Case No: 2012-834

Neutral Citation Number: [2013] EWHC 4112 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 20/12/2013

Before:

MR JUSTICE ANDREW SMITH

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Between:

	(1) DAR AL ARKAN REAL ESTATE DEVELOPMENT COMPANY (c) (2) BANK ALKHAIR B.S.C.	**Claimants**
	and	
	(1) MAJID AL-SAYED BADER HASHIM AL-REFAI (2) KROLL ASSOCIATES UK LIMITED (3) ALEXANDER RICHARDSON (4) FTI CONSULTING GROUP LIMITED	**Defendants**

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Anthony Trace QC, Jonathan Russen QC and James Sheehan
(instructed by **Addleshaw Goddard LLP**) for **Sheikh Abdullatif**
Craig Orr QC, Nicholas Sloboda and Sophie Weber
(instructed by **Slaughter and May**) for the **Second Defendant**

Hearing date: 29 November 2013

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JudgmentMr Justice Andrew Smith:

Introduction

1. By a "committal application" dated 7 October 2013 the second defendants, Kroll Associates UK Limited ("Kroll"), seek a declaration that the claimants are in contempt of court in that they broke a so-called "preservation undertaking" and a "drives delivery order", and orders that they be fined and that Sheikh Abdullatif Al Shalash ("Sheikh Abdullatif"), the managing director of the first claimants, Dar Al Arkan Real Estate Development Company ("DAAR"), and a director of the second claimants, Bank Alkhair

BSC ("BA"), be imprisoned. The applications before me are about the court's jurisdiction to order Sheikh Abdullatif's imprisonment and the service of the committal application upon him.

2. The committal application has been served on the claimants: they are incorporated overseas (DAAR in Saudi Arabia, and BA in Bahrain), but have submitted to the court's jurisdiction by suing the defendants here. Sheikh Abdullatif disputes the court's jurisdiction over him. He is domiciled and resident in Saudi Arabia, and Kroll cannot serve him in the jurisdiction unless he comes here or instructs solicitors to accept service.

3. The main (but not the only) issues between Kroll and Sheikh Abdullatif are:

i) Whether the court's power to order that a director or officer be imprisoned for a company's contempt has extra-territorial effect: that is, whether it applies to directors and officers who are outside the jurisdiction.

ii) Whether Sheikh Abdullatif can be served with the committal application under article 22(5) of the Brussels Regulation.

iii) Whether the court can and should give permission for service of the committal application under rule 6.36 of the Civil Procedure Rules, 1998 (the "CPR") on the grounds that Sheikh Abdullatif is a necessary or proper party to contempt proceedings against the claimants.

iv) Whether the court can and should dispense with service of the contempt proceedings on Sheikh Abdullatif under CPR rule 81.10(5)(a).

Before considering them, I introduce the litigation, the preservation undertaking and the drives delivery order, and explain the allegations of contempt.

The litigation

4.I can conveniently introduce the litigation by setting out part of my judgment in the case dated 12 December 2012, [2012] EWHC 3539 (Comm) (to which I shall refer as my "December 2012 judgment") at paras 4, 5 and 6:

> "[DAAR], a Saudi Arabian property development company, and [BA], a Bahraini registered investment bank, have common shareholders and directors, including Sheikh Yousef Al Shelash ("Sheikh Yousef"), who is chairman of them both, and [Sheikh Abdullatif]. According to the claimants' pleading, "The business of

BA is dependent in part upon the custom of DAAR". Until August 2010 Mr Al Refai was the Chief Executive Officer and the Managing Director of BA. He has since his dismissal been involved in criminal and civil proceedings in Bahrain, and has apparently left Bahrain: the claimants believe that he is now living in Kuwait. He has been convicted in his absence by the Bahraini courts of offences including embezzlement and misuse of BA's funds, destruction of their documents, forgery and money laundering.

"The claimants allege that Mr. Al Refai instigated a campaign after he was dismissed to discredit, damage and destroy their business "Whether out of frustration, desperation or a desire for revenge" (to quote … from the claimants' pleading), and to this end he enlisted the assistance of Kroll, an English company, who provide investigatory, business intelligence and other services, of Mr Richardson, a chartered accountant with a home in England but who is apparently ordinarily resident in Bahrain where he has a business called Business Solutions Incorporated WLL ("BSI"), and of FTI, an English company, who provide public relations services; that in the course of such a campaign, which, according to the claimants, began in November 2010, the defendants went about harming the claimants' commercial relationships with third parties and with the "business and financial world at large"; and that they engaged in "wholesale publication of damaging and untrue allegations and smears against DAAR or BA or [Sheikh Yousef]", and to this end deployed a large amount of information and material confidential to BA and DAAR to which Mr Al Refai had had access when employed and which he took without authority. (They estimate that Mr. Al Refai removed 150,000 to 200,000 documents in breach of his contract of employment.) Specifically, the defendants are said to have conducted the campaign and disclosed such confidential information through a website (the "Website") that was launched in February 2012 and closed only after these proceedings were brought and the court had made the ex parte orders that are now challenged. (The evidence indicates that the Website was closed on about 4 August 2012.)

"The claimants have asserted against the defendants six causes of action:

i) Breach of confidence;

ii) Conspiracy to injure using unlawful means ("unlawful means conspiracy");

iii) Conspiracy the predominant purpose of which was to injure

("conspiracy to injure");

iv) The tort of unlawful interference with business or commercial interests, or, as it is sometimes called, of causing loss by unlawful means;

v) Defamation; and

vi) Malicious falsehood.

The claimants have not yet quantified their claim, but they estimate DAAR's loss to be at least $500 million and BA's loss to be at least $130 million."

Since I gave the December 2012 judgment the claimants have introduced further claims of breach of contract against the first defendant, Mr Majid Al-Sayed Bader Hashim Al Refai, and of inducing breach of contract against the other defendants.

5. Before the proceedings were brought on 19 June 2012, the claimants applied without notice to Popplewell J for interim relief by way, inter alia, of an injunction against Mr Al Refai, Kroll and the third defendant, Mr Richardson: when I refer to "the defendants" in this judgment, I refer to these three defendants and not to FTI Consulting Group Limited, the fourth defendant. They sought orders to prevent the disclosure of confidential information and documents belonging to BA, to prevent confidential information from being uploaded and displayed on the Website and to prevent the defendants from "furthering by conduct their revealed aim of causing financial loss to both claimants". The application was first heard on 1 June 2012, but Popplewell J adjourned it to 14 June 2012 and then to 18 June 2012. On 18 June 2012 he made orders with a return date of 27 June 2012 prohibiting disclosure by the defendants of so-called "Proprietary Information" and uploading it to the Website. His order recorded an undertaking given to the Court by the claimants, which has been referred to as the "preservation undertaking": that they would "preserve and keep safe the original hard drives containing the Material and delivered to [DAAR] as described [by Sheikh Abdullatif in his affidavit of 7 June 2012]". On 27 June 2012, the return date, Popplewell J extended the non-disclosure and other orders against the defendants, and he also made an order against the claimants (the "drives delivery order") in these terms: "The original hard drives … shall be delivered as soon as reasonably practicable to the Claimants' solicitors (Dechert LLP) and preserved and kept safe in the London offices of Dechert LLP pending further order of the Court. Upon delivery of the Original Hard Drives to Dechert LLP in accordance with this Order, the Claimants shall be released from [the preservation undertaking]."

6. I should explain what was being referred to as the "Material" and the "original hard drives". The "Material" was defined as "the email documents, information and material received by [DAAR] in electronic form and referred to [by Sheikh Abdullatif in his affidavit]". On 31 May 2012, the claimants had applied to Blair J for authorisation "(if

and in so far as is necessary) … to disclose and deploy in court and otherwise use certain emails and other evidence" for the purposes of the proceedings, including any application for interim injunctive relief. The application was made under section 55 of the Data Protection Act, 1998 (the "DPA"), which prohibits disclosure of "personal data" and makes it an offence to do so, subject to a number of exceptions including disclosure authorised by a court order. It was supported by a witness statement of Mr Antony Dutton, a partner in Dechert LLP, who said that the claimants had "come into possession of a quantity of data, which may constitute data under section 1 of the DPA, and which may have been procured unlawfully". Mr Dutton explained that, according to Sheikh Abdullatif, the claimants had two hard drives which had been sent to DAAR by post anonymously, and they believed that they contained emails from mailboxes operated by Mr Al Refai and "potentially" from mailboxes operated by "individuals associated with Mr Al Refai". Sheikh Abdullatif had told him that the material had not been requested by anyone employed by the claimants or obtained at their instigation. The first drive had been sent to DAAR's legal department in an envelope which gave the sender's name as "Mohammed Al Qhatani" and on which was written what appeared to be an incomplete telephone number. Sheikh Abdullatif had instructed DAAR's "legal team" to send it to BA on 19 April 2012 because the material apparently concerned them. DAAR had received on 26 April 2012 the second disc in its post office box, and similarly sent it to BA. Mr Dutton emphasised that, according to information given to him by Dr Salahuddin Almajthoob, the Managing Director of Special Projects at BA, the discs had been dealt with carefully: that "Following liaison with BA's IT team, it was decided to store the data contained on the hard drive on a laptop computer specially purchased for this purpose", with the intention both (i) of avoiding any risk of access by others at BA and so of preserving the privacy of the data, and (ii) of ensuring that viruses or other damaging software were not downloaded on to BA's computer system. It was only then that the material had been reviewed by a Mr Zain Al Hamad, a Financial Analyst, who reported that the drives apparently contained emails from mailboxes of Mr Al Refai and persons associated with him, and seemed to provide evidence that the defendants were engaged in a conspiracy to injure the claimants by using information confidential to BA.

7. In an affidavit that was before Popplewell J in draft on 1 June 2012 but was not sworn until 7 June 2012, Sheikh Abdullatif gave evidence consistent with Mr Dutton's statement about the circumstances in which the first hard drive was received by DAAR and what they did with it, but he did not refer to the second hard drive. Nevertheless, the preservation undertaking referred to "the original hard drives … described in the first affidavit of [Sheikh Abdullatif]". This was an error: the intention was to refer to both the drives that, according to the claimants, were received by DAAR in April 2012.

8. On 7 September 2012 Kroll and Mr Richardson applied to have set aside or discharged the orders made by Popplewell J on the grounds (i) that, when they applied to the court, the claimants had not made full and frank disclosure and had misled the court in their evidence and submissions, and (ii) they had not complied with the preservation undertaking and the drives delivery order. On 16 October 2012 Mr Al Refai made a similar application. After a hearing over six days in November 2012 (which has been referred to as the

"discharge hearing"), I concluded in my December 2012 judgment that the claimants had broken the preservation undertaking and the drives delivery order, and, so far as is material, I discharged the orders against the defendants. In reaching my conclusion that the defendants had established the grounds for their application, including the breach of the preservation undertaking and the drives delivery order, I applied the civil standard of proof (while recognising the need for cogent evidence to prove allegations of this kind).

9. In response to the defendants' applications, the claimants presented evidence, including written and oral evidence from Sheikh Abdullatif, about the drives that they had received and what they had done with them. I do not need to set it out in detail: I do so in my December 2012 judgment. The claimants' evidence was not consistent, and I concluded that it did not provide an honest and candid account of what had been done with the drives. It suffices here to say this: on 2 July 2012 Mr Dutton received from BA two drives that he was told were those received by DAAR, and he brought them to London. He therefore wrote to Kroll's solicitors, Slaughter & May, on 6 July 2012 that the claimants had complied with the drives delivery order. However, before the drives were delivered to him, Sheikh Abdullatif had deleted from one of them (referred to as HDD1) two files, both of which, as I concluded, lent support to the defendants' contention that the claimants were party to unlawful hacking of emails associated with Mr Al Refai. I rejected (at para 85 of the December 2012 judgment) the submission that this was not deliberate, and I concluded that "Sheikh Abdullatif deleted the documents knowing that this was a breach of the preservation undertaking and that he did so because they would reveal that DAAR and BA had had the drives, or at least HDD1, before April 2012" (and so the account given to Popplewell J about how they were obtained was wrong).

10. The claimants also presented evidence about receiving a third hard drive. Dr Abdulrehman H Al Harkan, the General Manager of DAAR, said in an affidavit of 28 September 2012 that he had been tasked with investigating how the drives had been handled, and he concluded, he said, that on 4 June 2012 DAAR received "an envelope … which may have contained a hard drive" in addition to the two drives received in April 2012. His evidence was that he had been told that this too had been delivered to BA. However, Dr Almajthoob said that he did not think that the third drive had been sent to BA. In my December 2012 judgment, the only conclusion that I was able to reach about the third drive was this (at para 82): "I cannot tell whether DAAR never had a third drive or whether Dr Almajthoob is not telling the truth in denying any knowledge of it, but I cannot accept that all the claimants' evidence about this is honest: at least one of their witnesses has been untruthful".

<u>The committal and associated applications</u>

11. On 7 October 2013 (immediately after the expiry of a stay of the proceedings to allow an opportunity for mediation) Kroll issued the committal application, seeking this relief:

> "(1) a declaration that the First and Second Respondents ("DAAR" and "BA") were and remain in contempt of court by reason of their

> breach of … [the preservation undertaking and the drives delivery order];
>
> (2) an order that Sheikh Abdullatif Al Shalash, the Managing Director of DAAR and a Director of BA, be committed to prison pursuant to CPR 81.4 for a period to be determined by the Court for DAAR and BA's above-mentioned contempt of court;
>
> (3) an order that DAAR and BA be fined in an amount to be determined by the Court for their afore-mentioned contempt of court; and
>
> (4) an order (insofar as necessary) to dispense with personal service on the Respondents of the Order of Mr Justice Popplewell dated 18 June 2012 and the Order of Mr Justice Popplewell 27 June 2012 and the need for a penal notice on them."

In the accompanying form (form N510) Mr Jonathan Cotton, a partner in Slaughter & May, Kroll's solicitors, stated that the court has power under the Brussels Regulation to hear the claim, the claim being one to which article 22 applies.

12. CPR 81.10(3) provides that:

> "The application notice must –
>
> (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
>
> (b) …".

Kroll attached to their notice a four page document headed "Reasons why the order is sought". At a hearing on 22 November 2013 I questioned whether this sufficiently complied with CPR 81.10(3), not least whether it distinguished properly between the allegations of contempt against DAAR and allegations against BA. Although Kroll did not, I think, accept that the notice was inadequate, on 25 November 2013 they served an application for permission to amend the allegations of contempt, and Mr Anthony Trace QC, who represents the claimants and Sheikh Abdullatif, did not oppose this (without prejudice to the contention that the amendment would not cure all the deficiencies in the notice and, in the case of Sheikh Abdullatif, without prejudice to his challenge to the court's jurisdiction). I permitted the amendment. I do not need to set out all the grounds on which the committal application is now made, but they include these:

> "(1) Contempt Charge 1 (against DAAR and BA):

12.1 In contempt of the Preservation Undertaking and/or Drives Delivery Order, Sheikh Abdullatif deleted two electronic files from HDDI on 2 July 2012, immediately before it was provided … to Dechert, purportedly in compliance with the Claimants' obligations under the Drives Delivery Order.

12.2 In deleting those two electronic files, Sheikh Abdullatif was acting in his capacity as a director of DAAR and BA. DAAR and BA are vicariously responsible for his acts and/or his acts are to be attributed to them.

...

(2) Contempt Charge 2 (against DAAR):

12.4 In contempt of the Preservation Undertaking and/or Drives Delivery Order, DAAR:

(1) failed to preserve and keep safe the original hard drives; and/or

(2) failed to keep the original hard drives free from harm or interference; and/or

(3) interfered with the original hard drives and/or harmed them and/or permitted its officers and/or employees to do so.

…

Further, by no later than about 24 July 2012, DAAR destroyed all electronic copies of any Hacked Material in its possession (apart from the … hard drives provided to Dechert …), purportedly in compliance with [the drives delivery order], despite knowing (by Sheikh Abdullatif) that it had mishandled the original hard drives as set out above. As a result, it appears that DAAR has destroyed (by electronic means) at least one original hard drive (HDD1 being the only confirmed original hard drive still in existence). DAAR was accordingly in contempt of:

(1) the Preservation Undertaking, by destroying an original hard drive; and/or

(2) the Drives Delivery Order, by destroying an original hard drive and/or failing to deliver an original hard drive to Dechert, whether as soon as reasonably practicable or at all. …

(3) Contempt Charge 3 (against DAAR):

12.9 Although its existence was not revealed by DAAR until service of Dr Al Harkan's First and Third Affidavits on 28

> September 2012 and 15 October 2012 respectively, the Third Drive was an original hard drive within the meaning of the Preservation Undertaking and Drives Delivery Order.
>
> 12.10 In contempt of the Preservation Undertaking and/or Drives Delivery Order, DAAR:
>
> (1) failed to preserve and keep safe the Third Drive; and/or
>
> (2) failed to keep the Third Drive free from harm or interference; and/or
>
> (2) interfered with the Third Drive and/or harmed it and/or permitted its officers and/or employees to do so;
>
> …"

13. On 9 October 2013 Kroll applied for an order for permission to serve the committal application by alternative means on Sheikh Abdullatif (and also on DAAR, but that is irrelevant for present purposes). They said that they made the application under CPR 6.15 (1), which provides as follows:

> "Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

The application might more precisely (or more completely) be said to have been made under CPR 81.10(5), which deals specifically with service of committal applications and other documents under section 2 of CPR part 81:

> "The court may –
>
> (a) dispense with service … if it considers it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place."

14. In a statement accompanying the application under CPR 6.15 Mr Cotton said that the application had been served on BA in Bahrain, but that "Matters in Saudi Arabia … were less straightforward". He described the steps taken by Kroll's local counsel to serve the committal application notice on 8 and 9 October 2013. In summary:

i) On 8 October 2013 Kroll's local counsel went to Sheikh Abdullatif's offices with the notice of application, and asked to meet him. His private secretary, Mr

Ibrahim Farh, told them that Sheikh Abdullatif could not meet them, and offered to receive the documents. Initially the offer was declined, and the counsel waited in the hope of serving Sheikh Abdullatif or another senior officer of DAAR, but in the end delivered the documents to Mr Fahr, according to Mr Cotton "on behalf of DAAR and Sheikh Abdullatif".

ii) Later that day, Slaughter & May wrote to Addleshaw Goddard, who earlier on 8 October 2013 had served a notice that they replaced Dechert as the claimants' solicitors, to explain what had happened and sent the committal documents to them.

iii) On 9 October 2013 Kroll's local counsel returned to Sheikh Abdullatif's offices in order to deliver documents to him, but again they were not permitted access to him. Mr Farh asked them to leave the documents in the lobby of the offices, and they did so in Mr Farh's presence.

15. Sheikh Abdullatif's counsel assert in their skeleton argument that he was "unable to break off from a meeting to accept personal service of the committal application", and that the suggestion that Sheikh Abdullatif was evading service is "wholly unfounded". This is not supported by evidence. However, Mr Mark Hastings, a partner in Addleshaw Goddard, said in a statement dated 21 November 2013 that in the evening of 8 October 2013 Sheikh Abdullatif was made aware by Mr Issam Issa, the Legal Director (Special Projects) at BA, "that Kroll were seeking to commence contempt proceedings", and that Sheikh Abdullatif first read the documents relating to the committal application on 20 and 21 October 2013.

16. Mr Cotton said in his statement, citing Allison v Limehouse, [1992] 2 AC 105, that he believed that there was a "good argument" that effective service on Sheikh Abdullatif had been effected in Saudi Arabia. This argument was not ventilated before me, counsel disregarded it in their submissions, and so I too shall disregard it in this judgment. However, Mr Cotton continued, "for the avoidance of doubt and in the interests of avoiding future argument" Kroll applied for an order that they "be permitted to serve by the alternative means utilised on 8 October 2013 (i.e. through service on Mr Ibrahim Farh in DAAR's offices in Saudi Arabia and Addleshaw Goddard in London) and for an order under CPR 6.15(2) that those steps already taken on 8 October 2013 constituted good service". On 11 October 2013 I made an order that Kroll should have permission, in so far as it was necessary, to serve the application and accompanying documents on Sheikh Abdullatif through service on DAAR and BA, or service on his private secretary, Mr Fahr, or service on Addleshaw Goddard; that the steps taken by Kroll be deemed to constitute good service of the notice of the committal application and related documents; and that the notice be deemed to have been served on 8 October 2013.

17. On 21 November 2013 Sheikh Abdullatif challenged the jurisdiction over him in respect of the committal application and applied to set aside the order of 11 October 2013 (and for

other relief) on the grounds that:

i) It does not "fall within the grounds relied on by Kroll for service of [it] out of the jurisdiction on Sheikh Abdullatif and the Court has no jurisdiction over [him] in respect of the Application"; or alternatively the court should not exercise any jurisdiction over him that it does have; and

ii) Kroll "failed to give full and frank disclosure in respect of the application" for service of the committal application by alternative means.

18. On 25 November 2013 Kroll made a further application for permission "retrospectively" to serve the contempt application and related documents out of the jurisdiction on Sheikh Abdullatif in Saudi Arabia, for an order that what they had done on 8 and 9 October 2013 should be deemed to constitute good and sufficient service on Sheikh Abdullatif, and that the contempt application should be deemed to have been served on 9 October 2013.

19. Sheikh Abdullatif's application of 21 November 2013 and Kroll's application of 25 November 2013 were listed for hearing before me on 29 November 2013. On 28 November 2013 Kroll's counsel sent to the court and to Sheikh Abdullatif's representatives a "Supplemental Skeleton Argument", in which they said that, even if I accept the challenge to the court's jurisdiction and refuse permission for service out of the jurisdiction under CPR 6.36, I should make an order under CPR 81.10(5) dispensing of service with the committal application notice. Mr Trace resisted the application, but did not contend that it should not be heard because there was no formal notice of it or because Sheikh Abdullatif had had inadequate notice.

Is service on Sheikh Abdullatif required by the CPR?

20. A person who is not a party to proceedings but who aids and abets breach of a court order obstructs the course of justice and is guilty of contempt punishable by committal: Halsbury's Laws of England, Vol 22, Contempt of Court (5th Ed, 2012) para 92. The same is true of a person who aids and abets breach of an undertaking to the court: Thorne RDC v Bunting, [1972] 3 All ER 657, 661A, (affd [1972] 3 All ER 1084). However, Kroll do not seek the imprisonment of Sheikh Abdullatif on the grounds that he is in contempt of court himself or that he aided and abetted the claimants' contempt. They have not explained, and are not obliged to explain, why they do not do so: possibly they did not consider that such an application would be covered by article 22(5) of the Brussels Regulation, which concerns "proceedings concerned with the enforcement of judgments". That is speculation, but the Court of Appeal stated this principle in Seaward v Paterson, [1897] 1 Ch 545 (as it is put in the head-note to the report, which Goulding J cited with approval in the Bunting case):

> "There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the first case the order is made to enable the plaintiff to get his rights; in the second, because it is not for the public benefit that the course of justice should be obstructed."

21. Kroll instead apply for an order under CPR 81.4 that Sheikh Abdullatif be imprisoned for the claimants' breaches of the preservation undertaking and drives delivery order and their contempt of court thereby. CPR 81.4 provides that:

> "(1) If a person –
>
> (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
> (b) disobeys and judgment or order not to do an act,
>
> Then … the judgment or order may be enforced by an order for committal.
>
> (2) …
>
> (3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation ..."

22. Section 2 of CPR part 81 is headed "Committal for breach of a judgment, order or undertaking to do or abstain from doing an act", and CPR 81.10(2), which is in section 2, provides that, "Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23". CPR 81.10(4) provides that, subject to the court's powers in CPR 81.10 (5) (at para 13 above) to dispense with service or to allow service by alternative means, "the application notice and the evidence in support must be served personally on the respondent". CPR 81.3 provides that in CPR 81:

i) A committal application is "any application for an order committing a person to prison".

ii) Respondent means "a person (i) against whom a committal application is made or is intended to be made; or (ii) against whose property it is sought to issue a writ of sequestration".

23. Mr Craig Orr QC, who represented Kroll, accepted that, in order to apply for a committal

order against Sheikh Abdullatif, Kroll have to serve him with the committal application, unless the court makes an order dispensing with service. He was right to do so: although an order under CPR 81.4(3) for the imprisonment of Sheikh Abdullatif would be based on the contempt of the claimants (or one of them), it is made "against" Sheikh Abdullatif, and, as I interpret the rules, a committal application for such an order is considered to be made "against" him, so that he is a respondent on whom service is required. This conclusion, I observe, is in accordance with the notes in the White Book, which say at p.2329 at 81.5.2:

> "Where a committal order is sought for breach of a judgment or order under which a company had obligations, and a committal order is sought against a director or other officer, that director or other officer is a person "against whom a committal application is made or is intended to be made" and is therefore a "respondent" (as defined in r.81.3(5)) upon whom a copy of the judgment or order must also be served." (The reference to "r.81.3(5)" is an error for "r.81.3(c)".)

Does the court have jurisdiction to make a committal order against Sheikh Abdullatif?

24. Sheikh Abdullatif submitted that CPR 81.4(3) does not apply to foreign directors or officers: that is to say, to directors or officers (of an English or a foreign company) who are not within the jurisdiction and cannot be served here. If he is right, the power of the court to deal with contempt of its orders by companies with foreign directors and officers would be much reduced (including where, as here, a company has invoked the court's jurisdiction, and where it made a jurisdiction agreement). The efficacy of, for example, many worldwide freezing orders and anti-suit injunctions would be compromised.

25. However, Mr Trace argued that the interpretation of CPR 81.3(4) is governed, and its ambit is restricted, by the principle against extraterritorial application of legislation, including the CPR. He relied upon the judgment of Lord Mance in Masri v Consolidated Contractors International (UK) Ltd (No 4), [2009] UKHL 43 ("Masri no 4"), in which the other members of the Judicial Committee concurred. In that case Lord Mance referred (at para 10) to the "[principle] of construction, underpinned by considerations of international comity and law", formulated in Bennion, Statutory Interpretation (4th Ed, 2002 section 128, now in 5th Ed, 2008 section 128), that "Unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters". This formulation in Bennion was cited with approval by Lord Bingham in R (Al Skeini) v Secretary of State for Defence, [2007] UKHL 26, para 11 (where Lord Bingham also referred to section 106 of the fourth edition of Bennion, now section 106 of the fifth edition).

26. The Masri (no 4) decision concerned the interpretation of CPR 71, which is about orders to obtain information from judgment debtors. CPR 71.2(1) provides as follows:

"(1) A judgment creditor may apply for an order requiring –

(a) a judgment debtor; or

(b) if a judgment debtor is a company or other corporation, an officer of that body,

to attend court to provide information about –

(i) the judgment debtor's means; or

(ii) any other matter about which information is needed to enforce a judgment or order."

Lord Mance rejected an argument that the rule-making power in section 1 of the Civil Procedure Act, 1997 did not allow rules with extraterritorial effect in the absence of specific statutory authority and therefore did not allow a rule for examination of an officer of a foreign company. However, he accepted the argument that the presumption against extraterritoriality applies to CPR 71 and nothing displaced it: CPR 71.1, he said, "was not conceived with officers abroad in mind".

27. On a different application in the same litigation, in Masri v Consolidated Contractors International Co SAL, [2011] EWHC 409 (Comm) Gloster J had made a receivership order over oil and rights to oil to which Consolidated Contractors (Oil & Gas) Company SAL ("CCOG"), a Lebanese company, were or might become entitled, and had it endorsed with a penal notice that, if Mr Elias Joujou, who was one of the judicial administrators of CCOG appointed by the First Instance Court of Beirut, disobeyed the court's order, he might be held to be in contempt of court and imprisoned. The endorsement continued, "This Notice is given without prejudice to any representations you may make as to your capacity and position under Lebanese law and does not represent a determination of any such issues." Mr Joujou applied to discharge the receivership order in so far as it related to him personally.

28. At paragraph 88 of her judgment Gloster J observed that in Masri (no 4) the House of Lords "did not consider the position whether a director or officer out of the jurisdiction could be liable for contempt of court or whether contempt proceedings could be served on such a person outside the jurisdiction". She continued:

"That would have required the House to consider, *inter alia*: the construction and legislative intendment of RSC Order 45, Rule 5 (with its express references to officers of bodies corporate); the decision of the Court of Appeal in *Mansour v Mansour*; the terms of the *Babanaft* proviso, including the standard officers' wording; and whether service is permitted under the enforcement gateway in Practice Direction 6B, paragraph 3.1(10), not least because RSC

> Order 45 Rule 5(1) expressly provides that a judgment or order may be enforced by committal proceedings against a director or other officer of the defendant."

(RSC Ord 45 r. 5 can be regarded for present purposes as the predecessor of CPR 81.4.) Gloster J declined (at para 89) to exclude references to Mr Joujou from the order because she considered that the judgment creditor had a good arguable case for their inclusion. Some of her reasons (including that it was premature to consider whether the order might be served outside the jurisdiction, that Mr Joujou might come to the jurisdiction and that through him CCOG might act contemptuously within the jurisdiction) are irrelevant for present purposes, but she also said that in her view:

> "… there are good arguments for saying that the reasoning in *Masri* (no. 4) does not apply to receivership orders or injunctions of this kind, where the director or officer is named in the order, not in any third-party capacity, but because he is the directing mind or controlling organ of the corporate defendant or judgment debtor, and the person through whom any breach of the order will be committed by the corporate defendant /judgment debtor. It is not that such a person is the *alter ego* of the defendant. Rather, he is the person who, under the rule of attribution applicable to the injunction and any contempt proceedings under RSC Order 45, rule 5, for breach of the order, is the person whose acts or omissions are, for this purpose, to count as the acts or omissions of the company."

29. Mr Joujou and other judicial administrators appealed against the receivership order, but the appeal was allowed only to the extent that all references to the judicial administrators of CCOG were removed: [2011] EWCA Civ 746. As Arden LJ observed (at para 79), it was not necessary for the Court of Appeal to consider whether proceedings for contempt of court can be served outside the jurisdiction.

30. As for the considerations that Gloster J identified as relevant to whether a company director who is out of the jurisdiction could be liable for contempt of court and whether (s) he could be served out of the jurisdiction, CPR 6BPD 3.1(10) is about whether proceedings can be served out of the jurisdiction, rather than directly relevant to whether a director who is out of the jurisdiction could be liable to imprisonment for contempt of court. Kroll do not rely upon that provision in this case, and I need say nothing about it. The decision in Mansour v Mansour, [1989] 1 FLR 418 is relevant to the application that I dispense with service of the committal proceedings, and I consider at para 82 below the decision and its standing in light of Masri (no 4), but it does not, I think, assist about the interpretation of CPR 81.4.

31. The label "Babanaft proviso" derives from Babanaft International Co v Bassatne, [1990]

Ch 13, in which Nicholls LJ said this:

> "It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That self-evidently would be for an English court to claim an altogether exorbitant, extra-territorial jurisdiction."

Since then conventionally freezing (and some other) orders have contained a provision designed to meet this concern, and, after some refinement, CPR 25 APD includes this wording in the exemplar freezing order:

> "(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.
>
> (2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –
>
> (a) the Respondent or his officer or agent appointed by power of attorney;
>
> (b) any person who –
>
> (i) is subject to the jurisdiction of this court;
>
> (ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
>
> (iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and
>
> (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state."

The orders of Popplewell J of 18 and 27 June 2012 included Babanaft provisos in such terms. I am not confident that I understand quite what Gloster J had in mind when she referred to the proviso, but I suspect that she thought that it would be unnecessary if persons outside the jurisdiction would in any case not be liable for contempt. However, both Mr Trace and Mr Orr told me that they did not rely on this consideration, and I do not do so in deciding these applications.

32. The crucial question is what Gloster J called "The construction of the relevant provisions of the rules, and the legislative intention behind them". Although, as she said, in his speech in Masri (no 4) Lord Mance did not directly consider whether a director or officer out of the jurisdiction could be liable for contempt of court, some guidance is found in his speech. I refer first to his consideration of two Court of Appeal decisions. In In re Tucker (RC), [1990] Ch 148 the Court set aside an order obtained by a trustee in bankruptcy under the Bankruptcy Act, 1914 against the bankrupt's brother for his examination. The trustee accepted that there would be a tension between "the accepted practice of nations and comity in the field of international law and international relations" and an interpretation of the 1914 Act that allows foreigners to be summoned for examination, but also argued that it sufficed that the summons was against a British subject. The argument was rejected, and Dillon LJ, with whom Sir Nicholas Browne-Wilkinson V-C and Lloyd LJ agreed, commented that he would not expect the 1914 Act "to have empowered the English court to haul before it persons who could not have been served with the necessary summons within the jurisdiction of the English court" (loc cit at p.158F"). In In re Seagull Manufacturing Co Ltd, [1993] Ch 345 the Court of Appeal considered the extraterritorial application of section 133 of the Insolvency Act, 1986, which authorises the public examination of persons who were or had been an officer of an insolvent company or had acted as its liquidator, administrator, receiver or manager, or, subject to exceptions, were or had been concerned or taken part in the promotion, formation or management of the company. It upheld an order for the examination of a former director who was living outside the jurisdiction. Lord Mance did not criticise and, subject to para 35 below, implicitly endorsed the decision.

33. The case of Masri (no 4), Lord Mance said, "stands between" the two Court of Appeal decisions. On the one hand, like the position under section 133, the category of persons covered by CPR 71.1 was limited to officers (and indeed probably only current officers), and so did not cover persons who were mere witnesses, and indeed was more restricted in scope than section 133. On the other hand, CPR 71 was concerned with private civil litigation, and there was not a public interest comparable to that recognised in In re Seagull, that "those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that the investigation should be public" ([1993] Ch 345, 354G, cited by Lord Mance (loc cit para 23)). How does this apply to CPR 81.4(3)? Certainly the category of persons covered by it is limited. CPR 81.4 is headed "Enforcement of judgment, order or undertaking to do or abstain from doing an act", and to that extent it is directed to private rights obtained through private civil litigation. But this does not mean that there is no relevant public interest in the enforcement of judgments, order and undertakings. If the case were one of criminal contempt, the public interest would be unquestionable: recently in JSC BTA Bank v Ereshchenko, [2013] EWCA Civ 829 Beatson LJ said (at para 71), "Where proceedings for criminal contempt are instituted by the person who has also brought the substantive proceedings against the defendant, it is important for the applicant and for the court to keep in mind … that the allegation is of a public wrong, and its primary purpose should not be to vindicate a private right". But, while there might be more room for debate about the primary purpose of proceedings for civil contempt (such as these), the public interest in them is well recognised. For example,

in Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd., [1964] Ch 195, 198 Cross J, citing Halsbury, Laws of England (3rd ed.) vol 8 p.20, spoke of civil contempt (or contempt in procedure) bearing "a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised in the public interest". In Nicholls v Nicholls, [1997] 2 All ER 97 Lord Woolf MR said (at p.107d):

> "Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld."

Seaward v Paterson (cit sup) does not suggest otherwise: Rigby LJ said (at p.558):

> "That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time – for longer than any of us can remember – and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of the Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court".

34. Thus, contempt proceedings of this kind engage a public interest that is more specific and goes beyond the public interest in the court "getting to the bottom of litigation and ensuring that parties have the means of obtaining full information to enable it to do so", which Lord Mance recognised in Masri (no 4) is engaged in civil litigation generally (loc cit at para 23). To my mind, in that it is about whether CPR 81.4(3) has extra-territorial application, this case, unlike Masri (no 4), does not stand between In re Tucker and In re Seagull, but is closer to In re Seagull.

35. Lord Mance was unhappy about one part of the judgment of Peter Gibson J in the Court of Appeal in In re Seagull. Peter Gibson J emphasised the distinction between the issue before him about the scope of section 133 and the question whether the order for public examination could be effectively enforced out of the jurisdiction. Lord Mance said (at para 22), "Impracticality of enforcement is in my opinion a factor of greater importance than Peter Gibson J's words suggest. It is in particular a relevant factor when considering whether CPR 71 covers officers abroad". Clearly he did not consider it a decisive factor: it must be weighed when interpreting the rule but in my judgment it does not outweigh the considerations that I have mentioned. I find support for this in the passage from the judgment of Moore-Bick LJ in KJM Superbikes v Hinton, [2008] EWCA Civ 1280 at para 28, which I cite at para 82 below.

36. Mr Orr drew on Lord Mance's speech to advance another argument. The Insolvency Act, 1986 provides at section 134 that a person who without reasonable excuse fails to attend for public examination under section 133 is guilty of a contempt of court and liable to be punished accordingly. Mr Orr submitted that this shows that "there is no intrinsic impediment to the English court exercising its contempt jurisdiction over directors or officers of a company who are outside the jurisdiction". I accept that submission as far as it goes, but the absence of an "intrinsic impediment" does not go far to show that CPR 81.4(3) should be interpreted to have extra-territorial effect. I prefer to put my decision on the broader basis that I have sought to explain.

37. I should refer briefly to another of Mr Orr's arguments: he relied upon the language of rule CPR 81.4(3) in that it refers to "a company or other corporation", and submitted that the reference to "other corporation" would be unnecessary if the rule were intended to have only domestic application on the basis that English domestic law recognises no corporate entity other than a company registered under the Companies Act. This is wrong: English law recognises other corporations (sole and aggregate). In any case the thrust of Mr Trace's argument against interpreting the rule to have extra-territorial application was that it should not be taken to cover directors and officers who are outside the jurisdiction, not that it should be confined to English companies and corporations.

Article 22(5)

38. Article 4 of the Brussels Regulation provides that "If a defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to articles 22 and 23, be determined by the law of that Member State". Article 23 is about jurisdiction agreements. Article 22 of the Brussels Regulation is in section 6, which is headed "Exclusive Jurisdiction", and it provides as follows:

> "The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. …
>
> 2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
>
> 3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the

register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place ….

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced."

39. Kroll contend that the contempt application is by way of "proceedings concerned with the enforcement of a judgment" within the meaning of article 22(5), the judgment being the orders of Popplewell J of 18 and 27 June 2012. In response, Sheikh Abdullatif raises four arguments:

i) That the Regulation does not permit proceedings against persons who are not domiciled in a member state: the "domicile" argument.

ii) That the application against Sheikh Abdullatif is not by way of proceedings concerned with enforcement within the meaning of article 22: the "enforcement" argument.

iii) That an undertaking is not a "judgment" within the Regulation, and therefore, in so far as they concern an application that Sheikh Abdullatif should be imprisoned because of breach of the preservation undertaking, the contempt proceedings are not covered by article 22: the "undertaking" argument.

iv) That the court has, and should exercise, a discretion that article 22 allows not to hear the proceedings against Sheikh Abdullatif: the "discretion" argument.

40. It is not enough for Kroll to show that they would have a good arguable case on these issues. Although for practical reasons the courts adopt the test of a good arguable case where their jurisdiction over a foreign defendant turns upon disputed questions of fact, Sheikh Abdullatif's arguments raise legal questions, which are normally determined, and in this case should be determined, when the challenge to jurisdiction is decided: Dicey, Morris & Collins, The Conflict of Laws (15th ed, 2012) para 11-147.

41. Sheikh Abdullatif's first argument is inconsistent with what is said in the text books.

Layton & Mercer, European Civil Practice (2nd ed, 2004) states of article 22 "the exclusive jurisdiction rule applies irrespective of the domicile of the parties, so the fact that the defendant is not domiciled in a Brussels-Lugano state is irrelevant" (at para 14-021).

Briggs & Rees, Civil Jurisdiction and Judgments (5th ed, 2009) states of article 22 at para 2.53:

> "If the claim before the court is captured by this Article, the courts of the Member State so identified have exclusive jurisdiction over it. The domicile of the parties is wholly irrelevant: even if none is domiciled in a Member State, Article 22 is not prevented from being applied."

Similarly Dicey, Morris & Collins, The Conflict of Laws (15th ed, 2012) states at para 11.248:

> "the provisions relating to exclusive jurisdiction ... are not confined to cases where the defendant is domiciled in a Member State or Convention State (or in a particular part of the United Kingdom)".

This view finds some support in the judgment of Carnwath LJ in Speed Investments Ltd v Formula One Holdings Ltd (No 2), [2004] EWCA Civ 1512 at paras 12, 13, although the point was not there disputed. It is also supported by Lawrence Collins LJ in Masri v Consolidated Contractors International (No 2), [2008] EWCA Civ 303, who said (at para 109) that the starting point for considering article 22 is that, even if a company is not "domiciled in a Brussels I Regulation State, Article 22(5) will apply to proceedings within its scope".

42. Mr Orr also cited the Jenard Report on the Brussels Convention, observing that it remains authoritative in relation to the Brussels Regulation. Of article 4 of the Convention, which is in materially the same terms as article 4 of the Regulation, the Report states that the only exceptions to the application of the rules of jurisdiction of internal law is the field of exclusive jurisdiction in article 16, and so the rules which grant exclusive jurisdiction to the courts of a Member State are applicable whatever the domicile of the defendant. Of article 16 the Report states:

> "These rules, which take as their criterion the subject-matter of the action, are applicable regardless of the domicile or nationality of the parties. In view of the reasons for laying down rules of exclusive jurisdiction it was necessary to provide for their general application even in respect of defendants domiciled outside the Community. Thus, for example, a Belgian court will not, on the basis of Article 53 of the Law of 1876 or of Article 637 of the draft Judicial Code, which in actions against foreigners recognize the jurisdiction of the courts of the plaintiff, have jurisdiction in proceedings between a

> Belgian and a person domiciled, for example in Argentina, if the proceedings concern immovable property situated in Germany. Only the German courts will have jurisdiction."

Mr Trace observed that this illustration contemplates two courts in the Community that might assume jurisdiction over proceedings. That is so, but both these passages of the Report state that article 16 of the Brussels Convention gave the appropriate court within the Community jurisdiction over persons domiciled outside the Community.

43. Against this, Mr Trace made these submissions:

i) First, he cited the French version of the Brussels Regulation, which refers to the courts of the Member State designated by article 22 as "seuls compétents, sans considération de domicile". As Mr Trace said, all versions of the Regulation are of equal interpretative weight, but I do not see how the wording of the French version provides any support for Mr Trace's argument.

ii) Next he relied on the language of the prescribed application form, form N510, which required Kroll to state that the Court had jurisdiction to hear the claim because article 22 applied to it and no proceedings were pending between the parties in the courts of any other Community jurisdiction. I see nothing in the form that supports Mr Trace's argument, but in any case the wording of form N510 cannot bear on what autonomous meaning should be given to the Brussels Regulation.

iii) Next Mr Trace sought support in the CPR in that, he submitted, if article 22 confers on the court jurisdiction over persons domiciled outside the Community, there is little, if any, scope for the provisions of CPR 6BPD 3.1, which allow the court to permit service out of the jurisdiction (inter alia) if "A claim is made to enforce any judgment or arbitral award" or if "The whole subject matter of the claim relates to property located within the jurisdiction". However, the Brussels Regulation does not apply to all proceedings (see article 1), and again the language of the Practice Direction does not assist to interpret article 22 autonomously.

iv) It is said that there is no principled reason that in the circumstances described in article 22 a Community court should assume jurisdiction over a non-community domiciliary. I do not agree. The reason that jurisdiction is given is explained in the passage of the Jenard Report to which I have referred at para 42 above. I also refer to the opinion of Advocate General Lenz in AS-Autoteile Service GmbH v Malhé, (case 220/84), who said (of article 16 of the Brussels Convention) that "the particular areas which fall under article 16 ... are matters which, because of their particular difficulty or complexity, require that the court having jurisdiction should

> be particularly familiar with the relevant national law". This was cited by Lord Bingham in Kuwait Oil Tanker Co SAK v Qabazard, [2003] UKHL 31, who commented (at para 6) that, "It would appear that very much the same considerations of principle, comity and convenience as underlie the English law are reflected in the jurisprudence of the Brussels and Lugano Conventions also".

I therefore do not find these points persuasive.

44. However, Mr Trace had a more formidable argument: he cited the decision of the Court of Appeal in Choudhary v Bhattar, [2009] EWCA Civ 1176, which he submitted is an authority by which I am bound under the doctrine of precedent. That case was about whether the English court had jurisdiction over a dispute concerning a company incorporated in England in 1872, which had no other connection with England and carried on business solely in India. The claimants sought to restrain the company and a director from acting on what purported to be letters of resignation from the board from the first and second claimants. At first instance Mr David Donaldson QC held that, in light of article 22(1) of the Brussels Regulation, and the decision of the European Court of Justice ("ECJ") in Owusu v Jackson, Case C-281/02, the English court was obliged to accept jurisdiction over the proceedings. His decision was reversed by the Court of Appeal. The first judgment was given by Sir John Chadwick, and Ward and Stanley Burnton LJJ agreed with his judgment without giving their own reasons on the question that is relevant for present purposes. Sir John Chadwick said this (at para 38):

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

He concluded that no authority compelled a different conclusion.

45. The passage that I have cited was part of the ratio of Sir John Chadwick's decision, and so, subject to an argument of Mr Orr to which I come at para 55, it is authority that binds me. It was not argued that his statement was applicable only to cases covered by article 22 (1), or that the words "regardless of domicile" should be given a different meaning or have a different application in cases covered by article 22(5). It does not assist Mr Orr to observe that the case was "very extreme" on its facts in that the defendant company had no connection with England other than its historic incorporation here. Nor does it assist Kroll that the decision has met with academic disapproval: for example, in the British Yearbook of International Law (2009) Professor Briggs wrote at pp. 615, 616 that the Court of Appeal's view on this point "was quite wrong. For Article 22(2) means what it says; and it says the same throughout Article 22. … Article 22 may operate, and may establish exclusive jurisdiction over a defendant wherever that defendant is domiciled".

46. Mr Orr, however, submitted that the decision is contrary to what the ECJ said in three decisions: Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA, (Case C-412/98); Owusu v Jackson (cit sup); and Land Oberösterreich v CEZ AS, (Case C-343/04). The Group Josi case concerned a claim made by a Canadian insurance company against a Belgian reinsurance company for monies due under a reinsurance contract. The Canadian company brought proceedings in the Tribunal de Commerce, Nanterre, France, and the Belgian reinsurer, relying on the Brussels Convention, argued that the French court lacked jurisdiction and the Tribunal de Commerce, Brussels, within whose territorial jurisdiction it had its registered office, had jurisdiction over the dispute. The French court rejected the challenge on the grounds that the claimants were incorporated under Canadian law and had no place of business within the Community. On appeal, two questions were referred to the ECJ, including this: "Does the Brussels Convention … apply not only to "intra-Community" disputes but also to disputes which are "integrated into the Community"? The ECJ decided (at para 61) that the relevant parts of the Brussels Convention were "in principle applicable where the defendant has its domicile or seal in a contracting State, even if the plaintiff is domiciled in a non-member country". The court said (at paras 45 and 46):

> "… although the court seised must be that of a Contracting State, that provision does not further require that the plaintiff be domiciled in such a State.
>
> The same conclusion can be drawn from Article 16 of the Convention, which states that the rules of exclusive jurisdiction which it lays down are to apply without the domicile of the parties being taken into consideration. The fundamental reason for those rules of exclusive jurisdiction is the existence of a particularly close connection between the dispute and a Contracting State, irrespective of the domicile both of the defendant and of the plaintiff…".

47. In Owusu v Jackson the claimant, who was domiciled in the United Kingdom (as the ECJ put it: more specifically, I think, in England and Wales), and who had suffered injuries diving from a beach in Jamaica, claimed damages in English proceedings against Jamaican companies who owned the beach or had licences relating to its use. The defendants asked the English court to decline jurisdiction on the grounds of forum non conveniens, but the court at first instance considered that it had no power to so do in view of the Group Josi case. On appeal the Court of Appeal referred questions to the ECJ, including whether it was inconsistent with article 2 of the Brussels Convention for the court of a contracting state to exercise a discretionary power available under its national law to decline to hear proceedings against a person domiciled in that state, if the jurisdiction of no other Convention state is in issue and the proceedings had no connecting factors to any other contracting state. In their judgment ECJ said this (at para 28):

> "Moreover, the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to

> be applicable to legal relationships involving only one contracting state and one or more non-contracting states. That is so, under article 16 of the Convention, in the case of proceedings which have as their object rights in rem in immovable property or tenancies of immovable property between persons domiciled in a non-contracting state and relating to an asset in a contracting state, or, under article 17, where an agreement conferring jurisdiction binding at least one party domiciled in a non-contracting state opts for a court in a contracting state."

48. The Land Oberösterreich case was about a claim by an Austrian province against a Czech energy supply undertaking for nuisance caused by radiation from a power station, and the province alleged that it concerned rights in rem over immovable property within article 16 (1) of the Brussels Convention, the predecessor of article 22(1) of the Brussels Regulation. At the relevant time the Czech Republic was not of the European Community or a party to the Brussels Regulation. The main issue was whether an application to prevent a nuisance of this kind was covered by article 16(1), but the ECJ said this under the heading "Preliminary observations" (at para 21):

> "It must be observed, as a preliminary point, that, although the Czech Republic was not a party to the Brussels Convention at the date on which the Province of Upper Austria brought the action before the Austrian courts, and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent application of Article 16 of the Brussels Convention, as is expressly stated in the first subparagraph of Article 4."

The relevance of article 4 of the Convention, which was in materially similar terms to article 4 of the Brussels Regulation, is clear from the opinion of Advocate General Poiares Maduro, who wrote at para 22:

> "Article 4 of the Convention expressly provides that when the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State is to be determined by the law of that State. Article 4 also, however, excludes the cases of exclusive jurisdiction established in Article 16 from this application of the domestic provisions on international jurisdiction. In this way, Article 16 plays a central role in that it grants a ground for jurisdiction under the Convention that would not otherwise be available given that the defendant is not domiciled in a Contracting State".

49. In Choudhary v Bhattar (cit sup) Sir John Chadwick referred to the Group Josi case only in the context of explaining the first instance decision in Owusu v Jackson that the judge

considered that he had no discretion to decline jurisdiction. Of the Owusu case he said (at para 52) "Properly understood, the decision in Owusu provides no direct authority on the question whether a court of a contracting state is precluded from declining the jurisdiction (if any) conferred on it by article 22 of the Judgments Regulation in respect of a person not domiciled in a Member State on the ground that the court of a non-contracting state would be a more appropriate forum for the trial of the action." He did not refer to the passages of the decisions in Group Josi and Owusu that I have cited above, and he did not refer at all to the Land Oberösterreich case, which contained the most recent and perhaps clearest statement of the ECJ's views. Nor did he refer to the Jenard Report or any academic authority. I do not easily conclude that the Court of Appeal was not only unaware of the Land Oberösterreich case, but also had not seen the relevant passages of the other two ECJ cases. However, I find it impossible otherwise to explain why Sir John Chadwick's judgment made no reference to them,.

50. Mr Trace rightly observed that a decision is not reached per incuriam simply because a court was unaware of relevant authority: the principle of per incuriam does not apply unless the court would have reached a different decision (or at least unless it would have reasoned differently) had it been aware of the relevant authorities. In Duke v Reliance Systems Ltd, [1988] 1 QB 108, Sir John Donaldson MR said this (at p.113 C-E):

> "I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material it *must* have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it *might* have reached a different conclusion. That appears to me to be the position at which we have arrived today."

51. However, the relevant passages of the three ECJ judgments would, as I see it, have compelled Sir John Chadwick and the other members of the court to a different decision. Otherwise they would not have been observing the requirement of section 3(1) of the European Communities Act, 1972, which covers both the Brussels Convention and the Brussels Regulation, and provides that:

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court".

52. I reach this conclusion notwithstanding Mr Trace's submission that the judgment of the

Choudhary case is not isolated in regarding article 22 directed only to allocating jurisdiction within the community. In Lucasfilm v Ainsworth, [2009] EWCA Civ 1328 the Court of Appeal said that "the whole of article 22 only makes sense if the proposed extra-EU jurisdiction is not conferred by the Regulation" (at para 108) and of the co-operation required by the EC Treaty (Community Policies), which conferred the power to make the Regulation, that "The judicial co-operation is between the courts of the member states, not about co-operation between the courts of a member state and those of third countries. It is all about the internal market" (at para 116). These observations were not considered when the case went to the Supreme Court ([2011] UKSC 39), and they were made in the context of a case in which the Court of Appeal considered that the English court had no subject matter jurisidction over the dispute, which involved a claim for damages for infringement of a foreign (non-EU) copyright, and its concern was apparently that the courts of member states should not be required to take what it called "universal international jurisdiction" over disputes which (inter alia) have no "intra-member state or effect" and "no EU interest requiring or making it convenient that the member state concerned should have jurisdiction". It was far removed from this case.

53. However this may be and whatever criticisms may be made of the Choudhary decision, they do not persuade me to depart from its ratio. In Law in the Making (7th ed, 1964), Professor C K Allen referred to Young v Bristol Aeroplane Co, [1944] KB 718, in which the Court of Appeal determined that the doctrine of precedent does not oblige it to follow its previous decisions if they were made in ignorance of a precedent of its own or of a court of co-ordinate jurisdiction. Professor Allen observed (at p. 246) that "up to the present time, no judge sitting alone seems to have rejected an appellate court's ruling on any of the grounds afforded by *Young's Case;* nor, it is believed, is it likely to do so". However, he recognised (at p.245) that in principle the corollary of R v Northumberland Compensation Appeal Tribunal ex p Shaw, [1951] 1 KB 711, in which the Divisional Court considered itself free to disregard a Court of Appeal decision because previous decisions of the House of Lords and the Privy Council had not been cited, is that puisne judges are similarly free. Two first instance judgments support this view:

i) In The Uganda Co (Holdings) Ltd v The Government of Uganda, [1979] 1 Lloyd's Rep 481, 486 Donaldson J considered that he could depart from a previous decision of the Court of Appeal because he thought that the decision was undermined by a misunderstanding of the doctrine of precedent.

ii) In Amanuel v Alexandros Shipping Co, (The "Alexandros P"), [1986] 1 All ER 278 Webster J apparently considered that he could have departed from a decision of the Court of Appeal if it was made per incuriam (but in fact concluded that it was not).

54. Cross and Harris in Precedent in English Law (4th ed, 1991) states (at p.157) that "It is unclear what room for manoeuvre is conferred on divisional courts and first instance

judges as regards prima-facie binding decisions of the Court of Appeal" which have not been overruled (explicitly or otherwise) by the House of Lords (or the Supreme Court). However, they cite Baker v The Queen, [1975] AC 774, 788 in which Lord Diplock expressed the view that the per incuriam qualification of the doctrine of precedent is not available to inferior courts in respect of any superior appellate court, and the speech of Lord Simon in Miliangos v Geo. Frank (Textiles) Ltd., [1976] AC 443, 479, in which he concurred. Lord Diplock's views were expressed in the Privy Council and Lord Simon was dissenting, but Lord Diplock had expressed the same views in Cassell & Co Ltd v Broome, [1972] AC 1027, 1131D: "[The label per incuriam] is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal": see too at p. 1054E per Lord Hailsham LC. If I do not follow Choudhary's case, I should be expanding upon what was decided in Young's case, and I am not entitled to do so: although I have concluded that the decision in Choudhary v Bhattar was reached per incuriam, the doctrine of precedent compels me to follow it.

55. However, Mr Orr has another argument: he submitted that section 3 of the 1972 Act (cit sup at para 51) applies to the question before me about the interpretation of article 22, and therefore I am obliged by statute to determine it "in accordance with the principles laid down by and any relevant decision of the European Court", the European Court being the ECJ. I am obliged to do so, he argued, even if this involves departure from the ratio of a Court of Appeal (or Supreme Court) decision: the statutory obligation trumps the common law doctrine of precedent. The submission is far-reaching. As I see it, it is independent of whether the decision in the Choudhary case was reached per incuriam: if the 1972 Act obliges me to decide questions of this kind in accordance with principles laid down by and any relevant decision of the ECJ notwithstanding any contrary decision of a superior English court, that would be so regardless of how the superior court reached its decision. (I recognise that a contrary argument might be advanced: that, if a superior court had considered an ECJ decision, then the doctrine of precedent would require a first instance judge to accept that the superior court's judgment is in accordance with the ECJ's decision and the principles laid down by it: in other words, a judgment reached after consideration of an ECJ decision would be a binding precedent about what the ECJ had decided. But this does not seem to me convincingly to distinguish precedents given per incuriam from other precedents: the doctrine of precedent itself requires acceptance (even if it be a fiction) that decisions of the superior courts are right and, as to their ratio, were reached properly and so in accordance with the requirements of the 1972 Act. Moreover, the argument does not recognise that judgments are regarded as per incuriam only if a previous decision would necessarily have changed the conclusion: see para 50 above. In other words, judgments given in ignorance of an ECJ decision are not necessarily given per incuriam.)

56. The question is one of statutory interpretation: whether Parliament intended that the 1972 Act should set aside the doctrine of precedent where section 3 comes into play. The doctrine is an integral and essential part of the hierarchical structure of the courts: see, for example, Sayce v TNT (UK) Ltd, [2011] EWCA Civ 1583 at para 22 per Moore-Bick LJ.

As I interpret section 3, it does not require individual judges to operate as if outside the hierarchical structure, to form their own individual views about the principles laid down by the ECJ and the effect and relevance of the ECJ's decisions, and to reach decisions accordingly. I interpret it as requiring that the court system as a whole, operating in accordance with the hierarchical system, should make determinations in accordance with the requirements of the section. More specific words would be required if the 1972 Act were to have the radical effect for which Mr Orr argued.

57. This conclusion is consistent with, and to my mind indicated by, two decisions of the Court of Appeal, although I agree with Mr Orr that neither directly engaged with his argument. First, I refer again to the decision in Duke v Reliance Systems Ltd (cit sup), in which apparently a somewhat similar argument was advanced by Mr Anthony Lester QC about section 2(4) of the 1972 Act, which provides (to attempt to summarise at the risk of inaccuracy) that statutory instruments implementing Community obligations shall be construed and have effect subject to (inter alia) the requirement that Community obligations be recognised, and be available and be enforced, allowed and followed accordingly. Sir John Donaldson MR said this (loc cit at p.113 E/F):

> "For my part I think that what section 2(4) means is a matter of great interest on which a great deal of time could be spent, but I do not believe it has the effect of abrogating the doctrine of stare decisis in this court, even when European law is involved."

58. The second Court of Appeal decision is The Conde Nast Publications Ltd v Commrs of HM Revenue & Customs, [2006] EWCA Civ 976, which concerned retrospective time limits for claiming input value added tax on supplies. The Court had to consider Fleming (t/a Bodycraft) v Customs and Excise Commrs, [2006] EWCA Civ 70, a decision of another division of the Court of Appeal comprising a majority of Ward and Hallett LJJ, Arden LJ dissenting. The Fleming case, like the Conde Nast Publications case, considered the decision of the ECJ in Marks & Spencer Plc v Customs & Excise Commrs (No 5), (C62/00). In the Conde Nast Publications case Chadwick LJ, with whom Arden and Smith LJJ agreed, said this about whether he should follow the majority in Fleming, even if he disagreed with it:

> "I am content to assume that there may be circumstances in which the obligation imposed on courts by s.3(1) of the European Communities Act 1972 would require this Court to refuse to follow its own earlier decision as to the meaning and effect of a Community instrument – including, in the present context, the effect of a judgment of the Court of Justice. Those circumstances would, I think, include a case in which the judgment of the Court of Justice under consideration by this Court in the earlier case had been the subject of further consideration – and consequent interpretation, explanation or qualification – by the Court of Justice in a later judgment. But, as it seems to me, one constitution in this

> Court should not substitute its own view as to the effect of a judgment of the Court of Justice for the view which has been reached by an another constitution in this Court in an earlier case on consideration of the same judgment in circumstances in which there has been no opportunity for the Court of Justice to review that judgment. In those circumstances, if persuaded that there are strong grounds for thinking that the earlier decision is wrong (as a matter of Community law) this Court may think it right to refer the point to the Court of Justice for a preliminary ruling. Or it may follow the earlier decision and give permission to appeal. But it should not refuse to follow the earlier decision merely because, on the same material and the same arguments, it is satisfied that a different conclusion should have been reached" (at para 44).

He continued (at para 46), "In the present case, therefore, I do not think that we are free to refuse to follow the decision of the majority of the Court of Appeal in Fleming … "

59. I must therefore conclude, in deference to the Choudhary decision, that article 22 does not cover the committal application against Sheikh Abdullatif because he is not domiciled in a Community jurisdiction. Therefore, the other issues between the parties about article 22 do not arise, but I shall deal with them briefly.

60. First, the enforcement argument: is the application covered by the term "proceedings concerned with ... enforcement" in article 22? There is text-book authority that it is: Layton & Mercer, European Civil Practice, (2nd ed, 2004) vol 1 states (at para 19.65) that, "English interpleader, third party debt, and committal proceedings will usually, if not always, fall within the exclusive jurisdiction provisions of this article [sc. article 22] where enforcement is to take place in England". (I do not consider the qualification "usually, if not always" relevant for present purposes: committal proceedings in relation, say, to contempt in face of the court might be different from those which Kroll bring.) Mr Orr submitted that the view expressed by Layton & Mercer is correct, and he cited the Jenard Report. It states of article 16(5) of the Brussels Convention that the expression "proceedings concerned with the enforcement of judgments" refers to proceedings which may arise "from use of force or constraint, or the dispossession of movables and immovables in order to obtain the physical implementation of judgments and measures", and that "the difficulties to which these procedures give rise are within the exclusive jurisdiction of the court of the place where the judgment is to be enforced". Mr Orr argued that this is an apt description of these committal proceedings in that they would, if the orders sought by Kroll are made, involve the use of force or constraint by the state in order to enforce orders of the court. He found further support in Reichert v Dresdner Bank (No 2), (Case C-261/90), in which the ECJ said (at para 26) that "the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of

the authorities responsible for enforcement".

61. Against this, Mr Trace observed that article 22 should not be given an interpretation wider than is required by its objective (see Sanders v Van der Putte (case 73/77) para 17), and he argued that an interpretation of article 22(5) that includes committal proceedings is not required because no other Community court would exercise the quasi-criminal jurisdiction of committal in respect of an order of the English court. I cannot accept this: an intrinsic purpose of the contempt jurisdiction, at least in a case such as this, is indeed to enforce the court's orders. I reject Mr Trace's enforcement argument.

62. The undertaking argument: Sheikh Abdullatif does not dispute that the drives delivery order is a "judgment" within the meaning of the article 22, but Mr Trace submitted that the preservation undertaking is not. Article 32 of the Brussels Regulation defines a judgment as follows:

> "For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."

63. Undertakings given to the court are conventionally embodied in written orders of the court, and when so embodied undertakings are of the same effect in English domestic law as an order of the court: Biba Ltd v Stratford Investment Ltd, [1973] Ch 281, 287E. In this case the preservation order was embodied in the order of Popplewell J dated 18 June 2012: in other words, the preservation undertaking is a provision of an order of the court, and enforcement of the undertaking is enforcement of a provision of an order of the court. I consider that enforcement of an undertaking is covered by article 22(5).

64. The discretion argument: Mr Trace submitted that, even if the court has jurisdiction under article 22, nevertheless jurisdiction may be declined as a matter of residual discretion and that I should decline to take jurisdiction over Sheikh Abdullatif on the committal application. His argument was essentially based on his submission that CPR 81.4(3) has no application to directors and officers who are not in the jurisdiction, and I have rejected that submission. If the court has residual discretion, I would not have exercised it to decline jurisdiction: my reasons are essentially the same as those which have led me to exercise my discretion to permit service out of the jurisdiction under CPR 6.36: see below. In view of this conclusion and my conclusion on the domicile argument, I shall not consider whether the court may decline to exercise a jurisdiction conferred by article 22. It is not a straightforward question, but I expressed my view about it in Ferrexpo AG v Gilson Investments Ltd, [2012] EWHC 721 (Comm).

Should the order of 11 October 2013 be set aside because Kroll did not give the court proper

guidance?

65. Sheikh Abdullatif has applied for the order of 11 October 2013 to be set aside on the grounds that it was made on Kroll's ex parte application and Kroll did not draw to the court's attention his various arguments about whether the committal proceedings are within article 22(5) of the Brussels Regulation, and specifically they did not refer to Choudhary v Bhattar (cit sup). It is said that Kroll were therefore in breach of their duties as an applicant for an ex parte order: such duties include, as I said in my December 2012 judgment at para 133, citing Memory Corporation Plc and anor v Sidhu and anor, [2000] 1 WLR 1443, 1453-1455, "a duty to provide to the court proper guidance as to the relevant law as well as to make a proper presentation of the facts". It is convenient to consider this contention next.

66. Mr Trace described the "inexplicable failure" to draw the attention of the Court to Choudhary v Bhattar as the "most serious breach" by Kroll of their duty. Mr Orr accepted that Kroll did not refer to the authority: he explained, and I accept, that Kroll's advisers were not aware of it. This was an error, but I consider it understandable and excusable: the authority is not mentioned in Layton & Mercer or Briggs & Rees, which both pre-date it, and Dicey, Morris & Collins, which post-dates it, does not refer to it in the context of article 22. I readily accept that it could be overlooked despite proper efforts to research the law relevant to Kroll's committal application and their application for service by alternative means. Even if Kroll were in breach of duty in this regard, it would be disproportionate to respond by discharging the order on this account.

67. Sheikh Abdullatif complained that in other ways Kroll failed to explain why, as he contends, article 22(5) does not apply to the committal application. Mr Trace did not develop this more general argument in his submissions, and it suffices to say that I am not persuaded that other criticisms of Kroll are justified, nor, even if they are not, that they are sufficiently grave to justify setting aside my order of 11 October 2013.

Can and should the court give permission for service of the contempt proceedings out of the jurisdiction under CPR 6.36?

68. CPR 6.36 provides that "In any proceedings [unless permission is not required because the proceedings are covered by the Brussels Regulation], the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply". The grounds set out in paragraph 3.1 of Practice Direction 6B include at (3):

> "A claim is made against a person ("the defendant") on whom the claim form has been served or will be served (otherwise than by reliance on this paragraph) and -
>
> (a) there is between the claimant and the defendant a real issue

which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

CPR 6.37(1) provides that an application for permission under CPR 6.36 must set out that the claimant believes that the claim has a reasonable prospect of success. CPR 6.37(3) provides that the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

69. The issues that arise in relation to Kroll's application for permission to serve the notice of the committal application out of the jurisdiction are these:

i) Is the notice of the committal application against Sheikh Abdullatif a "claim form" within the meaning of CPR 6.36 and 6BPD 3.1(3)?

ii) Is there a "real issue" between Kroll and the claimants?

iii) Is Sheikh Abdullatif a "necessary or proper party" to the committal application against the claimants?

iv) Do Kroll have a sufficiently case strong case for permission for service out of the jurisdiction?

v) Is the English court the proper place to proceed against Sheikh Abdullatif?

vi) Should the court exercise its discretion to give permission?

vii) Has the court power to give retrospective permission, and if so should it be exercised?

<u>Is the notice of application against Sheikh Abdullatif a "claim form"?</u>

70. CPR 81.10(2) provides that:

"Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23."

Accordingly, Kroll's notice of the committal application was issued under CPR part 23. Such a notice is "a document in which the applicant states his intention to seek a court order" (CPR 23.1), but is it a "claim form" within the meaning of the CPR within the meaning of CPR 6.36? CPR 6.2(c) provides that:

> ""claim' includes petition and any application made before action or to commence proceedings and "claim form", "claimant" and "defendant" are to be construed accordingly; …"

71. Accordingly, the question whether the application notice is a claim form depends upon whether it is given to "commence proceedings", that is to say whether the term "proceedings" when used in CPR 6.2 includes applications for committal. In my judgment it does because:

i) Such applications are commonly referred to as committal proceedings both in general legal usage and, more importantly, elsewhere in the CPR; and

ii) This interpretation avoids anomalies that would otherwise result.

72. General legal usage is sufficiently illustrated by passages from the judgments of Gloster J in Masri v Consolidated Contractors International Co SAL (cit sup) and of Beatson LJ in JSC BTA Bank v Ereshchenko (cit sup) to which I have referred at paras 28 and 33 above. Indeed, Mr Hastings so used the expression "committal proceedings": see para 15 above. I illustrate usage in the CPR by referring to CPR 32.14 ("Proceedings for contempt of court may be brought …") and CPR 81PD 4.1 ("Where the committal proceedings relate to contempt in the face of the court …").

73. As for the consequences if an application notice such as Kroll issued is not a "claim form", it would apparently follow that:

i) Applications for committal under section 2 of part 81 (Committal for breach of a judgment, order or undertaking to do or abstain from doing an act) would not be covered by the relevant provisions of CPR part 6, whereas applications under section 3 (Committal for interference with the due administration of justice) would be covered.

ii) The position under CPR 81.18, about committal applications in relation to a false statement of truth or disclosure statement, would be curious in that an application notice is used for committal proceedings permitted by the court and a claim form used when the Attorney General gives permission for them.

iii) Applications for committal under section 2 of part 81 could not be served on persons domiciled in other Community jurisdictions because CPR 6.32 and 6.33 (which deal with service where permission is not required) cover only service of claim forms.

I consider it improbable that the CPR is to be interpreted so as to have these results.

Is there a "real issue" between Kroll and the claimants?

74. Mr Trace submitted that the contempt application does not give rise to an issue between Kroll and the claimants because the contempt proceedings are "not private law proceedings, but public law proceedings", and therefore the issue whether DAAR or BA are in contempt of court is not an issue *between* Kroll and the claimants. The issue, he argued, is in reality between the claimants and court, albeit the committal proceedings are prosecuted by Kroll. I cannot accept that description of contempt proceedings: it does not recognise their dual nature, to which I have referred at para 33 above. Mr Trace cited Malgar Ltd v R E Leach (Engineering) Ltd, [2000] FSR 393, in which Sir Richard Scott V-C said (at p.396) that "Proceedings for contempt are not private law proceedings. They are public law proceedings". However, that case was about proceedings under CPR 32.14, where the alleged contempt was one of making false statements in documents verified by a statement of truth, such as now would fall under CPR 81 section 6. Sir Richard Scott distinguished cases where the allegation was of breach of a court order (at p. 396):

> "… An injunction granted in an action between two private individuals restraining one from doing some act which is to the prejudice of the interests of the other can be enforced by committal proceedings brought by the party for whose benefit the injunction was granted. Committal proceedings of that character can be brought without permission. But under CPR rule 32.14 a private individual can only bring committal proceedings with permission of the court. The reason for that is the nature of the proceedings. These are not proceedings where the alleged contempt consists of the breach of an order obtained by an individual in protection or furtherance of his own private rights. It is a case of an allegation of public wrong, not private wrong. Interference with the course of justice is plainly a public wrong and it is right therefore that there should be a public control over the launching of proceedings for this species of contempt."

In my judgment there is a real issue between Kroll and the claimants within the meaning of CPR 6BPD 3.1(3)(a).

Is Sheikh Abdullatif a "necessary or proper" party to the committal application against the claimants?

75. Kroll submit that Sheikh Abdullatif is a necessary party and a proper party to the committal proceedings. In that this depends not on disputed issues of fact but on legal questions, it is not sufficient for Kroll to establish a good arguable case that he is: see para 40 above. However, I am satisfied that Sheikh Abdullatif is both a necessary and a proper party, although it would suffice for Kroll to show either.

i) I consider that he is a necessary party because in the committal proceedings Kroll contend that the claimants should be punished for their contempt by the imprisonment of Sheikh Abdullatif as their director or officer. If Kroll are to pursue that part of the committal application, it is necessary that Sheikh Abdullatif be party to the proceedings.

ii) The question whether Sheikh Abdullatif is a proper party to proceedings against the claimants depends on this: supposing that both the claimants (or one of them) and Sheikh Abdullatif had been in England, would they both have been proper parties to the proceedings? - see Dicey, Morris and Collins, The Conflict of Laws (15th ed, 2012) para 11-165. Applying this test, Sheikh Abdullatif is a proper party to the committal proceedings against the claimants.

Do Kroll have a sufficient argument on the contempt proceedings?

76. The court should not permit service out of the jurisdiction unless it considers that the proceedings have a reasonable prospect of success against the person who is to be served out of the jurisdiction. In this case the question is whether there is a reasonable prospect that the committal application will result in an order for the imprisonment of Sheikh Abdullatif (in my judgment, whether it be for his immediate imprisonment or a suspended order, but my decision does not depend on this). I consider this question on the basis (a) that Kroll may rely only on the grounds set out in their amended application notice (unless the court otherwise permits, a possibility that I disregard for present purposes), and (b) that they will have to satisfy the court of their allegations to the criminal standard (in principle, a higher standard than that applicable to my determinations in the December 2012 judgment). I consider that there is a reasonable prospect. I need hardly emphasise that on an application of this kind I do no more than take a provisional view on incomplete material about the prospects in the committal proceedings: I have had no evidence or submissions from Sheikh Abdullatif or the claimants about this. In these circumstances I shall give only brief reasons for this part of my decision:

i) With regard to whether Kroll have a sufficient prospect of establishing that the claimants are guilty of contempt of court, I consider that they have a reasonable prospect of establishing each of the allegations in the amended application notice, including the allegation that Sheikh Abdullatif himself deleted two electronic files

from HDD1.

ii) With regard to the prospects of the court ordering Sheikh Abdullatif's imprisonment, there is no dispute that he was at the relevant times and remains a director and officer of both claimants. There is no reasonable prospect of the court making an order for his imprisonment unless Kroll show not only that he knew of the preservation undertaking or the drives delivery order (or both) at the relevant time but also that he wilfully caused the claimants to be in breach of them (or one of them): A G for Tuvalu v Philatelic Distribution Corp Ltd, [1990] 1 WLR 926, 936E-F. I consider that they have reasonable prospects of doing so.

iii) Again with regard to the prospects of the court deciding to order imprisonment, I also consider that there is a reasonable prospect that Sheikh Abdullatif will be held to have aggravated the contempt and his part in it by giving dishonest evidence when Kroll and other defendants applied to discharge the orders made against them.

Is England and Wales the appropriate forum?

77. I consider that this court is the appropriate forum to bring the committal proceedings against Sheikh Abdullatif. Indeed there is probably no other court where they can be brought. In any case this court is best placed to adjudicate about whether the undertaking given to it and the order that it made have been broken, and if so what consequential orders (if any) should be made. Moreover, the committal application against the claimants will be heard here in any event, and Sheikh Abdullatif has apparently been involved in these proceedings on behalf of the claimants, as well as being a witness when the defendants applied to discharge orders against them.

Should the court exercise its discretion to grant permission?

78. I am satisfied that the court should exercise its jurisdiction to permit service of the committal application and associated documents on Sheikh Abdullatif in Saudi Arabia. It is right that Kroll should be able to argue that, if the alleged contempt of the claimants (or one of them) is established, the court should make a committal order against Sheikh Abdullatif in view of the serious nature of the contempt alleged. I accept that, as Briggs J emphasised in Sectorguard Plc v Dienne Plc, [2009] EWHC 2693 (Ch) at para 47, there is always a danger that parties to litigation will use committal applications as a tactical weapon, and I am not blinkered to the possibility that Kroll are doing so here. However, I do not consider that this concern should deter me from permitting service out of the jurisdiction, given the serious allegations and the part that Sheikh Abdullatif is said to have had in the contempt.

79. There is another consideration: whether it is appropriate for the court to exercise its

discretion to permit service of the committal application on Sheikh Abdullatif given that he might well not come to this jurisdiction and the court is unlikely to be in a position to enforce any order for his imprisonment. This does not persuade me that therefore I should refuse permission: I refer again to the reasons that Moore-Bick LJ gave in KJM Superbikes v Hinton, (cit sup) at para 26, when granting permission for contempt proceedings against an Australian who could not be served unless he chose to come to the jurisdiction or to instruct solicitors to accept service: see para 82 below. Comparable considerations seem to me to apply here, and persuade me that it is appropriate to grant permission, notwithstanding that the court might well not be in a position to impose any "practical sanction" on Sheikh Abdullatif.

Has the court power to give retrospective permission and should it exercise it?

80. It was established by the Court of Appeal in National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer") (No 2), [2000] 1 Lloyd's Rep 129 that the court has power to grant permission for service out of the jurisdiction with retrospective effect so as to legitimise service that has already taken place without permission. (The case ante-dated the introduction of the CPR, but this is still the law: Nesheim v Kosa, [2006] EWHC 2710 (Ch) para 22.) Mr Trace did not dispute that the court can give Kroll retrospective permission and did not argue that (if it permits permission for service out of the jurisdiction at all) it should not give Kroll retrospective permission. I agree that, in view of my other decisions, it is clearly sensible to give retrospective permission in this case: it will not disadvantage Sheikh Abdullatif, except if he wishes simply to delay the committal proceedings.

Can and should the court dispense with service of the contempt proceedings on Sheikh Abdullatif?

81. As I have said at para 16 above, on 11 October 2013 I made an order under CPR rule 81.10(5) permitting service by an alternative method on Sheikh Abdullatif, and I have refused his application that I should set aside that order. In these circumstances, Kroll do not need their application for an order dispensing with service of the contempt proceedings on Sheikh Abdullatif, but I should say something about it. Mr Orr submitted that the court may dispense with service even if otherwise it would have no jurisdiction over the respondent, and that, if they cannot serve Sheikh Abdullatif under articel 22 and are not permitted to serve him out of the jurisdiction in Saudi Arabia, the court should exercise its power to dispense with service on him. Mr Trace resisted this, arguing that, if Sheikh Abdullatif cannot be served in Saudi Arabia, the court cannot dispense with service on him, or that it would not be just to exercise it in these circumstances.

82. Mr Orr relied on two authorities:

i) In Mansour v Mansour, (cit sup) a husband had brought a claim against his wife for conversion of chattels within the jurisdiction and the wife had counterclaimed

for breach of trust. She, like her husband, was an Egyptian national and was normally resident in Egypt. The husband, who had obtained a freezing order against his wife, took out a notice of motion alleging that she had disposed of a car in breach of it. The wife applied to set it aside, and, when the application reached the Court of Appeal, Lord Donaldson MR considered the ambit of RSC Ord 52 r 4(3), which can be regarded as the predecessor for present purposes of CPR 81.10 (5)(a). He said (loc cit at p.420E) that there was "nothing on the face of that rule which limits the discretion of the court under Ord 52, r 4(3). No doubt it is a factor to be taken into consideration that the respondent to the notice of motion is resident abroad but, for my part, I cannot see that other rules fetter this rule"; and he continued (at p.420G) "… I cannot see why, if it is appropriate, if it is just, to dispense with service, one should be concerned with leave [to serve the notice of motion out of the jurisdiction]".

ii) In KJM Superbikes v Hinton (cit sup) the Court of Appeal considered a case in which a witness, Mr Anthony Hinton, who lived in Australia and was not domiciled in this jurisdiction, was said to have made an untruthful witness statement and to have verified it with a statement of truth. The issue was whether the court should permit proceedings against him for contempt of court and the Court of Appeal, reversing the puisne judge, concluded that it should do so. Moore-Bick LJ, with whom Mummery and Arden LJJ agreed, said this (at paras 25 and 26):

> "25. Mr Hinton … could not be required to come to this country to answer a charge of contempt; indeed, unless he chooses to instruct solicitors to accept service on his behalf, it will not be possible to serve the proceedings on him unless he comes to this country and becomes amenable to personal service. The court has the power to dispense with service of the application for committal, if it thinks it just to do so (see RSC Ord 52, r 4(3)), but it will not be able to impose any practical sanction on him while he remains outside the jurisdiction. …. It is right to say that these factors do not appear to have influenced the judge's decision, but they inevitably raise the question whether anything is now to be gained by giving [the claimant] permission to bring proceedings against him.
>
> 26. I can see that there may be some cases in which considerations of that kind might tip the balance against granting permission, but in general I do not think that they should weigh significantly against doing so. The international business community conducts a large amount of litigation in this country and it is common for statements to be provided by witnesses from abroad for use in procedural hearings. This case is a good example. The integrity of the system as a whole would be undermined if it were thought that foreign witnesses were not subject to the same discipline as

witnesses from this country."

83. On their face, these authorities support Mr Orr's submission that the court has power to dispense with service on a respondent who could not be served in order to establish the court's jurisdiction over him. However, in Masri (no 4) Lord Mance, having considered the decision in Mansour v Mansour and the discussion of it by Waller LJ in The Ikarian Reefer (no 2) (cit sup), said (at para 34): "Leaving aside situations where the non-party is the alter ego of a party to existing legislation, any suggestion that any non-party can be served without leave under CPR 6.30(2) with any ancillary summons issued by either party in any proceedings properly brought and served within the jurisdiction clearly cannot be right". The judgment in the KJM Superbikes case was apparently not cited or considered in Masri (no 4).

84. I do not need to decide whether, in view of what was said in Masri (no 4), the court can dispense with service in cases where the court could not give permission for service of a non-party out of the jurisdiction, or whether, as Mr Trace submitted, what was said in that regard by Sir John Donaldson MR in Mansour v Mansour and by Moore-Bick LJ in the KJM Superbikes case should be treated as expressly or impliedly overruled. I see the force of Mr Trace's submission, but, since I have decided that the court can permit service on Sheikh Abdullatif, the question does not arise, and I say no more about it. I need only consider the position on the basis that the court has power to permit service on Sheikh Abdullatif in Saudi Arabia. I do not make an order dispensing with service of the notice of the committal application and other supporting documents on Sheikh Abdullatif only because my other conclusions make it unnecessary, indeed pointless, to do so. Otherwise I would have so ordered. To my mind, it would have been just to do so in this case, bearing in mind in particular that:

i) Sheikh Abdullatif knows about the application and the evidence on which it is based; and

ii) If Kroll establish their allegations, they are serious ones, and it might be that the alleged contempt and Sheikh Abdullatif's part in it were aggravated by untruthful evidence given on behalf of the claimants, including that of Sheikh Abdullatif, when Kroll and other defendants applied to discharge the orders made against them.

iii) Refusal of the application would only cause unnecessary and pointless delay to determining the contempt allegations and possibly the litigation generally.

Conclusions

85. Therefore:

i) I conclude that it is not open to me to hold that notice of the committal application may be served on Sheikh Abdullatif under article 22 of the Brussels Regulations.

ii) I grant permission for service of the notice and supporting documents on Sheikh Abdullatif in Saudi Arabia.

iii) I order that the permission shall have retrospective effect.

iv) I decline to discharge my order of 11 October 2013.

v) I do not make an order dispensing with service of the notice on Sheikh Abdullatif only because my other conclusions mean that it would be pointless to do so.

I should be grateful if counsel seek to agree a minute of order to give effect to these conclusions.