Respondents are made out. It follows that although the Respondents have raised every conceivable point to support their opposition to the Contempt Application, it is only necessary for me to decide those matters that are necessary to determine whether the contempt is proved.

ANALYSIS AND DISCUSSION

Contempt Application against CNG

[62] The charges "laid" against CNG have been summarised above.

[63] The Contempt Application against CNG is opposed on the following grounds:

(1) The Contempt Application was defective because it lacked the clarity and particularity required by law.

(2) The amendments made to the Contempt Application are not effective because the Claimants did not obtain the consent of the Respondents or the Court to make those amendments.

(3) The application leading to the grant of the Order was unfair. Among other things, it is said that the Court did not have the benefit of hearing CNG. If it had, the Order would not have been granted *ex parte* or, if it had been granted *ex parte*, would have been discharged at the earliest possible opportunity.

(4) As far as the Freezing Injunction was concerned, the sole focus of the Claimants' application for the injunction was the assets alleged to belong to SIL. No reference at all was made to the assets of CNG, and no evidence at all (let alone solid evidence) was adduced of any risk that CNG might dissipate its assets.

(5) On the basis that a disclosure order is made to police a freezing order, if the Freezing Injunction ought not to have been granted, then neither should the Disclosure Order. Further, and in any event, since the Freezing Injunction was limited to USD 200 million, the Disclosure Order ought also to have been subject to that limit.

(6) The Mandatory Injunction was impossible to comply with.

(7) The Claimants obtained the injunction by making a number of misleading statements, which constituted a serious breach of their duty of full and frank disclosure.

(8) The Mandatory Injunction was ambiguous as it was not clear what acts CNG was required to undertake in order to comply with it.

(9) As originally granted, the Mandatory Injunction only gave CNG one working day to procure that Soremi SA (a Congolese subsidiary of its BVI subsidiary) transfer funds into bank accounts in the name of SIL in France.

(10) CNG was caught between the conflicting orders of this Court and the Congolese Courts. The Mandatory Injunction related to cash assets held by Soremi SA, which is a Congolese company and subject to the jurisdiction of the Congolese Courts. Any action taken by CNG to procure that Soremi SA complied with the Mandatory Injunction would constitute a breach of the orders of the Congolese Courts.

(11) The conduct of CNG cannot properly be categorised as contempt.

(12) The Contempt Application is fatally flawed because it constitutes a breach of both art. 6 of the European Convention on Human Rights ("ECHR") and the common law principle of natural justice that everyone has the right to a fair trial (*audi alteram partem*). The breach arises because CNG has never been permitted to address the Court on the merits of the Injunction. Specifically, it is claimed that on at least two occasions, the Court has refused to allow counsel for CNG to address it on the merits of the Order or to seek a stay.

(13) The Contempt Application lacks utility and is sought for a collateral purpose rather than to enforce the Court's orders.

[64] There is a substantial degree of overlap in the above arguments relied upon by CNG in resisting the Contempt Application. In addition, several of the matters relied upon by the Respondents in opposing the application are matters for the Discharge Application. I deal with those matters in my judgment on that application. So far as those matters are relevant to the Contempt Application, I make this simple comment about them: as set out in more detail in the Discharge Judgment, they are not just lacking in substance on the facts but are entirely misconceived in law.

[65] I will deal with each of the grounds of opposition in turn.

Is the Contempt Application defective?

[66] Mr Adair, on behalf of the Defendants, refers to the provisions of **s. 4(2) of the 1898 Act**, which state:

> "All contempts of Court other than those committed in the presence and hearing of the Court when sitting shall be dealt with and determined only by means of a rule of the Court which may be applied for by any person whomsoever calling upon the defendant to show cause why he should not be attached for contempt of Court.
>
> Such rule of Court shall contain with certainty the words or acts alleged to constitute the contempt of Court, and shall be served at least seven clear days before the return day thereof, except in the case of a contempt of Court by spoken or written comment on legal proceedings then pending, in which case the rule of Court shall be made returnable without delay."

[67] He then refers **ECSC CPR 53.7(1)**, which, he contends, reflects **s. 4(2)**:

> "The application [i.e., the Contempt Application] must specify the -
>
> (a) exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor; and
>
> (b) precise term of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken."

[68] Mr Adair contends that the notice of application by itself must set out the nature of each alleged breach or breaches and the precise terms of the order which the defendant is alleged to have breached. In other words, even if there is sufficient material which sets out the case of the claimant in the clearest possible terms in any supporting documentation, such as the written evidence in support, and provides all the information and evidence to enable the defendant to know the exact case he has to meet, the notice is defective if it does not set out a proper summary of the nature of each alleged breach or breaches and the precise terms of the order which the defendant is alleged to have breached. In such circumstances, he contends that the Contempt Application has to be dismissed.

[69] Mr Adair refers to various authorities to support this principle. They include **Harmsworth v Harmsworth [1987] 1 WLR 1676** and **Olu-Williams v Olu-Williams [2018] EWHC 2464 (Fam)**. Those authorities and many others on the subject do little more than confirm the principle set out in **Gee on Commercial Injunctions, 7th Edition, Steven Gee KC, 2020 ("Gee"), at para. 20-12** (disregarding the footnotes in that paragraph), on the importance of a defendant knowing the precise case he has to meet on an application alleging his contempt:

> "The application notice must clearly state in full the grounds of the application, specify with particulars each alleged act of contempt and its date, stating precisely in numbered paragraphs, separately for each act of contempt, what the alleged contemnor is said to have done, and the date of each act of contempt[4]:
>
> > "...It is obvious and clearly established that an application notice for committal must be particularised in clear terms sufficient to provide the respondent with full and reasonable notice of the conduct alleged to constitute contempt."
>
> The same is the case in family proceedings under **FPR 2010 r.37.10(1) and (3)**. Unless the court otherwise orders, on a committal application the applicant is confined to those grounds."

[70] I accept Mr Adair's submission that the application must contain a sufficient summary of how a defendant is alleged to have failed to comply with the order. However, the authorities also make it clear that the level of information that has to be given in the application need only condescend to such detail as is sufficient to enable the defendant to know the case that he has to meet. As **Males J** (as he then was) observed in **City of Westminster v Addbins Ltd & Ors [2012] EWHC 3716 (QB), at [43]**:

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[4] Referring to **Group Seven Ltd v. Allied Investment Corp Ltd [2013] EWHC 1509 (Ch)**, **at [38]**, citing **Harmsworth v. Harmsworth [1987] 1 W.L.R. 1676**.

> "…the application notice must contain sufficient detail of what is alleged to enable the alleged contemnor to meet the case against him, but that requirement must be applied sensibly and the level of detail required to be included in order to satisfy this test will depend on the circumstances of the particular case, including the nature of the acts or omissions alleged."

[71] In **City of Westminster**, the third defendant, G, was a director of both the first and second defendant companies, which had provided and installed approximately 3000 cigarette bins within the City of Westminster. The bins displayed advertising for the second defendant, which had been illegally installed in breach of s. 224 of the E&W Town and Country Planning Act 1990. The defendants declined to remove the bins, and the Claimant obtained an injunction requiring the companies to remove all of the bins within 14 days. The companies failed to do so. The Claimant accordingly applied to commit the companies and G, as director of the companies, for contempt of court. The court had to decide whether, *inter alia*, the committal application was too vague and general.

[72] The court found the contempt proved, rejecting all the arguments advanced by G. So far the allegation of the vagueness of the contempt application was concerned, the court ruled that while it was established law that the application notice to commit for contempt of court had to contain sufficient detail of what was alleged to enable the allege contemnor to meet the case against him, that requirement had to be applied sensibly and the level of detail required to be included would depend on the circumstances of the particular case, including the nature of the acts of omissions alleged. On the facts, there was no doubt that the application notice had given the defendants enough information to meet the charge against them. In addition, by the date of the application notice, the defendants had already admitted their extensive failure to comply with the injunction. Furthermore, the defendants had recognised that the removal of the bins would be a substantial task, but not a single bin was removed before the injunction application was actually made. Although G gave instructions for the bins to be removed, he made no serious attempt to ensure compliance with the court's order. At all material times, G had known that the injunction would not be complied with and that there would not even be substantial compliance, but he had done nothing to speed things up. There was no doubt that very much more could and should have been done to ensure compliance with the injunction than had, in fact, been done.

[73] **Males J** said, at [**57**] and [**59**]:

"[57] I accept in the light of the authorities referred to … that particulars of the allegation must be found in the application notice itself and that … the contents of [the affidavit in support] cannot be resorted to if they are not contained in the notice. However, the notice, including the continuation sheet, must be read sensibly and as a whole in the light of the background as it was known to the parties. Reading it in this way the question is whether the notice gave the Defendants enough information to meet the charge against them or, in other words, whether it was sufficiently clear to tell them what Westminster was complaining that they had done or failed to do. I have no doubt that it was.

[58] It is clear from the application notice and continuation sheet read as a whole that the particulars relied on by Westminster relate to the streets specified in paras 7(2) and 7(3) of the continuation sheet. Paragraph 7(1) refers to inspections held on 11 and 12 July 2012 during which it was found that a large number of cigarette bins had not been removed, and paras 7(2) and 7(3) identify the streets where those inspections had taken place. So the application notice identified the streets of which complaint was made. It was in my judgment unnecessary for the application notice to identify the particular addresses on the streets where it was said that bins containing unauthorised advertisements remained. The Defendants would know, or could reasonably be expected to know, where they had erected cigarette bins on those streets and whether they had taken steps to remove them …

[59] In any event this whole argument is extremely artificial. By the date of the application notice the Defendants' solicitors' letter dated 12 July 2012 had already admitted their extensive failure to comply with the order (see 25 above). The issue of substance would be whether they had a valid reason for non-compliance so as to avoid a finding of contempt, a point on which Mr Trompeter accepted that they would bear an evidential burden, albeit that the ultimate legal burden would remain on Westminster to prove its case. In such circumstances, to hold that the application notice was defective because it failed to identify with sufficient precision the precise location of the many hundreds of advertisements which the Defendants admitted that they had failed to remove would indeed be, to borrow **Woolf LJ's** words in **Harmsworth**, 'to produce a result which unnecessarily makes a mockery of justice'."

[60] In relation to [G], I consider below the factual position as to his involvement and responsibility for the failure to comply with the order. So far as the application notice is concerned, however, I consider that sufficient details were given to enable him to know the case he had to meet. It was sufficiently clear from the application notice, considered against the background of [G's] extensive personal involvement in this long running dispute, that Westminster's case was that [G] as a director of both companies was personally responsible for ensuring compliance with the order and that he had deliberately or recklessly failed to do so. In circumstances where non-compliance with the order had been admitted there could be no doubt that [G] would need to explain how and why that non-compliance had come about, and why it did not amount to a contempt. As I have already said, Mr Trompeter [counsel for the Defendants] accepted that the Defendants (and therefore, by implication, [G] also, subject to the question of dispensing with service of the order upon him) would have an evidential burden

> to explain the failure to comply. I have no doubt that [G] and those advising him fully understood this necessity, and that was in fact the case which he came prepared to meet. Once again, that case did not depend upon identifying the precise location of particular advertisements. Nor could Westminster reasonably be expected to give details of precisely what [G] had done or failed to do to ensure compliance. Those were matters entirely within the Defendants' and [G's] knowledge."

[74] More than one judge has said that the allegations specified in a committal application and the requirement that a claimant identify the matters alleged to constitute a contempt should not lead to the technicalities associated with criminal charges. What matters is that a defendant should know the substance of the allegations he has to meet (which must be set out in the application) and he should have a proper opportunity of dealing with them in the course of the proceedings: see **Harmsworth** at **1686**, per **Woolf LJ**; and **Westminster**, at **[58], per Males J.**

[75] Mr Adair states that there are various defects in the Application Notice.

[76] First, he states that the while para. 9 of the Amended Notice of Application states that CNG has "purported" to provide disclosure of all its assets by means of a letter dated 23rd April 2024, that letter was not "properly compliant" with the terms of the freezing provision of the Order.

[77] There is no substance in this point. The requirement in **ECSC CPR 53.7(1)** is clear. The claimant is only required to specify "the exact nature of the alleged breach" and the "precise term of the order" alleged to be breached. The Application did both this perfectly adequately.

[78] In para. 1 of the relief sought in the Application, the Claimants set out, in terms, which particular parts of the order were breached. They then went on to state what those breaches were, at para. 9: "By letters of 23 April 2024 the First and Second Respondents purported to comply with the terms of the 28 March Order insofar as related to the disclosure of their assets. Neither correspondence was properly compliant with the 28 March Order." (Emphasis supplied). By reference to the words emphasised, the Application could not have spelt out what was required more clearly.

[79] I am not sure what more the Claimant could have said.

[80] It is not the case that the Defendants did not understand what was required. The 23 April 2024 letter had not suggested that the Defendants did not understand the meaning of the terms of the

Order. The relevant terms of that letter simply said that "CNG's main portfolio includes", and that its assets "primarily consists of shares in various companies" – which were then listed. The disclosure obligation in the 28 March Order was to disclose all assets worldwide (by way of an affidavit) with a value of over USD 100,000. What the Defendants did was to decide for themselves what information they would give, even though they knew full well, by the reference to the Application, what they needed to do. In the case of CNG, even the very limited information its lawyers provided by letter dated 23 April 2024 was not verified by an affidavit, which the Order made clear it had to be.

[81] Nor, frankly, is there any substance in the assertion by CNG that para. 11 of the Application is defective.

[82] Paragraph 11 is in the following terms:

> "Moreover, and more egregiously, no Respondent has made <u>any efforts</u> <u>to comply with the order to repatriate the funds</u> to the Second Respondent in accordance with either the 28 March Order or the 3 July Order."
>
> (Emphasis supplied).

[83] The difficulty with the argument that Mr Adair raises is the words emphasised above. They make it clear that what the Defendants were required to do was to make efforts to comply with the terms of the Order. Taken together with what para. 1 of the Application said about the terms of the Order[5], it was as plain as a pikestaff that what the Claimants were saying was that the Defendants had failed to take steps to comply with their obligations as set out in the Order.

[84] Mr Adair's contention that neither order makes it an obligation on the part of CNG to repatriate the relevant funds to the Second Respondent is, of course, correct. However, I can see nothing in the Application that states that CNG must do this. The plain words of the Application are clear and leave no room for doubt about what CNG is required to do. Even if one strains the construction of the words in the words that Mr Adair seeks to do, I cannot see that it supports the construction that he seeks to give to those words.

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[5] Paragraph 1 stated: "The Respondents are in contempt of court in that they have breached paragraph 11 to 13 and 14 and 17 of the Order of this Court dated 28 March 2023 as continued on 9 April 2024 (28 March Order) and as varied by the Order of this Court dated 3 July 2024 (3 July Order)."

[85] I am unable, therefore, to accept that the Notice of Application did not contain all the information complying with **ECSC CPR 53.7(1)** or that it did not provide the Defendants with sufficient information to know the exact case that they had to meet.

[86] But even disregarding the above, there is simply no case for the Defendants to succeed on any of the technical objections that Mr Adair advances.

[87] Even in the context of the procedural provisions governing contempt applications in England and Wales, which are stricter than those that apply in this territory, it is provided that in committal applications, orders for committal and writs of sequestration the court "may 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": see **E&W CPR 81.28-81.32** and **paras. 8.1-16.3 of the PD** supplementing it. The equivalent of this provision in the BVI is **ECSC CPR 26.9,** which confers on the Court a wide power to put matters right and, in an appropriate case, to do so, without requiring any remedial action to be taken. If, therefore, Mr Adair is correct about the alleged technical defect in the Application invalidating the Contempt Application (which, in my judgment, he is not), for my part, I would waive that defect, and do so. The written evidence in support provides all the information (and very substantially more) for the Defendants to know the exact case they have to meet and for this Court to come to the sure conclusion that the absence of it has made no difference to the fairness of the proceedings.

[88] In this context, it is worth setting out what **Marcus Smith J** had to say about this in **Ocado Group Plc v McKeeve [2020] EWHC 1463 (Ch)**, at **[22]-[25]** in full:

> "It would, of course, be wrong to allow technicalities to obstruct the due process of justice. Technical rules exist for the protection of the respondent: but they should not be allowed to be abused. That is the clear signal sent by Hildyard J in **Group Seven Ltd v. Allied Investment Corporation Ltd [2013] EWHC 1509 (Ch)**. In that case, **Hildyard J** articulated the general rule as follows, at [38]: 'It is obvious and clearly established that an application notice for committal must be particularised in clear terms sufficient to provide the respondent with full and reasonable notice of the conduct alleged to constitute contempt: see **Harmsworth v. Harmsworth, [1987] 1 WLR 1676**. I accept that that is so whether the contempt alleged is civil or criminal in nature, not least since both seek imprisonment as the ultimate sanction.
>
> However, where the conduct alleged to constitute contempt is clear beyond per peradventure – and specifically, is clear to the respondent – the respondent will not be permitted to evade the consequences of his or her conduct by relying on a technicality: **[at 45]**: 'On balance I have concluded that, though the application notice did not

adumbrate as clearly and comprehensively as it should have all the grounds relied upon by the claimant in support of its case that any dealing with the debt was, for the purposes of the freezing order, a dealing with one of Mr Sultana's assets, Mr Sultana and his advisers were aware of the allegations and arguments that they had to meet. I would not in such circumstances consider that the argument should be ruled impermissible. But in reaching that conclusion I emphasise in this context also that I consider the case to be exceptional: my conclusion is not to be taken as any dilution for the future of the rule that a committal application must give clear and fair notice of the breach alleged and the basis of the allegation; and ordinarily any defect cannot be cured by reference to the supporting affidavit, still less a subsequent skeleton argument'."

"**Woolf LJ** made the same point in **Harmsworth v. Harmsworth [at 1686]**: 'What I would emphasise is that in proceedings for contempt the court should always have in mind the fact that the liberty of the subject is involved. However, it should not allow that fact to produce a result which unnecessarily makes a mockery of justice'."

"If an applicant seeking the commital of a respondent falls short in terms of providing the respondent, in the application, with full and reasonable notice of the conduct alleged to constitute contempt, the application will be at risk. It may, of course, be that matters are so obvious that a deficiency in the application can be overlooked or remedied. But the risk of an application failing for lack of specificity is one that all applicants should strive to avoid."

(Emphasis supplied).

[89] There can, in my judgment, in these circumstances, be no clearer case of a mockery being made of justice if the alleged technical points purportedly identified by Mr Adair were allowed to succeed. Even if the Application was defective, which I do not accept, the case of the Claimants was fully spelt out, and supported by compelling evidence, in the written evidence served in support of the Application. In addition, CNG had the benefit of having instructed a well-known firm of lawyers in this jurisdiction, which had attempted to give information "of sorts" to the Claimant in their letter dated 23 April 2024. They must have known full well what was required and must also have known that the information they had provided on behalf of CNG was substantially short of what was required by the terms of the Order. In addition, Mr Lu Shudong, a director of CNG, accepts, in his affidavit filed with the Court on 9 August 2024, that CNG only complied "substantially" with the terms of the Order, or where it failed to comply with the terms at all, it was because it was impossible for it to do so. There is no clear suggestion in that affidavit that the terms of the Order were unclear and, if so, why they were unclear. It is difficult, therefore, to understand how any part of the Contempt Application could, in any way, have been unfair to CNG.

Is permission required to amend the Application?

[90] Mr Adair also raised, it appears for the first time at the Omnibus Hearing, that the Claimants could not rely on the amended Contempt Application because the Claimants had neither obtained the permission of this Court to amend the application, nor had the Defendants' agreement to do so.

[91] That argument is a thoroughly bad one.

[92] **ECSC CPR 11.13(1)** states that an applicant may amend an application once, without the permission of the court, not less than 7 days before the date fixed for hearing. However, any amendment to an application made within 7 days of the date fixed for the hearing of the application must be made with the permission of the court: **ECSC CPR 11.13(2)**.

[93] If **ECSC CPR 11.13** applies to these proceedings, permission to amend was not required because the amendments to the Contempt Application were made a substantial time prior to the Omnibus Hearing.

[94] I was informed that **ECSC CPR 11.13** came into effect in July 2023. Before it came into effect, the **ECSC CPR** were silent about whether permission was needed to amend an application. It seems to me to be clear that even if the Contempt Application was governed by the rules that applied before **ECSC CPR 11.13** came into effect, there was no requirement to obtain permission to amend an application. The most likely reason why **ECSC CPR 11.13** was implemented must have been to prevent amendments being made to an application at the eleventh hour, often necessitating an adjournment of the application because the respondent to the application would be faced with an amended application without having had an opportunity to meet the revised case that was being put against him.

[95] The pre-July 2023 position mirrors the position that currently applies under the **E&W CPR**. There is no provision in the **E&W CPR** that deals with whether permission to amend an application notice issued under the **E&W CPR Part 23** is required.

[96] In my judgment, permission to amend is not required under the **E&W CPR** and, on that basis, permission to amend was not required under the **ECSC CPR** before July 2023. I have mentioned one reason for that above. But there are others.

[97] The **E&W CPR** specify several instances of when permission to amend will be required. They relate largely to originating processes and pleadings. The absence of a specific provision in the **E&W CPR** requiring permission to amend an application must, in my judgment, mean that permission to amend an application is not required. The same must, therefore, apply to the pre-July 2023 regime governing the grant of permission to amend an application, broadly in line with the statutory principle of construction known as the "Expressio unius" principle, i.e., expressing one thing excludes another. As the authors of **Bennion Bailey and Norbury on Statutory Interpretation**, **8th Edn**, **2020**, **Eds Bailey and Norbury**, explain at para. **[23.12]** (disregarding the footnotes in that paragraph)

> "Expressio unius principle – expressing one thing excludes another
>
> (1) Where an Act mentions one or more things, by implication it excludes other things of the same kind.
>
> (2) This principle is often expressed in the latin maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), or for short, the *expressio unius* principle.
>
> (3) It applies in particular where a general formula is accompanied by words of extension or exception naming only some members of that class. The remaining members of the class are taken to be excluded from these words.
>
> (4) There is no room for the application of this principle where some reason other than the intention to exclude certain things exists for mentioning some but not others."

[98] Counsel were unable to refer me to any English and Welsh authorities in which this point had been considered. I have managed to find three. These authorities have largely been decided on the basis that the position about whether permission to amend an application notice under the **E&W CPR Part 23** is uncertain, but that if permission is required, a court can grant that permission either in furtherance of the "overriding objective" or pursuant to its inherent jurisdiction: see **Agents Mutual Ltd v Moginnie James Ltd [2016] EWHC 3384 (Ch)**; **Naibu Global International Plc v Daniel Stewart Company Plc [2020] EWHC 2719 (Ch**); and **Cavadore Ltd and another v Jawa and another [2021] EWHC 3382 (Ch)**. So far as those

cases suggest definitively that permission is required, I consider that they have been wrongly decided and refuse to follow them.

[99] Further, and in any event, if I am wrong about all of this, I would have been prepared to exercise my power to grant permission to amend the Contempt Application at the Omnibus Hearing had that application been made to me by the Claimants. Even though no such application was made, I would have been willing to exercise my power to waive the defect under **ECSC CPR 26.9** for all the reasons referred to above and, so far as is necessary, do so now. The Defendants have known for months what the Claimants' case against them is, and to suggest that the Contempt Application cannot proceed against them because permission to amend it has not been obtained is not only wrong but is a clear attempt to obstruct the due process of justice.

Declaration of breach?

[100] The next point that Mr Adair makes is that neither the **1898 Act nor Part 53 of the ECSC CPR** provides for the Court to grant declarations regarding a party being in contempt of court. He states that the remedies provided by **Part 53** (committal and sequestration) are not sought by the Claimants and, therefore, there is no utility in granting the Claimants the relief they seek.

[101] Mr Adair cites **Bank St. Petersburg v Arkhangelsky [2014] EWHC 574 (Ch),** by way of example, to support what he says. In that case, **Hildyard J** had to decide whether he should grant a declaration of breach. He observed:

> "12. … the making of a declaration is always discretionary, and when considering whether to grant a declaration or not, the Court takes into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant such relief: see **Nokia Corp v InterDigital Technology Corp [2006] EWCA Civ 1618**.
>
> 13 In this case, I can see no real utility in making a declaration, even if the alleged breaches could be established; and I can see possible injustice to the Defendants if there is any possibility (as I am concerned there would be) of the grant of such a declaration being treated as if it were a finding of contempt. It was and remains open to the Claimants to establish contempt and seek committal: I see no reason for or utility in the half-way house they propose. To that extent, the Claimants' application fails and must be dismissed."

[102] Mr Adair is right to point out that **Bank St Petersberg** is not comparable with the present case because that case involved the court having to decide whether a declaration of breach should be made, whereas this case involves whether a declaration of contempt should be made. The contention by CNG that the declaration should not be granted because it would not have any utility seems to me to be little more than a bare assertion.

[103] It has long been the law that where a declaration is appropriate, it should be granted. This has been established by a wealth of authority. I need only refer to the case that I mentioned in the course of my exchanges with counsel – **Rolls-Royce plc v Unite The Union [2009] EWCA Civ 387, [2010] 1 WLR 318** – about how wide the power of the court is to grant declaratory relief. Declaratory relief may, therefore, even be granted in a case such as **Bank St Petersburg**, though, on the facts, **Hildyard J** was right not to grant it because it would have served no useful purpose in that case. Indeed, declaratory relief may even be possible where a person seeks a determination that he is not guilty of a criminal charge that may be brought against him, though, as was said by **Viscount Dilhorne** in **Imperial Tobacco Ltd v Attorney-General [1981] AC 718 at 742**, "it would [have to] be a very exceptional case in which it would be right to do so."

[104] I can well understand why a declaration of breach may serve no useful purpose in this case. But I fail to see how a declaration that a party is in contempt would serve no useful purpose. In essence, what the Claimants are asking for is a declaration of contempt, based on which they can ask the Court to exercise its power to punish the Respondents for that breach. There is nothing wrong with that. Arguably, the declaration could have a wider reach than just the parties in these proceedings, and the findings made by me less likely to be challengeable in future proceedings. However, I have not considered this aspect in any detail.

Collateral purpose

[105] Mr Adair relies on the following passage (disregarding the footnotes in that paragraph) from **Gee**, at **20-103**, to support his contention that the Contempt Application is abusive because it was made for a collateral purpose:

> "If the committal application is not in the public interest, the circumstances may permit striking out under … The applicant is in the position of a prosecutor conducting proceedings neutrally and dispassionately in the public interest and must act with scrupulous fairness and without seeking to further private interests or aims.82 The case is not like a private prosecution. If proceedings are pursued unfairly, the court should

> strike them out. If they are pursued otherwise than for 'legitimate aims', the court should be 'astute to detect' this and ready put an end to them by striking them out. Legitimate aims are to bring to the court's attention a clear, serious, contumacious contempt so that the court can enforce its order and deter future contempts. Contempt proceedings must not be used for a collateral purpose, for example, to harass or vex a person or out of revenge or vindictively, or for an improper subjective motive, or as a lever to obtain a settlement or personal financial gain. If there is a real and substantial improper motive the court can strike out the proceedings. If contempt proceedings are brought for an improper purpose they will be struck out as abusive."

[106] The subsequent paragraphs in **Gee** set out examples of when a court may be driven to such a conclusion: see, by way of examples, **Knox D'Arcy Ltd v Jamieson, Court of Appeal (Civ Div) Transcript No.1759 of 1995 (19 December 1995)** in which attempts to obtain a favourable settlement by way of threats were found to be an abuse. This may be contrasted with **Integral Petroleum v Petrogat FZE [2020] EWHC 558 (Comm)** in which no abuse was detected because the conduct complained of did not go beyond that which was permissible in attempting to settle hard-fought commercial litigation.

[107] Mr Adair states that the purpose of the Contempt Application was "the obtaining of a debarring order to prevent CNG being heard by the Court in relation to the Freezing Injunction, the appointment of Interim Receivers and, most importantly, the rectification of SIL's register of members. It is highly material that the Claimants' Rectification Application seeks the rectification of the Register of Members of SIL, without providing for the payment to CNG of the price of those shares (USD 86.32 million). Had a debarring order been made against CNG on the Contempt Application, it would not have been able to point out to the Court this defect in the Rectification Application."

[108] This, too, is a bare statement unsupported by any evidence. For reasons which I explore in the Rectification Judgment, I do not accept any of the points made by Mr Adair at paras. 46 to 48 of his skeleton argument. The Claimants were perfectly within their rights to consider all the options available to them to enforce the Order. There is no requirement that they should have restricted their rights to enforce the Order by pursuing only one type of remedy. So far as it is suggested by the Defendants that they are not able to comply with the terms of the Order because of the Congolese injunction, that is down solely to their own deliberate acts or omissions. As pointed out later in this judgment, what they have done is to deliberately "cock a snook" at the processes of this Court by obtaining an injunction against themselves and then complaining that they cannot comply with the terms of the orders because they are prevented from doing so by that injunction.

There are only a few cases I have come across where this type of scandalous and deliberate conduct, designed to abuse the process of this Court, has been so blatant.

[109] Mr Adair also states that throughout 2024, the Claimants were insistent that the Contempt Application should be heard in priority to the other applications, including CNG's application to discharge the Freezing Injunction and their own Rectification Application. He maintains that it is relevant in this regard that the Claimants took two months to file their Rectification Application, following the dismissal of CNG's application to set aside the Court's recognition of the arbitral awards on 15 April 2024. Although the Claimants now assert that their priority is the Rectification Application, this was clearly not the case during 2024, when obtaining a debarring order was the Claimants' clear priority.

[110] Like most of the rest of the Defendants' allegations, this assertion is based on pure speculation. Whatever reason may have been given by the Claimants about which application should be heard, it was this Court that decided that the Contempt Application needed to be dealt with first[6]. It is also difficult to see how this assertion can be correct in any event, given the complaints that the Defendants make about the number of times the Claimants sought to have the Rectification heard by the certificates of urgency they filed with the Court. While not agreeing with the continued use of certificates of urgency by the Claimants where there is no good reason to do so, I do not see this as an attempt to have the Contempt Application decided before any other application. It must also be noted that on 2 October 2024, the Contempt Application had to be adjourned because a day or so before it was due to be heard with one or other applications, there was an application to recuse **Wallbank J** from dealing with those applications. Whether or not the recusal application was justified is not for me to comment on because the application is due for determination by the Court of Appeal. However, no part of that delay can be laid at the door of the Claimants. The Claimants were, in my judgment, legitimately entitled to pursue those applications that they believed needed to be determined before those which could, temporarily, take a backstage.

[6] That is because any finding of a contempt would affect the rights and liberties of a person (including a corporate body) and should not hang over that person for any longer than is absolutely necessary, as this could amount to an infringement of their Convention rights. That was why I decided that the Contempt Application had to be heard first, and then the Discharge Application next, because the latter application also potentially involved the interference with a person's Convention Rights.

[111] There is absolutely no basis, therefore, for me to infer bad faith on the part of the Claimants, as is suggested on behalf of CNG at paras. 46-48 of Mr Adair's skeleton argument that I should do. Even taking CNG's case at its highest, it is based on pure speculation.

Article 6 of the ECHR

[112] As already stated above, I accept that the ECHR applies in the BVI. I also accept that despite the Contempt Application being brought in civil proceedings, the "criminal" provisions specified in **art. 6 of the ECHR** govern such an application.

[113] I cannot detect any unfairness in any part of the contempt proceedings. Mr Adair's primary complaint about the fairness (or unfairness) of the contempt proceedings is that the Respondents did not have the opportunity of presenting their case before the Court on the application for the injunction. For the reason set out in the Discharge Application, I do not agree with him. But even if he is right about that, the unfairness does not, and cannot, mean that the Orders made may be ignored. As stated below, the contempt proceedings are not a nullity, and any order made by this Court is valid until it is set aside.

[114] So far as Mr Adair alleges that the delay in dealing substantively with the appropriateness of continuing the Order or the Discharge Application affects the position of the Defendants in the Contempt Application, an important point needs to be made or, perhaps more accurately, reiterated.

[115] Even if CNG is correct, which I do not accept for the reasons set out in the Discharge Judgment, that the Court would have either set aside the Order or discharged it as it contends, the Respondents would still be in breach of the Order by not complying with its terms until it was set aside. This might be a matter of mitigation that the Court would need to take into account (on the basis that they should not have been in jeopardy of being found guilty of contempt for so long), but it would not exonerate the Respondents from any liability for contempt.

[116] CNG does not criticise the fairness of the process for the bringing of the Contempt Application to this Court (as opposed to its purpose), its progression through the Court and, so far as I am aware, the final hearing of it at the Omnibus Hearing. Nor does it complain about the delay that has been occasioned in the hearing of the application. This is perhaps not surprising because

the application would have been heard before **Wallbank J** on 2 October 2024, but had to be adjourned because CNG made an application to recuse **Wallbank J** from hearing it.

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[117] It is, of course, not for me to decide whether the recusal application was appropriate or not. That matter is within the sole province of the Court of Appeal, which will ultimately need to decide whether the appeal against the recusal order should be allowed. But what has been described as a "summary procedure" for determining whether a person is in contempt of court for failing to comply with the terms of an order, had to be adjourned for almost nine months through no fault of the Claimants.

Validity of the Order

[118] Mr Adair correctly states, at para. 70 of his skeleton argument, that "It is accepted that all orders of the Court must be obeyed unless and until they are set aside. This is so even if the order ought not to have been made or is irregular in some way. The fact that an order ought not to have been made may be a mitigating factor but is not a defence to contempt proceedings for failing to comply with the order."

[119] However, he then goes on to state at paras. 71 and 72 of his skeleton argument:

> "71 … this case is distinguishable because it involves a fundamental breach by the Court of CNG's rights under Article 6 of the ECHR and/or the principles of natural justice. Those breaches of CNG's rights lie in the fact that it has been denied the fundamental right to be heard by the Court on the merits of the Freezing Injunction. It is also relevant in this regard that the Court has breached **CPR 17.4(4) and (5)** by permitting the Freezing Injunction to remain in force for 14 months (rather than no more than 28 days) without there being a hearing for 'further consideration' of the matter (i.e. a hearing on the merits).
>
> 72 The breach of CNG's rights under **Article 6 of the ECHR** and the principles of natural justice constitutes an unlawful act. It is a well-established principle that the BVI Court must not act in breach of the **ECHR** and the principles of natural justice and that to do so is unlawful. It is submitted that it would be contrary to principle and inappropriate (if not unlawful) to make any finding of contempt or impose a penalty in these circumstances."

[120] Mr Adair cites no authority in support of this proposition. The reason is that there is none that supports what he says; rather, all the authorities support the contrary proposition, i.e., an order of a superior court must be complied with until it is set aside.

[121] This principle is of long standing and, in England and Wales, has also been applied to inferior courts and tribunals of record – i.e., those courts and tribunals whose jurisdiction is amenable to judicial review[7] – thus emphasising the importance of parties needing to comply with all orders made by a court or tribunal, even if they are incorrect until they are set aside.

[122] The authorities that establish this principle include the following: **Grafton Isaacs v Emery Robertson [1985] AC 97, [1984] 3 All ER 140, [1984] 3 WLR 705**); **DPP v T [2006] EWHC 728 (Admin), [2006] 3 All ER 471, [2007] 1 WLR 209**; **Kleinwort Benson Ltd v Lincoln CC [1999] AC 153**; **Percy v Hall [1997] QB 924**; **R v Central London County Court, ex parte London [1999] QB 1260, [1999] 3 All E R 991; R v Governor of Brockhill Prison, ex p Evans [2000] UKHL 48, [2000] AC 19**; **R (on the application of US (Pakistan)) v Secretary of State for the Home Department [2018] EWCA Civ 2838, [2019] 3 All ER 433**; and **R (on the application of Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22, [2019] 4 All ER 1**.

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[7] See, for example, **R v Central London County Court, ex parte London [1999] QB 1260, [1999] 3 All E R 991**, CA. It is appropriate to deal briefly with the facts of that case and the observations made by the Court of Appeal in the case. It shows the importance which the courts attach to the requirement that orders made by courts of whatever level must be complied with, until set aside, even if they happen to be unlawful or *ultra vires*: the applicant challenged the validity of orders made pursuant to s 29 on the basis that the County Court had no jurisdiction to make them. The Court of Appeal refused to uphold the challenge, ruling that the County Court had jurisdiction to make the orders that had been made against the applicant, which she had sought to impugn. However, **Stuart Smith LJ** (with whom **Robert Walker and Henry LJJ** agreed) provided the following observations about the validity of the orders if it had been found that the County Court did not have jurisdiction to make them and hospital managers had behaved in particular ways in reliance on what turned out to be orders which were invalid: "The starting point is the well known dictum of **Romer LJ** in **Hadkinson v Hadkinson [1952] P 285 at 288, [1952] 2 All E R 567 at 569**: "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void**. Lord Cottenham L.C**., said in **Chuck v. Cremer [1985] AC 97 at 101**: "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it . It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.'"

[123] The principles which one derives from these and other cases[8] may be summarised as follows:

(1) An order need not be complied with where it is clear, from the face of the order, that it simply cannot be valid. As **Lord Radcliffe** observed in **Smith v East Elloe Rural District Council [1956] AC 736 at 770**, the order must be complied with "unless it [bears] a clear brand of invalidity on its forehead." An extreme example of this would be an order that was made on the basis of a clear case of "mistaken identity", i.e., the order was made against a person who was neither a party to the proceedings nor had any interest in them. However, even in such a case, as an abundance of caution, the order should be complied with until it is set aside.

(2) Where an order is made by a court that does not have jurisdiction to make it, it will be invalid and will usually[9] be set aside, *ex debito justitae*. However, unless

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[8] See also the observations in: (a) **M v Home Office [1994] 1 AC 377 at 423H**, per **Lord Woolf**: "the order was made by the High Court and therefore has to be treated as a perfectly valid order and one which has to be obeyed until it is set aside: see the speeches of Lord Diplock **in Re a Company [1981] 374, 384 and Isaacs v Robertson [1985] AC 97, 102**." They echoed the observations of **Lord Donaldson of Lymington MR** in the same case in the Court of Appeal (see **[1992] QB 270 at 299, [1992] 4 All E R 97 at 133**) in which he said: "An order which is made by a court with unlimited jurisdiction is binding unless and until it is set aside. Common sense suggests that this must be so. Were it otherwise court orders would be consistently ignored in the belief, sometimes justified, that at some time in the future they would be set aside. This would be a recipe for chaos." These observations reflected similar observations which he made in an earlier case, **Johnson v Walton [1990] FCR 568 at 590**, in which he said: "It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself and it has to be obeyed whether or not it should have been granted or accepted in the first place; (b) **Official Receiver v Hannan [1997] 2 BCLC 473**; (c) **Re Mid East Trading Ltd, Lehman Bros Inc v Phillips and others [1998] 1 BCLC 240**; (d) **A v Harrow Crown Court [2003] EWHC 2020 (Admin), [2003] All ER (D) 78 (Aug)**; (e) **Ahsan v Carter [2005] EWCA Civ 990, [2005] All E R (D) 419 (Jul)**, per **Sedley LJ**: "Outside public law it continues to be fundamental that the only error of law which subverts jurisdiction is an error as to whether the tribunal is entitled to enter upon the inquiry at all: an excess, in other words, of constitutive jurisdiction. In a court of unlimited jurisdiction such as the High Court, not even such an error robs the court's orders of effect: **Isaacs v Robertson [1985] AC 97.** In a tribunal of limited jurisdiction, it may expose them to nullification by quashing as well as to appeal. But once it is acting within its constitutive jurisdiction, errors of law on the part of an inferior tribunal from which an appeal lies fall to be corrected, if at all, by appeal. Once a tribunal has decided a question of fact (including a question of jurisdictional fact confided to it by law) or a question of law within its constitutive jurisdiction, an issue estoppel arises on the decision."

[9] However, the remedy to set it aside is discretionary. It follows that, in an extreme case, even where the court is satisfied that an order is invalid, it may refuse to exercise its discretion to set the order aside. Examples include where the conduct of the person applying to set it aside does not justify the

it is obvious from the face of the order that it was made in circumstances where the court did not have jurisdiction to make it or was otherwise irregular, rendering it invalid, the person against whom it was made must comply with it until it is set aside. Indeed, as noted above, even if it is obvious from the face of the order that the order is invalid, as an abundance of caution, the order should be complied with until it is set aside.

(3) Where a party or an interested person has acted or relied upon the validity of the order to his detriment, the consequences arising from such acting or reliance will not be set aside.

[124] There is a good policy reason for having the principle that an order must be complied with until it is set aside. **Lord Donaldson of Lymington MR** in **M v Home** in the Court of Appeal (see **[1992] QB 270 at 299, [1992] 4 All E R 97 at 133**) stated that not to do so would be a prime "recipe for chaos". I take this as meaning that unless court orders are complied with, the parties to court proceedings would be able, as the Respondents have done in the present case, to advance spurious arguments that they should not be required to comply with orders that they believed had been affected by unfairness – effectively having a mini trial of the proceedings which resulted in the order being made in the first place.

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discretion being exercised in his favour or where a third party has acquired rights under, or relied upon the validity of, the order in good faith. As a result, an irregular or invalid order will effectively become regular and valid: see **Re Event Moves Ltd [2018] EWHC 260 (Ch), at [31]-[32],** per **ICC Judge Jones:** " … Whilst there are no degrees of nullity, it is well established as a matter of general law that a Court retains a jurisdiction to refuse relief even when an act or decision relied upon is void. The law acts justly and reasonably through the exercise of the Court's remedial, discretion[ary] powers. If the remedy is refused, an invalid act effectively becomes valid. That may occur because the Court will not grant a discretionary remedy or because rights have been waived or for other legal reasons… This is illustrated in **Ndole Assets Ltd** [i.e., **Ndole Assets Ltd v Designer M&E Services UK Ltd [2017] EWHC 1148 (TCC)**] when Mr Justice Coulson emphasised that he would have been extremely reluctant to strike out the claim had he found service to have been unlawful. In a different context, as further examples, the Court may decide to suspend the effect of a decision declaring a statutory instrument *ultra vires* or may decline to quash *ultra vires* regulations when that remedy would be disproportionate (see **HM Treasury v Ahmed and Ors (No 2) [2010] UKSC 5**; and **R (Hurley and Moore) v Secretary of State for Business Innovation & Skills [2012] EWHC 201**). Whilst the Court in exercising its discretionary powers will normally wish to avoid depriving its judgment of effect, there will be circumstances when it is right to refuse relief even when that gives effect to the invalid act. The Court has that discretionary power."

[125] Mr Adair referred to the following passage from **M v Home Office [1994] 1 AC 377 at 423-4** to support the premise that this Court has a residual jurisdiction to set aside an order which ought not to have been made:

> "Having come to the conclusion that **Garland J.'s** order was properly made, the next question which has to be considered is the effect of the advice which was understandably given to Mr. Baker that the order was made without jurisdiction. Here there are two important considerations. The first is that the order was made by the High Court and therefore has to be treated as a perfectly valid order and one which has to be obeyed until it is set aside: see the speeches of **Lord Diplock** in **In re A Company [1981] A.C. 374, 384** and **Isaacs v. Robertson [1985] A.C. 97, 102** … If, therefore, there is a situation in which the view is properly taken (and usually this will only be possible when the action is taken in accordance with legal advice) that it is reasonable to defer complying with an order of the court until application is made to the court for further guidance then it will not be contempt to defer complying with the order until an application has been made to the court to discharge the order. However, this course can only be justified if the application is made at the first practicable opportunity and in the meantime all appropriate steps have been taken to ensure that the person in whose favour the order was made will not be disadvantaged pending the hearing of the application."
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> (Emphasis supplied).

[126] These comments were made in the context of an application for the committal of a government department in circumstances where it was made in excess of jurisdiction. That is not the position in the present case. Also, none of the conditions that **Lord Woolf** set out were complied with here, so the analogy that Mr Adair seems to draw with **M v Home Office** appears to me to be misconceived.

[127] But the law has moved on since **M v Home Office**. As **Gee** pointedly states, at **para. 20-08** (with footnotes, including **M v Home Office**) :

> "No one can justify contempt on the grounds that the order should never have been made, or was irregular. If an order has been made, it must be obeyed until it is set aside.[31] Whether the original order should have been made may be irrelevant to an appeal challenging a committal order made on breach of the order.[32]
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> [31] **Yuzu Hair and Beauty Ltd v Selvathiraviam** [2020] EWHC 1209 (Ch) at [62], citing the text (finding of contempt in proceedings commenced in the name of a company which had been struck off for failure to file accounts**); Isaacs v Robertson [1985 A.C. 97**; **Hadkinson v Hadkinson [1952] P. 285**; **M v Home**

Office [1992] Q.B. 270 (affirmed on different grounds **[1994] 1 AC 377)**; **Paratus AMC Ltd v Lewis [2014] EWHC 1577 (Ch**) at **[5]**.

[32] **Sanghani v De Cordova [2014] EWCA Civ 787**.

[128] Likewise, the authors of **Halsbury's Laws of England, 5th Edition, Reissue, Civil Procedure, Volume 24, 2025, para. 69**, state (with footnotes):

"Orders improperly obtained

[129] The opinion has been expressed that the fact that an order ought not to have been made is not a sufficient excuse for disobeying it, that disobedience to it constitutes a contempt, and that the party aggrieved should apply to the court for relief from compliance with the order[1].

[1] **Woodward v Earl of Lincoln (1674) 3 Swan 626**; **Drewry v Thacker (1819) 3 Swan 529 at 546**; **Fennings v Humphery (1841) 4 Beav 1**; **Blake v Blake (1844) 7 Beav 514**; **Chuck v Cremer (1846) 2 Ph 113**; **Eastern Trust Co v McKenzie, Mann & Co Ltd [1915] AC 750 at 761, PC**, per **Sir George Farwell**; **Hadkinson v Hadkinson [1952] P 285 at 288–289, [1952] 2 All ER 567 at 569, CA, per Romer LJ**; **Isaacs v Robertson [1985] AC 97, [1984] 3 All ER 140, PC**. It appears that the position may be different where the court making the order lacks jurisdiction, although it is not clear why this should be so: see **Isaacs v Robertson**. See also **Scott v Scott [1913] AC 417, HL**; **Re M [1994] 1 AC 377**, sub nom **M v Home Office [1993] 3 All ER 537, HL**.

[130] This largely disposes of all the arguments raised by Defendants that the alleged unlawful grant or continuation of the Orders renders the Committal Application unlawful, unfair, wrong, inappropriate, unreasonable, unjust, or disproportionate. They include all the rest of the arguments advanced by Mr Adair on behalf of the Defendants in paras. 54-100 of his skeleton argument.

[131] For the sake of completeness, I should refer to the relevance of the 28-day period referred to in the provisions specified in **CPR 17.4(4) and (5)**. I did not get the impression that Mr Adair was suggesting that the application to continue the Order should have been substantively determined on 3 April 2024 or any later date within that period, but if he did, then he is wrong. This is not what is required under those provisions. What is required is that there should be a "further consideration" of the injunction within 28 days. That occurred in this case.

Has there been a breach of the undertaking given on 10 March 2023?

[132] CNG gave the following undertakings ("the Undertakings") set out in a letter dated 10 March 2023 sent by their lawyers, Linklaters, Hong Kong, to the Claimants' lawyers, Gibson, Dunn & Crutcher UK LLP**:**

> "CNG shall by itself and through its representatives and agents (which include for the avoidance of doubt the CNG-nominated directors of Soremi Investments):
>
> (a) not take any action to cause Soremi Investments to: (i) pay out any dividends, (ii) transfer, sell, charge, encumber or dissipate any of Soremi Investments' assets, (iii) incur any debt, or (iv) make any form of distribution by Soremi Investments; and
>
> (b) not take any action to cause any direct or indirect subsidiary of Soremi Investments to: (i) pay out any dividends, (ii) transfer, sell, charge, encumber or dissipate any of the subsidiary's assets, (iii) incur any debt, or (iv) make any form of distribution by the subsidiary;
>
> (c) not take any action that would be to the detriment of the value of Soremi Investments; and
>
> (d) not operate Soremi Investments.
>
> other than in the ordinary course of business or in accordance with the Shareholders' Agreement."

[133] Mr Adair's makes this, quite remarkable, submission at paras. 101 and 102 of his skeleton argument about the allegation of breach of the undertaking made by the Claimants:

> "101 The Undertakings are directed at preserving the value of the shares in SIL by ensuring that assets are not paid away or dissipated. The value of the shares in SIL is not affected by assets being moved between subsidiaries and the Undertakings must be interpreted with this in mind.
>
> 102 The only word that could possibly apply to the transactions in question is the word 'transfer'. However, it is submitted that, by application of the ejusdem generis principle or otherwise, the meaning of the word "transfer" must be construed by reference to all the other words used, which impute a meaning of dissipation or reduction in value. On the basis of that construction, it is submitted that a transfer of funds between Group Companies does not breach the Undertakings and that the Transfers were not wrongful in any proper sense of that word."

[134] The words of the Undertakings are clear. There is no need to apply the *ejusdem generis* or any other rule of construction to ascertain the meaning of the words.

[135] There is no connection between the word "transfer" and the other words used in the undertaking. In order to give effect to the construction contended for my Mr Adair, it would be necessary for the words in question to say "transfer, sell, charge, encumber or [otherwise] dissipate any of the subsidiary's assets"." (Emphasis supplied). In fact, unless the order of the words was rejigged to read "dissipate or otherwise transfer, sale, charge, or encumber", there could be no possible basis upon which the narrow construction which Mr Adair advances could be correct. The fact is that each of a transfer, sale, charge, or encumbrance could be perfectly valid, but for the fact that it is prohibited by the terms of the Undertakings. The word "dissipate" is the only word that inherently denotes some type of impropriety. In my judgment, the most that can be said about the word "dissipate" is that it is largely otiose. That is because it is difficult to see what type of transaction that does not involve a transfer, sale, charge, or encumbrance would constitute a dissipation. But importantly, the *ejusdem generis* rule applies where a phrase beginning with particular terms is followed by wider residuary words. The effect of the principle is then to curtail the literal meaning of the residuary words so as to confine it to the genus implicitly described: see, for example, the discussion in **CAB Housing Ltd v Secretary of State for Levelling Up Housing and Communities [2022] EWHC 208 (Admin)**. It is impossible to see how the word "dissipate" could be said to be some sort of residuary word that naturally follows from the words "transfer, sale [or] charge" so as to confine it to the genus implicitly described in those words.

[136] That the Court should not be persuaded to apply rules of construction where the language of the words sought to be construed is clear comes from a wealth of authorities: see, by way of example, **Chandris v Isbrandtsen-Moller Co. Inc [1951] 1 K.B. 240, CA**.

[137] As is the position with regard to the apparent inability of CNG and its lawyers to understand what was meant by the word "procure", at no stage was it ever suggested by the Respondents that they understood those words as only applying where there was a "dissipation". The fact is that this is an attempt by CNG to justify it having acted in breach of the Undertakings by wrongly claiming that it believed that the transactions were not caught by the terms of the Undertakings because it did not involve any "dissipation" of SIL's assets.

[138] Equally unconvincing is the suggestion that the value of the shares in SIL is not affected by assets being moved between subsidiaries. There is no scintilla of evidence to suggest that this is correct. But leaving aside the fact that if inter-company transfers were to be covered by the terms of the Undertakings, they would have said so, the transfer of the shares in a subsidiary would have the potential of putting the assets out of the reach of the Claimants if a subsidiary company decided to transfer, sell, charge or encumber them or became insolvent.

[139] There are, therefore, clear breaches of the terms of the Undertaking. The breaches are wilful, deliberate, and contumelious. The Undertakings were not given to this Court, so no question of any contempt arises for their breach. But the finding of breach, which I make, establishes two important matters: first, the willingness of CNG to refuse to obey agreements that they have entered into, which are designed to protect the assets of SIL over which the Claimants have an interest, away from the reach of the Claimants; and second, it amounts to an aggravating factor in the decision that this Court has to make about the imposition of an appropriate sentence for that breach.

The meaning of the word "procure"

[140] Mr Adair submits that the word "procure" in the Mandatory Injunction was ambiguous or uncertain. After referring to certain authorities, which appear to me to be of little relevance, he makes this bold submission in his skeleton argument:

> "106. The Mandatory Order required funds held in bank accounts in the name of Soremi SA to be transferred to bank accounts in Paris in the name of SIL. CNG's obligation under the Mandatory Order was to "procure" that such payments were made, but it was not made clear in the order what acts CNG was required to undertake in order to "procure" the payment by a Congolese subsidiary of a BVI subsidiary. There was no suggestion that CNG could make the payments itself and whilst it was asserted that CNG controlled Soremi SA, no evidence was adduced to show that this was the case. Thus, the Mandatory Order was ambiguous as far as the acts which CNG was required to undertake are concerned.
>
> 107 The basis of CNG's ability to procure such payments is assumed to be that it held 65% of the shares in SIL and SIL held 90% of the shares in Soremi SA. It follows that CNG (a Chinese state-owned company) would have to direct SIL (a BVI company) to direct Soremi SA (a Congolese company) to make the payments. How this was to be achieved would clearly depend upon the articles of association/regulations governing the companies in question and the company law of the jurisdiction in which they were incorporated. No evidence was adduced by the Claimants in respect of these issues at

the ex parte hearing on 28th March 2024 and the time necessary to procure the payments was not raised by the Claimants.

108. Similarly, what CNG's obligation to 'procure' payments would entail and whether this could be achieved within 5 days was not addressed at the hearing on 3rd July 2024 at which the Claimants' application to vary the Freezing Injunction was granted (CNG was not permitted to address the Court on the merits of the Freezing Injunction at that hearing)."

[141] Leaving aside the yet further attempt to conflate the Contempt Application with the Order, which does not require further mention by me, this argument has several serious flaws.

[142] The word "procure" is an ordinary word of the English language. It is worth drawing attention to the meaning given to that word in the Oxford English Dictionary. There, the following meaning is given to the expression:

> "to bring about, cause, or produce".

[143] It is defined in similar terms in the Cambridge English Dictionary[10]:

> "to get something, especially after an effort."

[144] The meaning of the word has also been considered judicially. In **Nearfield Ltd v Lincoln Nominees Ltd and another [2006] EWHC 2421 (Ch), [2007] 1 All ER (Comm) 441**, **Peter Smith J** said, at **[37]**:

> "In my view the normal meaning of the word 'procure' is to 'see to it'. Thus a person agreeing to procure that someone else performs a contractual obligation first is required to attempt to procure that person complies with the obligation and in the event that he fails to comply to pay damages calculated by the amount that ought to have been paid by the third party. This is conveniently summarised in the decision of **Lewison J** in **Barnicoat v Knight [2004] EWHC 330 (Ch), [2004] 2 BCLC 464**. It is also repeated in **Andrews and Millett Law of Guarantees (4th edn, 2005) pp 3–4 (para 1-004)**."

[145] In **Barnicoat and another v Knight and others [2004] EWHC 330 (Ch)**, **Lewison J** (as he then was) said at, **[23]**, that the word 'procure' meant "more than simply command. Its ordinary

[10] https://dictionary.cambridge.org/dictionary/english/procure#google_vignette, last accessed 23 June 2025.

meaning is to achieve a result." However, in **Nearfield**, the court stated that the word might have a different meaning depending on the context in which it was used.

[146] There can be no confusion or ambiguity about the meaning of that word in the present case. It was an obligation on the part of CNG to "see to it" that the obligations specified in the Mandatory Injunction were carried out.

[147] There is no doubt that CNG well knew this.

[148] The same word was used at several places in the SHA. The Defendants appeared to have had no difficulty in understanding what the word meant in the SHA – or if they did, they do not appear to have raised it with their legal practitioners.

[149] In addition, Mr Lu Shudong accepts, in his affidavit filed with the Court on 9 August 2024, that CNG only complied "substantially" (whatever that means) with the terms of the Order, or where it failed to comply with the terms at all, it was because it was impossible for it to do so. There is no clear suggestion in the affidavit that the terms of the Order were unclear and, if so, why they were unclear. This largely puts paid to the argument that CNG did not understand what was required of them. It follows that, like the other arguments that CNG raises, this argument is entirely fallacious.

Order impossible to comply with?

[150] Perhaps the most extraordinary argument raised by Mr Adair is the "impossible to comply" argument.

[151] Mr Adair maintains that the 5 days given to CNG to comply with the Mandatory Injunction fell over the Easter weekend and included Good Friday, Saturday, Easter Sunday and Easter Monday. Good Friday and Easter Monday are public holidays in the BVI, England, Australia and Hong Kong. It was relevant that by the time the Freezing Injunction was served on Walkers on the afternoon of Maundy Thursday, it was already Good Friday in Beijing (China Standard Time). He claims that this meant that it was very difficult to obtain any legal advice regarding the Freezing Injunction, since CNG's legal advisers in respect of these proceedings are situated in Hong Kong, Australia, England and the BVI. Additionally, the international banking system was

shut down over the Easter Weekend and largely shut down on Easter Monday, which was a public holiday in Hong Kong, France, and the Republic of Congo.

[152] At paragraph 35 of his affirmation dated 7 April 2024, Mr Cheng explains that it would take at least 8 business days for such a transfer to be effected:

> "I have asked our accounting department to make enquiries of EXIM Bank and I understand that to execute a transfer from an EXIM Bank account to a BOC Paris account, we will need to schedule an appointment 5 business days in advance. Subsequently, we will need to visit the counter and submit necessary documentation. It would take about another 3 business days for the funds to reach BOC Paris."

[153] However, as Mr Smith KC correctly points out on behalf of the Claimants, the fact is that Mr Cheng never inquired of Exim Bank if it was possible to make a faster instruction in a case of exceptional urgency. In addition, CNG has not disclosed the banking terms for the Exim account. Furthermore, Mr Cheng's own evidence contradicts the idea that urgent instructions could not be taken by Exim Bank. At para. 38 of his second affidavit, he says that "[t]ransfers from the EXIM Bank to BOC Paris can be completed through standard procedures applicable to international transfers without any special constraints." I agree with Mr Smith that, taken together, the evidence shows beyond any reasonable doubt that substantial compliance, at the very least, was possible over three business days.

[154] If there were any semblance of truth in what the Defendants say, there might be some basis for saying that the Defendants could not be expected to comply with such a tight timetable for complying with the Orders. That is because, as Mr Adair rightly observes, the courts do not expect those against whom an injunction is made to comply with those terms of the injunction that are impossible to fulfil. There is a considerable amount of authority in support of this premise.

[155] In **Sectorguard Plc v Dienne Plc [2009] EWHC 2693 (Ch)**, **Briggs J** (as he then was) ruled that a failure to comply with the terms of an order that it is impossible to comply with will not constitute a contempt. **Paragraph 12-23** of **Arlidge, Eady & Smith on Contempt, Fifth Edition, Eds: Londono P, *et al,*** summarises the effect of this ruling in the following terms:

> "In **Sectorguard Plc v Dienne Plc**, **Briggs J** accepted the thrust of counsel's argument that 'failure to perform an impossible undertaking is not a contempt'. It would be for the court, however, to determine whether compliance was indeed, in the circumstances, impossible. In that case, an undertaking had been given to identify a category of

> customers when the respondent had no list to enable it to do so. In a subsequent case, Males J [in **Westminster City Council v Addbins Ltd [2012] EWHC 3716 (QB)**] raised the question whether what he called 'this principle of impossibility' should be extended to cover cases where compliance with the order or undertaking was not impossible but merely difficult or inconvenient. The answer, it is submitted, is that difficulty of compliance would go to penalty, rather than determining the issue of contempt or no contempt. There would always be the option of applying to the court for variation, extension or discharge. Where there is difficulty in complying with the terms of an injunction, even though such orders should be implicitly obeyed, the court will take a realistic view. In appropriate cases, it was long recognised that the operation of an injunction might be suspended or varied, especially if it was made clear to the court that its terms were disproportionately burdensome."

[156] Leaving aside the assertion that the Respondents were unable to obtain legal advice over the weekend, which I am not able to accept, there are several flaws with this contention.

[157] I reject CNG's assertion that it could not have speedily obtained legal advice as to compliance with the order and procured the return of funds over 3 business days in China (Friday 29 March, Monday 1 April, and Tuesday 2 April). As set out below, instead of attempting compliance, CNG had made the decision not to comply and to go down the route of a stay/variation application, which it issued on 2 April 2024. In **IPartner v Panacore [2014] EWHC 3608 (Comm)**, the defendant was ordered to provide information within a tight timeframe and **Hamblen J** (as he then was) found a contempt where, at **[65]**, he found that "[t]here is no evidence of any attempt being made to comply with that Order…The inescapable inference is that this is a deliberate decision on the part of [the Defendants][11]." The same inference must be drawn against CNG.

[158] The assertion of "too little time to comply" does not withstand any, or any proper scrutiny. If CNG had any intention to comply, it could have applied to extend time for compliance, and the Court is likely to have granted it the extension. But it had no intention of doing so. It follows that the complaint of "too little time" is little more than a *non-sequitur*, essentially just another excuse, wholly lacking merit, to justify CNG's deliberate refusal to obey the Order.

[159] But, there simply is no answer to the points made by Mr Smith at paras. 38 and 39 of his skeleton argument. As he rightly summarises:

> "38 Cs were served with the First Congolese Injunction on 10.04.2024, on the morning of the second day of the hearing before **Wallbank J** concerning CNG's

[11] See also the facts of **City of Westminster v Addbins Ltd & Ors [2012] EWHC 3716 (QB)**, considered above.

challenge of the registration of the FPA and SPA. So far as Cs understood, CNG's position is that it had not been aware of the Injunction before that point. CNG could have substantially complied with the 28 March Order before 10.04.2024:

a. The First Congolese Injunction did not prohibit CNG from causing SIL and Soremi SA to comply with the 28 March Order. This is common ground (see Lu 2 ¶55) …

b. As submitted above, by 2 April 2024 CNG could have substantially complied with the Repatriation Order by procuring the necessary steps of Soremi SA urgently instructing Exim bank to return the SIL funds.

c. CNG could have provided substantial asset disclosure, and certainly the information in the Walkers letter of 23.04.2024 [CORR/2], before 10.04.2024."

[160] I am in no doubt that the obtaining of the Congolese Injunctions was not a coincidence. It was a deliberately calculated course of action to avoid having to comply with the Order. This is clear from Mr Lu's second affidavit, in which he says that "CNG understands that following Gerald's service of the 28 March Order on Soremi SA on 2 April 2024, Soremi SA informed the Congolese authorities about the contents of the 28 March Order, and sought injunctive relief on the basis of the criminal proceedings on foot against the Gerald Directors in the Congo.

[161] In addition, the first Congolese Injunction states that it was made "at the request of Société de Recherche et d'Exploitation Minière abbreviated SOREMI SA", and "in view of the request of the request made by SOREMI S.A. relating to the prohibition of any transfer by it of funds to SOREMI INVESTIMENTS LIMITED, GLOBAL MINING DEVELOPMENT LP and GERALD METALS LP, as well as any disclosure of strategic information."

[162] Furthermore, under the heading "Grounds" specified in the First Congolese Injunction, it is recorded:

> "Whereas the company SOREMI S.A requests from this investigating court the prohibition of any transfer of funds and of any disclosure of strategic information to the companies SOREMI INVESTMENT LIMITED or GLOBAL MINING Lp and GERALD METALS LLC."

[163] Likewise, the Second Congolese Injunction records that it was sought by Soremi SA and that Soremi SA was "represented by its General Manager".

[164] At the time the Order was made, CNG had sufficient control of Soremi SA to procure Soremi SA to comply with the Order as soon as it became aware of it. It could also have prevented it from applying for the Congolese Injunctions. It chose not to do so because it had decided from the outset that it was not going to comply and would seek to pull the wool over the Court's eyes that its failure to do so was because it was prevented from doing so. This type of disgraceful behaviour deserves the utmost condemnation from the Court.

[165] It follows that so far as it is alleged by the Respondents that the obtaining of the Congolese Order made it impossible for the Defendants to comply with the terms of the Orders, that so-called impossibility arose entirely as a result of their own deliberate and dishonest scheme to avoid having to comply with the Orders. There is no basis upon which they can say that they should be exculpated from any liability for breach because they could not carry out the terms of the Order.

[166] The "impossibility" argument also fails.

Compliance with injunction conflicting with orders of foreign courts

[167] In **Masri v Consolidated Contractors International Company SAL [2011] EWHC 1024 (Comm)**, **Christopher Clarke J** (as he then was), said, **at [257]**:

> "Firstly, in making its order the Court will have exercised a jurisdiction which it is entitled to exercise (and to which, in the present case, the defendants have submitted) and made an order which it required to be obeyed. Save in circumstances for which the order provides it is to be obeyed. In making it the court may have taken into account (in the exercise of the flexible discretion) the possibility of conflict with a foreign law or the order of a foreign court. Even if it has not (because the possibility was not apparent or no order had been obtained) the English order must be obeyed. If the addressee of the order thinks that the order may cause him difficulties under the law of some foreign state it must seek to persuade the English court not to make it in the terms sought, or, if it has already been made, to vary it. If an order is made and has been broken the Court should not be deprived of its powers of enforcement over a person properly subject to its jurisdiction, whether or not he is also subject to some other jurisdiction."

[168] At [**261**], **Christopher Clarke J** said:

> "In my judgment, the Court should, in relation to applications in a case such as the present, adopt a flexible approach in determining, as a matter of discretion, what action, if any, to take - just as it does in relation to the question whether to make an order in the first place. That will involve taking into account all the circumstances, including the nature

> of the order made by the English and the foreign court, the circumstances in which the relevant orders were obtained, the consequences of breach of the foreign order and any other relevant considerations."

[169] Mr Adair accepts that where there is a conflict between the orders of an English court and an overseas court, the protection for the defendant is the ability to persuade the court not to make the order or, if it has been made *ex parte*, to persuade the court to vary the order. He says this did not happen in the present case because CNG "has not been able to address the court on the merits of the Injunction at all and so has not been able to seek the variation or discharge of the Injunction. In particular, the Court refused to hear CNG's Stay Application, despite a Certificate of Urgency having been signed. The consequence is that the law has been stripped of its safeguards."

[170] This argument, as with many of the other arguments advanced by CNG, seeks a finding from this Court that CNG should not be liable for any of the breaches of the Order because the Order was unlawful, unfair, wrong, inappropriate, unreasonable, unjust, or disproportionate. That may, as I have said above, provide some basis for CNG to impugn the Order (though, not on the facts, as the Discharge Judgment makes clear, this is rejected), but does not exonerate CNG from any liability for those breaches. In any event, there is no merit in that argument: see the Discharge Judgment. Furthermore, the "impossibility" argument of which this limb of the argument is part, and the "conflict of laws" argument have no application in the present case. The circumstances that are alleged to give rise to those situations were deliberately orchestrated entirely by the Respondents.

[171] What CNG seeks to persuade me to do is to pick all the plums in his case, but to leave all the duff behind. But even taking CNG's case at its highest and stripping it of all the duff, each and every allegation is fully made out against CNG.

Conclusion on findings of contempt

[172] I find each and every allegation of contempt made out against CNG.

Sentence and aggravating and mitigating factors

[173] I indicated to Mr Adair that if I found any of the allegations of contempt proved, I would adjourn sentence to a date to be fixed and hear any mitigation he wished to advance. However, it is appropriate for me to make the following matters clear.

[174] The Claimants describe CNG's conduct as "egregious". It is that and much more. At the very least, it seeks to "play fast and loose" with the orders made by this Court. But in my judgment, it goes well beyond that. The Defendants orchestrated a deliberate and calculated course of action that was designed to avoid having to comply with the terms of the Order. This type of conduct is deceitful and disgraceful. Any sentence must reflect this.

[175] Second, the breaches are continuing. There is no evidence of any step having been taken by CNG to comply with the terms of the Order. In fact, it is not disputed that CNG has singularly failed to take any step to show any willingness to comply with the Order.

[176] Third, rather than seek to purge its contempt before this Court, CNG has sought to defend its position by relying on every conceivable point to exonerate itself from a finding of breach. It does CNG no credit at all to attempt to make a mockery of the processes of the Court by, for example, allowing Soremi SA to obtain an injunction against itself to avoid having to comply with the Order. As the Discharge Judgment makes clear, the procedure invoked to obtain the Order was perfectly lawful. What is extraordinary is that while complaining about how the delay in the court process was prejudicial to it, CNG had decided from the outset that, come what may, it would not comply with the Order and would put every possible obstacle in the path of the Claimants from enforcing it.

Mitigation

[177] The two most important mitigating factors that would be available to a person who was found to be in contempt of court are not available to CNG. There has been no admission of any wrongdoing on its part and no "guilty" plea. Nonetheless, it is appropriate that CNG should be able to advance any other mitigating factors before this Court so the Court can decide on the appropriate sentence to pass against CNG.

Sentencing Options – CNG

[178] Mr Smith stated that there may be a real question as to what understanding the leadership of CNG's group and the Chinese State has of these proceedings, and what has been conveyed internally to CNG's representatives' superiors. He also states, at para. 45 of his skeleton argument, that were this Court's findings to date properly understood, it is difficult to fathom that leaders within the Chinese state would knowingly permit a state-owned entity to continue to act in reckless disregard of the rule of law and that "a finding of contempt is the clearest expression by this Court that it will not abide by disobedience of its Orders and that CNG's conduct has been unacceptable. It is a finding which should be incapable of mistranslation or misrepresentation within CNG, or of being misunderstood."

[179] Mr Smith suggests that CNG should be fined for its deliberate breach of the Order up until the Receivers were appointed on 17 September 2024. That is a period of 28 (rounded down) weeks since the service of the 28 March Order and 10 (rounded) weeks from the service of the 3 July Order. He relies on the decision **Hoss Holding v Energy Concepts International Limited (BVIBVIHC (COM) 2023/0051**, in which **Webster J** imposed a fine of USD 100,000 on a company which had the means to pay a fine of that magnitude and suggests that I might take the same approach in deciding the penalty I should impose in this case. On the basis that this would be a weekly fine, the total amount payable would be USD 2.8 million.

[180] I entirely understand the wisdom of that approach. However, sentencing is primarily a matter for the Court. It has long been established that once a contempt is established, the role of "the prosecutor" – i.e., the party at whose behest the finding was made – is restricted to drawing the attention of the court to any guidelines that govern the sentencing of the "charges" found to be proved against the contemnor and any guideline cases that may apply to the facts.

[181] Mr Smith has done that by drawing my attention to **Hoss Holding** and has amply discharged the duty to draw my attention to other relevant cases. However, there are several features of the present case that make it appropriate to consider all the options available to me about how I should exercise my sentencing power. I have alluded to them above but, in brief, they include the contumelious nature of the breach, the fact that the breach is continuing, the brazen attempt by CNG to make a mockery of the processes of the Court, the failure even now, to accept its wrongdoing, and its failure to enter a "guilty" plea to the "offences".

[182] A very important purpose of sentencing a contempt where a court order has been breached is to deter others from doing the same, particularly in the appalling way that CNG has done. Corporate entities and private individuals who have the means to pay large fines should not think that they can openly flout court orders, buy their way out of trouble by paying those fines, and go about doing their business as if they have done nothing wrong.

[183] Unlike England and Wales, there is no maximum sentence for contempt in this jurisdiction. It would be sending the wrong message out if I took the view that the imposition of a fine is the only way to punish the breaches that have been proved against CNG.

[184] Accordingly, I intend to consider all options when I come to sentence CNG. In the final analysis, there may only be one practical course of action available to me in terms of the sentence I should pass, i.e., the imposition of a fine. But it is right that I make it clear that the sentence will be on an "all options basis". This also means, of course, that I will carefully consider any mitigation that is advanced on behalf of CNG to ensure that any penalty I impose for the breaches found to be proved is proportionate and commensurate with the findings I have made and any mitigation I hear.

Debarring Order against CNG

[185] The Claimants seek an order debarring CNG from defending these proceedings on account of its continued failure to comply with the requirements relating to the disclosure of its assets. They say that the failure renders the freezing injunction impossible to enforce.

[186] The Claimants contend that CNG should be debarred "until it purges its contempt in respect of its Asset Disclosure Obligation and Affidavit Obligation" and state that "there can be no conceivable impediment to CNG giving disclosure of its own position, verified by sworn affidavit."

[187] I am not sure how a debarring order can be made on the basis that it ceases to have effect if CNG purges its contempt. It is not, and cannot operate as, some sort of "stay" of CNG's defence to the proceedings until CNG complies with the disclosure requirements. In the same way as an order to strike out a claim finally brings the claim to an end, so must a debarring order. It has to be permanent. The Claimants may have some sort of "unless" order in mind. Mr Smith may have been referring to the principle of general application that even where a claim has not been struck out or dismissed for failing to comply with an order of a court, the court may nonetheless refuse

to hear the contemnor or allow him to participate in the claim until he has purged his contempt, which I understood to have been the issue which the court had to decide in **Maxime v Maxime DOMHMT 2014/0022 (4 July 2019)**.

[188] It is not disputed by CNG that this Court has power to debar a party from defending a claim where it has failed to comply with an order of the Court: see **ECSC CPR 26.3**. In addition, **ESCC CPR 26.4(1)** provides that "[i]f a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'."

[189] It is not necessary for the failure to comply with an order to relate to a proceeding in the substantive claim brought by a claimant against a defendant. A debarring order may be made in relation to a failure to comply with any requirement arising under an order, rule or practice direction, even if it relates to an ancillary matter arising in the claim, such as, in the present case, to comply with the terms of an injunction. Nor is it necessary for a party seeking to enforce an order to elect which of the remedies it has available to it for a breach it should pursue. Unless a statutory or other legal provision states otherwise, that party can take any one or more method of enforcement available to it for such a breach.

[190] In **ORB a.r.l v Ruhan [2016] EWHC 850 (Comm)**, **Popplewell** J said, at **[178]**:

> " … Court's orders are to be obeyed. The administration of justice depends on it. Maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself: [**JSC BTA Bank v Ablyazov (No 8) [2013] 1 WLR 1331 per Rix LJ at paragraph [188]**]. The Court regularly makes debarring orders where the failure does not directly impact on the substantive issues which fall to be decided at trial. It does so, for example when it stays proceedings for failure to provide security for costs. It is well established that such an unless or debarring order may be justified by failure to comply with a freezing order and ancillary disclosure order: see for example **Lexi Holdings Plc v Luqman [2007] EWCA Civ 1501**; **JSC BTA Bank v Ablyazov [2010] EWHC 2219 (Comm)**; **JSC BTA Bank v Shalabayev [2011] EWHC 2903 (Ch)**; and **JSC BTA Bank v Ablyazov (No 8) (supra)**."

[191] Unlike the "Repatriation Provision", there is no suggestion by CNG that it would be unlawful for it to comply with the disclosure requirements of the Order. On that basis, it seems to me to be entirely appropriate to make the debarring order that the claimants seek, modified as below.

[192] I will make an order that, unless within 7 days[12] of the finalisation of this Judgment, CNG complies with the disclosure requirements of the Order, it should be debarred from defending the Claim.

Contempt Application against Soremi SA

[193] The breaches complained of by the Claimants against Soremi SA are summarised above.

[194] Mr Adair does not suggest that there may be "defences" available to Soremi SA that are not available to CNG, although Soremi SA is unrepresented and not represented by Mr Adair.

[195] For the reasons referred to above in relation to CNG, I am satisfied, to the required criminal standard of proof, that Soremi SA is also in contempt. The breaches for which I find the contempt against Soremi SA made out are as follows:

(a) for Soremi SA's failure to comply with para. 11 of the 28 MarchOrder within 5 days of being served with the order because it took no necessary steps to repatriate the SIL Funds and has taken no necessary steps since that date to do so.

(b) for Soremi SA's failure to comply with para. 14 of the Order by failing or refusing to provide any information as to its assets either within 7 days of service of the Order or at all.

(c) for breaching the terms of para. 17 of the Order by failing or refusing to serve an affidavit either within 10 working days of service of the order or at all; and

(d) for breaching para. 11 of the 3 July Order for failing or refusing within 5 days of being served with the order or at all to repatriate the SIL Funds.

[12] I will hear submissions from CNG about whether there should be a lengthier period for compliance, but make it clear that I would expect CNG to take all steps necessary to ensure that it is in a position to comply with the 7-day time limit as the period of 7 days will run from the date this Judgment will be handed down. I would need convincing evidence about why compliance within this time is not possible.

Sentencing Options – Soremi SA

[196] As with CNG, I intend to consider all options when I come to sentence Soremi SA. As with CNG, there may be only one practical course of action available to me in terms of the sentence I should pass, i.e., the imposition of a fine. But it is right that I make it clear that the sentence will be on an "all options basis".

[197] No debarring order is sought by the Claimants against Soremi SA and, accordingly, I make no such order against Soremi SA.

Contempt Application against Mr Cheng

[198] Mr Cheng was, at all material times, the CEO of Soremi SA, albeit that he was not a director of that company, and SIL until he was removed following the appointment of Receivers.

[199] Mr Cheng is alleged to have facilitated the breach of the 28 March Order and, therefore, liable as an "accessory" to the contempt committed by the "actual offender", i.e., Soremi SA. The basis upon which he is sought to be made liable for contempt is under para. 29 of the 28 March Order, which states that "[i]t is a contempt of court for anyone notified of this Order knowingly to assist in or permit a breach of this Order."

[200] There is no suggestion by Mr Cheng that this provision is incapable of constituting a finding of contempt being made Mr Cheng if the facts relied upon by the Claimants can be proved to the required criminal standard of proof; rather, the basis upon which Ms Morgan contends that the contempt cannot be proved are that:

(a) the Order is invalid, based on broadly the same arguments that were advanced by Mr Adair on behalf of CNG;

(b) the facts and matters relied upon by the Claimants to support the finding of contempt cannot be established at all, let alone established to the criminal standard of proof;

(c) Mr Cheng did not understand his obligations under the Order; and

(d) in any event, Mr Cheng did his best to comply with the terms of the Order.

[201] The Claimants maintain that there has been a clear breach of the Order and that the breach has been established to the required criminal standard of proof.

[202] Specifically, they state that:

(a) Mr Cheng knew of the 28 March Order from that date or thereabouts, and he knew of the 3 July Order from that date (and likely earlier, given that the amendment was sought on notice and CNG did not object). He does not give any evidence as to when he first knew of each order. His failure to give such evidence leads to the inference that he became aware when CNG became aware, or (at the latest) when Soremi SA was served.

(b) Mr Cheng assisted Soremi SA's breaches by participating in the Congolese Injunctions. It is inherently likely that he was involved in Soremi SA's decisions: (i) not to comply with the 28 March Order and the 3 July Order; and (ii) seek the Congolese Injunctions. The Claimants point to the fact that Mr Cheng is the "General Manager" who made the application for the Second Congolese Injunction and that Mr Cheng does not deny such involvement in his evidence.

(c) Mr Cheng intended to assist Soremi SA's breach of the Order since it was reasonably foreseeable that is what his actions would do.

[203] The Claimants also dispute the statement made by Mr Cheng that he attempted to prevent Soremi SA from acting in breach of the Order. They claim that this is a vague statement that has no specific meaning and, in any event, does not provide any defence to the allegations of assistance for which he is sought to be made liable in contempt.

[204] So far as Mr Cheng adopts the contentions advanced by CNG that the Order was unlawful, unfair, wrong, inappropriate, unreasonable, unjust, or disproportionate, I have already ruled that those contentions are without substance. There is nothing that Mr Cheng advances over and above those contentions that can assist him.

[205] The summary of the breach of the Order relied upon by the Claimants is as follows:

> "The directors of SIL namely Mr Jiang Lliangyou, Mr Tong Junhu, Mr Wang Wanming and Mr He Shuiqing and the CEO of SIL and Soremi S.A. Mr. Cheng Shenghong being aware of the terms of the 28 March Order, are in contempt of court in that they have failed to procure and/or to take all necessary steps to comply with the 28 March order and/or facilitated the breach of the same."

[206] I reject Mr Cheng's contention that the meaning of the Order was not clear to him or that he did not know what was required of him to comply with the terms of the Order. So far as he seeks to adopt the points made by Mr Adair on behalf of CNG, such as failing to understand the meaning of the word "procure", there is no substance in them for the reasons that I have already given. The same applies in relation to his assertion that the Application Notice did not contain proper particulars of the breach relied upon by the Claimants.

[207] What is more, the position he now advances is inconsistent with para. 13 of his second affirmation in which he expressly denies that allegation that he was in breach of the injunction, stating, in terms, that "where it has been possible for me to comply with [the Order], I have sought to do so and where it has not been possible to comply, that has been because it has been outside my power to do so as a result of the actions of the Claimants or because of the orders of the Congolese State to prevent it."

[208] Mr Smith was correct to say that no procedural points concerning Mr Cheng's alleged failure were taken by him until Ms Morgan raised them in the course of her submission. The statement by Ms Morgan that until she received Mr Smith's skeleton argument submission, she was herself unclear about how the case was being put against Mr Cheng does not withstand proper scrutiny. Whether or not the Claimants subsequently sought to narrow how they were putting their case against Mr Cheng seems to me to be irrelevant. Mr Cheng perfectly understood the "charge" or allegation that he was being asked to answer.

[209] I am not sure that there is any issue about when he was notified about the 28 March Order. However, based on what he expressly states in his second affirmation, I do not accept his assertion (if that is what he asserts) that he was not aware or did not understand the terms of that Order. His failure to say this in his written evidence is ample proof that he well knew of its contents. So far as the later July order is concerned, it is, I believe undisputed that this was served upon him.

[210] For the above reasons, there is no substance in the assertion that he was not involved in obtaining the Congolese injunctions. But what makes the position clear from any doubt is that, as the CEO of Soremi SA, it would be inconceivable that he would not know and would not have participated in the initiation and obtaining of the Congolese injunctions. In addition, there is no doubt in my mind that he was actually involved in the decision to seek the Congolese Injunctions. This is clear from the request made by Soremi SA to prohibit the transferring of funds in compliance with the injunction, which was in the following terms:

> "In view of the request made by SOREMI S.A. relating to the prohibition of any transfer by it of funds to SOREMI INVESTIMENTS LIMITED, GLOBAL MINING DEVELOPMENT LP and GERALD METALS LP, as well as any disclosure of strategic Information …"

[211] Under the "Appeared" section of the order of the Congolese Court entitled "ORDER TO RECOGNIZE THE UNENFORCEABILITY OF A JUDICIAL DECISION AGAINST THE COMPANY SOREMI S.A AND TO PROHIBIT THE TRANSFER OF FUNDS TO SHAREHOLDERS, BANKING INSTITUTIONS, OR CUSTODIAN INSTITUTIONS OF ANY KIND", it is recorded that Soremi SA was "represented by its General Manager …". The reference there to the "General Manager" (or the reference to the more precise French expression Directeur Général) would be understood to be the CEO of Soremi SA and, in this context, to Mr Cheng. So, it was Mr Cheng who represented Soremi SA in connection with the application for the Congolese injunctions. The suggestion that he took steps to comply is simply false.

Sentencing Options – Mr Cheng

[212] As with CNG and Soremi SA, I intend to consider all options when I come to sentence Mr Cheng. No debarring order is sought by the Claimants against Mr Cheng and, accordingly, I make no such order against Mr Cheng.

CONCLUSION

[213] Each and every allegation of contempt is made out.

[214] Sentencing and any other matter arising from this judgment (and the Discharge Judgment and Rectification Judgment) may be dealt with when the judgment is handed down. I suggest that a two-hour time estimate will be sufficient to deal with all the applications I heard at the Omnibus

Hearing. The parties should endeavour to agree the drafts, or updated drafts, of the orders for consideration by me to reflect this Judgment and the Discharge Judgment and Rectification Judgment.

[215] I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' cases and for their cooperation throughout the hearing.

Abbas Mithani KC

High Court Judge

By the Court

Registrar