Neutral Citation Number: [2014] EWCA Civ 715

Case No: A3/2014/0459

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
The Hon. Mr Justice Andrew Smith
[2013] EWHC 4112 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2014

Before :
LORD JUSTICE RICHARDS
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

Between :	
(1) Dar Al Arkan Real Estate Development Co **(2) Bank Alkhair BSC**	**Claimants/ Respondents**
- and -	
(1) Majid Al-Sayed Bader Hashim Al Refai	**Defendant**
(2) Kroll Associates UK Ltd	**Defendant/ Applicant/ Respondent to appeal**
(3) Alexander Richardson **(4) FTI Consulting Group Ltd**	**Defendants**
- and -	
Sheikh Abdullatif Abdullah S. Al Shalash	**Non-Party/ Respondent/ Appellant**

Charles Béar QC and James Sheehan (instructed by **Addleshaw Goddard LLP**) for **Sheikh Abdullatif**
Charles Graham QC, Nicholas Sloboda and Sophie Weber (instructed by **Slaughter and May**) for **Kroll Associates**

Hearing dates: 26 and 27 March 2014

Approved Judgment

Lord Justice Beatson :

I. Introduction

1. This appeal and cross-appeal against the Order of Mr Justice Andrew Smith dated 20 December 2013 concerns the extra-territorial reach of proceedings for civil contempt against the director of a foreign company which has instituted proceedings in this jurisdiction but has not complied with an order of the court where the director is a foreign national and outside the jurisdiction.

2. The appellant, Sheikh Abdullatif Abdullah Al Shelash ("Sheikh Abdullatif"), is the Managing Director of Dar Al Arkan Real Estate Development Company ("DAAR") and a director of Bank Alkhair BSC ("BA"), companies respectively incorporated in Saudi Arabia and Bahrain. The application for committal was brought against DAAR, BA and Sheikh Abdullatif by the respondent to this appeal, Kroll Associates UK Ltd ("Kroll"). It was brought after a without notice injunction obtained by DAAR and BA against it and a number of other persons was discharged by Andrew Smith J on 12 December 2012 ("the discharge judgment"). The judge discharged the injunction because he found that DAAR and BA had breached their duty to make full disclosure and had also failed to comply with an undertaking, reflected in the order, to preserve two hard drives and the data on them, and to deliver the hard drives to their then solicitors in London.[1]

3. On 20 December Andrew Smith J ordered[2] that proceedings against Sheikh Abdullatif are within the scope of CPR 81.4(1) and (3), and that service on him of the committal proceedings out of the jurisdiction is authorised by CPR 6.36 and PD 6B paragraph 3.1(3). These and other material provisions are set out in the appendix to this judgment. It suffices to state here that CPR 81.4(1) and (3) provide that, where a company is required by a judgment or order to do an act and does not do it within the time specified or disobeys a judgment or order not to do an act, the judgment or order may be enforced by an order for committal and "the committal order may be made against any director or other officer of that company or corporation". Gateway (3) of CPR PD6B requires: (i) the application notice to be "a claim form", (ii) there be a "real issue" between the applicant and the corporate defendants, and (iii) the director to be "a necessary or proper party" to the committal application against the corporate defendants. It is submitted on behalf of the appellant by Mr Béar QC, who did not appear below, that the judge erred in holding that he had jurisdiction over Sheikh Abdullatif because he is domiciled and resident in Saudi Arabia.

4. Mr Béar accepted, as he was bound to in the light of the decision of the House of Lords in *Masri v Consolidated Contractors International (UK) Ltd and others (No. 4)* [2009] UKHL 43, reported at [2010] 1 AC 90 (hereafter "*Masri (No. 4)*"), that the rule-making power in section 1 of the Civil Procedure Act 1997 for "rules of court…governing the practice and procedure to be followed in…the High Court…" allowed rules with an extra-territorial effect to be made. See the speech of Lord Mance, with whom the other members of the Judicial Committee agreed, at [11] – [14]. He, however, argued that the principle against the extra-territorial application of legislation means that the language used in CPR 81.4(1) cannot properly be construed

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1 See [2012] EWHC 3539 (Comm).

2 See Order, paragraph 2, and [2013] EWHC 4112 (QB) at [24] – [37] and [68] – [76].

to enable a committal order to be made against a foreign director who is not within the jurisdiction. He also submitted that the requirements of CPR 6.36 and gateway (3) were not met because the application was not "a claim" brought on a "claim form", there was no "real issue" between Kroll and DAAR and BA in respect of the committal application, and because Sheikh Abdullatif was not a necessary and/or proper party to the application because CPR 81.4(3) did not have extra-territorial application.

5. Kroll had originally proceeded against DAAR, BA and Sheikh Abdullatif claiming the courts of this jurisdiction have exclusive jurisdiction under Article 22(5) of Council Regulation (EC) No. 44/2001, on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters ("the Brussels I Regulation") for which it is not necessary to obtain the permission of the court for service out of the jurisdiction: see CPR 6.33 and paragraph 3 of the Appendix to this judgment. Article 22(5) gives the courts of the Member State in which judgment "has been or is to be enforced" exclusive jurisdiction regardless of domicile "in proceedings concerned with the enforcement of judgments". On this, the judge accepted the submissions on behalf of Sheikh Abdullatif. He held that he was constrained by a decision of this court, which he considered to be *per incuriam* the Luxembourg jurisprudence, to make a declaration[3] that the court has no jurisdiction over Sheikh Abdullatif under Article 22(5). Kroll has cross-appealed against this part of the judge's order. Mr Graham QC on Kroll's behalf has also submitted that the court also had power to circumvent jurisdiction questions by dispensing with service of the committal application under CPR 81.10(5)(a) if it considered it just to do so.

6. I summarise the factual background in section II and the judgment below in section III. For the reasons I give in section IV I would not disturb the judge's order. As I would dismiss the appeal on the CPR 81.4(3) and Part 6 grounds, it is not necessary to decide the cross-appeal on either the Article 22(5) point or that concerning the power of the court to circumvent jurisdiction questions by dispensing with service. I make no observations on the latter ground but, in view of its importance, do so at [60] and [64] on the domicile aspect of the Article 22(5) point.

II. The factual background

7. I first summarise the relevant factual background. DAAR and BA considered that Majid Al-Sayed Bader Hasim Al Refai ("Mr Refai"), formerly Chief Executive Officer and Managing Director of BA, Kroll, an English company which provides business intelligence and investigatory services, and two others were carrying out a campaign of blackmail against them. The campaign was said to involve the creation of a website which exhibited a large number of internal documents belonging to DAAR and BA and text alleging corporate malpractice by those companies. DAAR and BA alleged that the information on the website had made it difficult for them to raise money for the repayment of "Sukuk" bonds compliant with Islamic law. On 19 June 2012 they issued proceedings in this jurisdiction claiming breach of confidence, defamation, conspiracy, and other economic torts arising out of the alleged campaign. They alleged that DAAR had suffered a loss of US$500 million and BA had suffered a loss of US$130 million.

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[3] See Order, paragraph 1, and [2013] EWHC 4112 (QB) at [38] – [64].

8. Before the proceedings were brought, DAAR and BA had taken two steps. The first was successfully to apply under section 55 of the Data Protection Act 1998 for protection from criminal sanctions in respect of data which they said "may" constitute data protected against disclosure by section 1 of the Act, and which "may" have been procured unlawfully. They claimed that this data was on two hard drives sent to DAAR anonymously. Sheikh Abdullatif swore an affidavit stating that the material had not been requested by anyone employed by DAAR or BA, or obtained at their instigation. Secondly, DAAR and BA made the without notice application for interim injunctive relief to which I have referred. They did so to prevent the disclosure of confidential information and documents belonging to BA, and to prevent confidential information from being uploaded and displayed on the website.

9. At the hearing of the without notice application for injunctive relief and for continuing protection under the Data Protection Act before Popplewell J on 14 June 2012, the evidence included Sheikh Abdullatif's affidavit about how the hard drives had come into the possession of DAAR and BA. It also included statements that DAAR and BA had and would continue to put in place a regime to protect the original hard drives and the data, some of which was personal and privileged. At the hearing they gave an undertaking to "preserve and keep safe the original hard drives containing the material and delivered to [DAAR] as described [by Sheikh Abdullatif in his affidavit.]". This undertaking is recorded in paragraph 10.1 of the order. The evidence of Sheikh Abdullatif and of Dr Almajthoob, BA's Managing Director (Special Projects), which was before Popplewell J at that hearing is summarised in Andrew Smith J's "discharge judgment".[4]

10. The return date was on 27 June 2012. At that hearing Popplewell J made "the drives delivery order". He ordered DAAR and BA to deliver "as soon as reasonably practicable" the original hard drives to their then London solicitors, Dechert, for forensic examination and for the original drives to be "preserved and kept safe in Dechert's London offices pending further order of the court". Subsequently, Kroll's forensic specialist was not allowed access to the drives, and DAAR and BA issued an application to cross-examine one of Kroll's employees about its compliance with the injunction.

11. On the morning DAAR and BA's application was to be heard, a draft witness statement of a partner at Dechert was served. This stated that Dechert had retained forensic specialists to analyse the drives and the specialists reported that the examination suggested that the drives may have emanated originally from DAAR and BA rather than an anonymous sender and that some incriminating files linking DAAR and BA to the hacking had been deleted but had been recovered by the forensic specialists. The forensic specialists concluded the files had been deleted on 2 July 2012, the day a partner from Dechert had arrived in Riyadh to collect the hard drives. They also identified the digital ID number of the person who deleted the files. It was subsequently admitted by DAAR and BA that the number was Sheikh Abdullatif's ID number. He then claimed that he had deleted the files because he was confused about the meaning of the preservation undertaking.

12. It was as a result of these developments that the defendants applied to set aside the orders made without notice on the grounds that DAAR and BA had not made full and

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4 [2012] EWHC 3539 (Comm) at [11] – [13]

frank disclosure, had misled the court in their evidence and submissions, and had not complied with the undertaking to and order of the court concerning the preservation of the original hard drives. The hearing of the application took six days in November 2012. In the "discharge judgment" the judge concluded that DAAR and BA had broken the preservation undertaking and the drives delivery order. Sheikh Abdullatif's account, including why he deleted the files, was rejected as dishonest: see [2012] EWHC 3539 (Comm) at [50] and [66] – [67]. After the discharge of the without notice orders, there was a stay for mediation, which was unsuccessful. Subsequently, a trial of preliminary issues was ordered for March 2015, and an application by DAAR and BA for permission to appeal the decision to order a split trial was refused by this court (Longmore and Underhill LJJ) on 1 May 2014.

13. Kroll's committal application was filed on 7 October 2013, when the stay expired. Kroll sought a declaration that DAAR and BA are in contempt of court in that they broke the "preservation undertaking" and "drives delivery order", orders that they be fined and that Sheikh Abdullatif be imprisoned for DAAR and BA's contempt of court. Kroll thus did not seek his imprisonment on the ground that he is in contempt of court himself or that he aided and abetted the contempt by the companies. It proceeded against him on the basis that the courts of England and Wales have exclusive jurisdiction to determine the application against the companies under Article 22(5) of the Brussels I Regulation and he was the director responsible for causing the breaches of the undertakings by the companies. On 9 October 2013 it applied for permission to serve Sheikh Abdullatif by alternative means or at an alternative place.

14. On 11 October Andrew Smith J ordered that Kroll should have permission, insofar as it was necessary, to serve the application and accompanying documents on Sheikh Abdullatif by specified alternative means. 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. For the purposes of these proceedings, Sheikh Abdullatif has not disputed that he was the corporate officer responsible for the breaches of the undertakings. On 25 November 2013 Kroll applied for permission to serve out. Its skeleton argument stated that, if Article 22(5) did not give the court jurisdiction, it would have jurisdiction over Sheikh Abdullatif under gateway (3) of PD6B 3.1 because he is a necessary and proper party to the contempt proceedings against DAAR and BA. On 28 November 2013, the day before the hearing of his challenge to jurisdiction, Kroll's counsel filed a supplementary skeleton argument maintaining that, if the court did not have jurisdiction pursuant to Article 22(5) and refused permission for service out under CPR 6.36, it should make an order under CPR 81.10(5) dispensing with the need for service of the committal application notice.

III. The judgment below

(i) CPR 81.4(3)

15. The judge rejected the submission on behalf of Sheikh Abdullatif that the principle against extra-territorial application of legislation means that CPR 81.4(3) cannot properly be construed to enable a committal order to be made against a foreign director who is not within the jurisdiction and cannot be served in this country. He did so for the following reasons:

i) Adopting the language of Gloster J (as she then was) in *Masri and Manning v Consolidated Contractors International Co SAL and others* [2011] EWHC 409 (Comm), he regarded the crucial question as the construction of the relevant provisions of the Rules and the legislative intention behind them.

ii) Although the underlying litigation is private civil litigation and enforcing a judgment, order or undertaking would (see [33]) be directed to enforcing private rights obtained by such litigation, in the circumstances of this case there is a relevant public interest in the enforcement of judgments, orders and undertakings. The judge relied on the decisions in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195 at 198 (*per* Cross J), *Nicholls v Nicholls* [1997] 2 All ER 97 at 108D (*per* Lord Woolf MR) and the much earlier decision in *Seaward v Paterson* [1897] 1 Ch 545 at 558 (*per* Rigby LJ). In *Nicholls v Nicholls* Lord Woolf stated that it was no longer appropriate to regard an order for committal as being no more than a form of execution available to another party and that "the court itself has a very substantial interest in seeing that its orders are upheld".

iii) The fact that contempt proceedings for breach of a judgment, order or undertaking engage that public interest means that they differ from the less specific public interest in "a 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 in *Masri (No. 4)* (at [23]) considered underpinned CPR Rule 71.2(1) and (7). It was that which led Lord Mance to conclude that nothing in CPR Part 71 displaced the presumption against extra-territoriality. Lord Mance (at [26]) stated that CPR Part 71 "was not conceived with officers abroad in mind", The judge below considered that, in the present circumstances, the nature of contempt proceedings of this sort means that this case is closer to the decision of this court in *In Re Seagull Manufacturing Co Ltd* [1993] Ch 345. In *Re Seagull* it was held that the power under section 133 of the Insolvency Act 1986 to order the public examination of any director or manager of a company which had been placed into compulsory liquidation could be exercised extra-territorially over a director outside the jurisdiction. Section 134 of the 1986 Act provides that a person required to attend for examination who did not attend without reasonable excuse is guilty of a contempt of court and liable to be punished accordingly.

iv) The judge (see [28] – [31]) also relied on the observations of Gloster J in *Masri and Manning v Consolidated Contractors International Co SAL* at [88] 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".

v) The judge considered that the practicability of effective enforcement of an order outside the jurisdiction is a factor which must be weighed when interpreting a rule, but, in the circumstances of this case, it did not outweigh the public interest considerations he had addressed. He noted that Lord Mance in *Masri (No. 4)* stated (at [22]) that impracticability of enforcement was a factor of greater importance than Peter Gibson J may have suggested in *Re Seagull* but noted that Lord Mance did not state that it was decisive, only that

"it is in particular a relevant factor when considering whether CPR 71 covers officers abroad". The judge was fortified in his approach by the statement of Moore-Bick LJ, with whom Mummery and Arden LJJ agreed, in *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280, reported at [2009] 1 WLR 2406 at [25] – [26]. Moore-Bick LJ stated, in the context of granting permission to pursue proceedings for contempt, that the fact that it will not be able to impose any practical sanction on the person involved while he remains outside the jurisdiction, should not in general weigh significantly against granting permission, although there may be some cases in which considerations of that kind might tip the balance against granting permission. This, he stated, was because:

> "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…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."

The judge had earlier stated (at [24]) that, on Sheikh Abdullatif's case, "the efficacy of many worldwide freezing orders and injunctions would be compromised" and "much reduced".

(ii) CPR Part 6 and gateway (3) of PD 6B 3.1

16. On the question of whether the court is able to give permission for service of the contempt proceedings out of the jurisdiction under CPR Rule 6.36 and whether it should do so, the judge considered seven matters.

17. The first was whether the notice of the committal application against Sheikh Abdullatif was a "claim form" within the meaning of CPR Rule 6.36 and PD 6B. The judge (at [71] – [73]) concluded that the notice of the application against Sheikh Abdullatif was a "claim form" for a number of reasons. First, it was given to "commence proceedings" within CPR 6.2(c) because "proceedings" in that provision includes applications for committal. He relied on general legal usage, including that in CPR 32.4 and PD 81.4.1. He also concluded that this interpretation would avoid a number of anomalies. Those anomalies were that applications for committal under section 2 of CPR 81 would not be covered by the relevant provisions of CPR Part 6, whereas applications under section 3 of CPR 81, committal for interference with due administration of justice, would be covered and treated differently. Secondly, an application notice is used for committal proceedings under CPR 81.18 in relation to a false statement of truth or a disclosure statement permitted by the court, and a claim form is used when the Attorney-General gives permission for the application. Thirdly, if the application notice is not a "claim form", applications for committal under section 2 of CPR 81 could not be served on persons domiciled in other EU jurisdictions because CPR Rules 6.32 and 6.33, which deal with service where permission is not required, only deal with service of claim forms.

18. The second matter considered by the judge was whether there is a "real issue" between Kroll and DAAR and BA. He concluded (at [74]) that there was because, notwithstanding the public law element in this type of application for contempt, it still raises issues between the parties to the underlying private law litigation. Moreover, unlike proceedings under CPR 32.14 where the permission of the court is required,

committal proceedings can be brought by the party for whose benefit the judgment order was granted without such permission.

19. The judge also rejected a number of submissions on the other matters which had been made on behalf of Sheikh Abdullatif but which did not play a significant part in the appeal. He found (at [75]) that Sheikh Abdullatif was a necessary and proper party to the committal proceedings because Kroll contended that DAAR and BA should be punished for their contempt by the imprisonment of him as their director. Accordingly, it is necessary that he be a party for that part of the committal application. He also (at [76]) considered that he would have rejected a submission that Kroll did not show a reasonable prospect that the application would result in an order made against Sheikh Abdullatif. He made it very clear that, while in his view there would be a "reasonable prospect", given the nature of the application, it was no more than a provisional one on incomplete material and without evidence or submissions from DAAR, BA or Sheikh Abdullatif about it. He stated (at [76(ii)]) that the requirements set out in *Attorney-General for Tuvalu v Philatelic Distribution Corp Ltd* [1990] 1 WLR 926 at 936 meant that an order for the imprisonment of Sheikh Abdullatif could not be made unless Kroll showed not only that he knew of the preservation undertaking or the drives delivery order at the relevant, but that he wilfully caused DAAR and BA to be in breach.

20. The judge considered (see [77]) that England and Wales is the appropriate forum for the committal proceedings because the court here is best-placed to adjudicate as to whether the undertaking given to it and the order that it made had been broken and, if so, what, if any, consequential orders should be made. He also referred to the fact that the committal application against DAAR and BA will, in any event, be held in this jurisdiction and Sheikh Abdullatif has been involved in those proceedings on behalf of those companies as well as being a witness.

21. Finally, the judge stated (at [78]) that he was satisfied that the court should exercise its discretion to grant permission to serve out. He did so because he considered that Kroll should be able to argue that, if the alleged contempt of DAAR and BA, or one of them, is established, a committal order should be made against Sheikh Abdullatif in view of the serious nature of the contempt alleged. He did not consider that the danger that parties to litigation will use committal applications as a tactical weapon pointed in a different direction given the serious allegations and the part that Sheikh Abdullatif is said to have had in the contempt. He also referred to what Moore-Bick LJ had said in *KJM Superbikes v Hinton*, as to which see [15(v)] above, when granting permission for contempt proceedings against Mr Hinton, an Australian who could not be served unless he chose to come to the jurisdiction or to instruct solicitors to accept service.

(iii) Article 22(5) of the Brussels I Regulation

22. Two questions arise. The first is whether, notwithstanding the fact that Article 22(5) provides that, "in proceedings concerned with the enforcement of judgments", the courts of the Member State in which judgment "has been or is to be enforced" have exclusive jurisdiction "regardless of domicile", it gives jurisdiction over persons, such as Sheikh Abdullatif, who are not domiciled in an EU Member State. The second is whether it applies to an application to commit. In view of his conclusion on the first question, he dealt with the second question briefly, concluding that enforcement of an

undertaking contained in a provision of an order of the court is enforcement of the order of the court and within Article 22(5).

23. On the question whether Article 22(5) gave jurisdiction over those not domiciled in a Member State, the judge's analysis of the national and EU jurisprudence was careful and analytically powerful. So was his analysis of the learning on the doctrine of precedent and what constitutes *ratio* and is therefore binding, and when a court is not obliged to follow a *prima facie* binding decision because is to be regarded as given *per incuriam* in the sense that relevant authority which would have compelled a contrary decision was not considered.

24. The judge (at [41] – [43]) rejected the submission on behalf of Sheikh Abdullatif that, as a matter of principle, Article 22(5) does not permit proceedings against persons who are not domiciled in an EU Member State. He concluded that, but for one obstacle, the decisions of the European Court of Justice ("ECJ") in *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA,* (Case C-412/98) [2001] QB 68; *Owusu v Jackson* (Case C-281/02) [2005] QB 801 and *Land Oberösterreich v CEZ AS*, (Case C-343/04) [2006] 2 All ER (Comm) 665 would have compelled him to assume jurisdiction over the committal proceedings against a person not domiciled in an EU member state, such as Sheikh Abdullatif.

25. The obstacle was the decision of this court in *Choudhary v Bhatter* [2009] EWCA Civ 1176 reported at [2010] 2 All ER 1031. In that case, in a judgment given by Sir John Chadwick with which Ward and Stanley Burnton LJJ agreed, this court (at [38]) stated 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". The judge (at [51] and [55]) considered that the material parts of the judgments of the ECJ would have compelled this court in *Choudhary's* case to a different decision. For that reason, although he was bound by the decision, it was *per incuriam* in a way which would permit this court, as a court of co-ordinate jurisdiction, to depart from it.

IV. Analysis

(i) CPR Part 81.4

26. It is accepted (see [4] above) that there is power for the Civil Procedure Rule Committee ("the Rule Committee") to make Civil Procedure Rules with an extra-territorial effect. This has not been expressly done in the case of Part 81 so that the crucial question is as to the legislative intention behind it and, in particular, CPR 81.4(3). Does the language and object of that rule show that such extra-territorial effect is required and thus that the presumption against extra-territoriality is displaced? There are four strands to Mr Béar's submissions on this part of the case. They are that the judge: (i) erred in not sufficiently recognising the strength of the presumption against extra-territoriality where the liberty of the person affected is at risk; (ii) adopted an approach that is contrary to the decision of the House of Lords in *Masri (No. 4)*; (iii) insufficiently recognised that the primary purpose of civil contempt proceedings is the protection of a litigant's private rights; and (iv) insufficiently recognised the importance as a factor of the impracticability of enforcing any order against a foreign director not within the jurisdiction.

27. As to the strength of the presumption against extraterritoriality Mr Béar submitted that, where the context is a criminal provision or one with penal consequences, the authorities show that it is only exceptionally and then by clear words that the United Kingdom legislates extraterritorially: see *Goldstar Publications v DPP* [1981] 1 WLR 732, 737 and *Serious Organised Crime Agency v Perry* [2013] 1 AC 182 at [91]. He placed particular reliance on the statement of Lord Diplock in *Air India v Wiggins* [1980] 1 WLR 815 at 819 that the words of the legislative provision had to be "clear and specific" and to be "incapable of any other meaning". He observed that, although CPR 81.4 does not create a substantive criminal offence, the consequences of a finding of civil contempt may be that the contemnor loses his liberty. For some purposes, including ECHR Article 6, contempt proceedings are treated as if they are criminal proceedings. Accordingly, in holding that CPR 81.4(1) and (3) apply to the non-party directors of a foreign company which has not complied with an order of the court where the directors are foreign nationals and outside the jurisdiction notwithstanding the absence of such language, the judge erred.

28. Mr Béar's submissions on the scope of CPR 81.4 also relied on its legislative antecedents. Its immediate predecessor was RSC Ord 45 rule 5, but it is ultimately derived from the Common Law Procedure Act 1860's provision in section 33, for a writ of attachment against a corporation's directors. Mr Béar submitted that, in 1860, the private company was in its infancy and, when enacting the 19th century predecessors to CPR 81, the legislators and members of the Rule Committee were, in the words of Lord Mance in *Masri (No 4)* at 140, "likely to have been focusing on domestic judgments and domestically based officers".

29. The core of his argument, however, was that the judge erred because his approach was contrary to the decision of the House of Lords in *Masri (No 4)* in a number of ways. He relied on Lord Mance's statement at 137 that because of the separate legal personality of a corporate judgment debtor and its officers, the presumption against extraterritoriality has a potential application to the officers of a judgment debtor which it does not have against the judgment debtor itself. Mr Béar maintained that the judge wrongly assimilated the position of Sheikh Abdullatif, a non-party, with the position of a party to proceedings.

30. Secondly, Mr Béar submitted that the judge was wrong to distinguish committal applications for civil contempt for not obeying an order of the court from proceedings under CPR Part 71.2 that an officer of a judgment debtor attend court to provide information about the judgment debtor's means, which the House of Lords in *Masri (No 4)* held had no extraterritorial scope and did not authorise the examination of an officer of the company who was outside the jurisdiction. Because (see e.g. *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 307-8) the primary purpose of civil contempt proceedings is the protection of a litigant's private rights, the present case, like *Masri (No 4)*, is concerned with a rule which is essentially about the enforcement of a private judgment or order. To regard *Re Seagull* as closer to the position in this case was wrong because that case concerned a provision which was an essential part of a legislative scheme based on a strong public interest in the public conduct of compulsory winding up proceedings.

31. Thirdly, Mr Béar submitted that the judge's treatment of what Lord Mance had stated about impracticability of enforcement (see [15(v)] above) "was unconvincing". He maintained that the fear expressed by the judge that, if Sheikh Abdullatiff's

submissions were correct, the power of the court to make effective orders would be much reduced was contrary to principle and *Masri (No 4),* because impracticability of enforcement points against extra-territoriality.

32. I have concluded that, largely for the reasons given by the judge, Mr Béar can derive only very limited assistance from cases such as *Air India v Wiggins*. This is because CPR 81.3 and 81.4(1) and (3) are not provisions in a criminal statute or regulation but are a vehicle and a mechanism for the court's disciplinary powers over corporate contemnors which are undoubtedly subject to its jurisdiction, in this case because they have instituted proceedings in it. Although a corporation is a legal entity distinct from its members, it is only capable of acting by its agents. It is for this reason that there are rules of attribution (see Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission of New Zealand* [1995] 2 AC 500 at 507) by which the acts of natural persons are attributed to a company in order to ascertain its rights and obligations.

33. It was because, absent a power over the directors and officers of companies which disobey orders of the court, the court's disciplinary powers over them would be significantly weakened, that a policy decision was taken to, in the words of *Arlidge, Eady and Smith on Contempt* (4th ed., 12-116), "exert pressure" on those who have accepted responsibility by virtue of their offices in the company. For a director or officer to be liable, it is necessary to show that he or she knew of and was responsible for the company's breach of the court order, undertaking to the court, or other contempt: see *Attorney General for Tuvalu v Philatelic Distribution Corp Ltd* [1990] 1 WLR 926 at 938; *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch) at [42]; *Masri v Consolidated Contractors International Co SAL* [2010] EWHC 2458 (Comm) at [40(2)]; and *Westminster City Council v Addbins Ltd* [2012] EWHC 3716 (QB) at [50] – [54].

34. I turn to the question whether the object of Part 81 and, in particular the object of CPR 81.4(3) in providing a mechanism for the court's disciplinary powers over corporate contemnors requires it to be given extra-territorial effect. Is such effect, in the words of Lord Wilberforce in *Clarke v Oceanic Contractors Inc* [1983] 2 AC 130 at 152C, as to which see *Masri (No. 4)* at [10], [19] and [26], "within the legislative grasp, or intendment" of Part 81? The principle relied on by Mr Béar is one of interpretation, in the light of considerations of international comity. Although, as I have stated (see [28] above), the core of Mr Béar's argument was that the judge erred because his approach was contrary to that of the House of Lords in *Masri (No. 4)*, I start by considering the position without regard to *Masri*'s case.

35. Does the content and context of Part 81 indicate that the presumption against extra-territoriality, which (see *Masri (No. 4)* at [16]) in principle applies when considering the scope of CPR Part 81, is negated or diluted? Mr Béar is entitled to point to the penal consequences for a director who falls within the scope of CPR 81.4(3) as a factor suggesting that extra-territorial jurisdiction is not taken by it. However, the fact that Part 81 is only engaged if the underlying proceedings are properly before the English courts, i.e. that there is a sufficient connection between the subject-matter of the proceedings and this country, is a factor pointing the other way. The court has an interest in being able to control the participants in such proceedings and to have a means of disciplining a company, which is in contempt because of the actions of its directors. That need exists whether the company is registered in this jurisdiction or is

a foreign company. That need is thus a pointer to the dilution or negation of the force of the presumption.

36. The regime introduced by the CPR clearly has legislative antecedents, but the CPR are a new procedural code designed to effect fundamental changes. While old authority may be a guide to principle (see e.g. *Hertfordshire Investments v Bubb* [2000] 1 WLR 2318), as a new code, the general position is that reference to authorities under the former rules is generally no longer relevant and the courts generally refuse to look at equivalent provisions in the RSC as an aid to interpretation: see the discussion in *Blackstone's Civil Procedure* (2014 at 1.21 – 1.24) and *Vinos v Marks and Spencer Plc* [2001] 3 All ER 784 at [17], *Purdy v Cambran* [1999] CPLR 843 and *Scribes West Ltd v Relsa Anstalt* [2005] 1 WLR 1839 at [22].

37. Although the procedural antecedent of CPR 81.4(3) is RSC Order 45 Rule 5, it is of significance that Part 81 only came into effect on 1 October 2012. It is stated in the *White Book* (2014, vol. 2, 3C-35) that it was enacted "principally for the purpose of bringing together, with improvements in certain respects, rules found formerly in RSC Order 52 and CCR Order 29". For this reason, while recognising the importance of understanding the legislative antecedents of a provision and mindful of the statement of Lord Mance in *Masri (No. 4)* summarised at [28] above, I have found relatively little assistance in the historical material tracing back to the Common Law Procedure Act on which Mr Béar relied. Although he was correct in stating that the Companies Act 1862 is the first piece of modern companies legislation, it was preceded by other legislation, including the Companies Clauses Consolidation Act 1845. Moreover, a significant part of commercial litigation in this jurisdiction was of an international character, involving foreign entities and persons, throughout the last century.

38. The number of cases of an international nature in this jurisdiction involving offshore companies and parties at the time Part 81 was introduced gives a practical reason for regarding the presumption against extra-territoriality as diluted or negated, but unless those practical reasons reflect an underlying reason of principle they will not suffice. An important reason given for generally regarding the provisions of the CPR as "untrammelled by the weight of authority that accumulated under the former rules" is, as May LJ stated in *Purdy v Cambran*, that "it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective". The overriding objective is to enable the court to deal with cases justly. It includes enforcing compliance with rules, practice directions and orders (CPR 1.1(1) and (2)(f)). I consider that the combination of that part of the objective, the need to ensure that the courts have the ability to control proceedings which are properly brought in this jurisdiction, and the anomalies that would result if the provision designed to provide such control for a corporation in contempt does not apply to foreign directors of that company which are responsible for its contempt, provide the underlying reason of principle for reading CPR 81.4(3) as including foreign directors out of the jurisdiction.

39. As to the anomalies, the most obvious would be the difference between a case such as the present one and a case in which the foreign director or officer happens to be a party to the underlying proceedings. Mr Béar accepted that such a person is subject to CPR 81.4(3) even if he is out of the jurisdiction. Another anomaly, one not confined to CPR 81.4, would be that, on the appellant's case, a person outside the jurisdiction who is not a party to existing litigation but who has signed a false statement of truth to

a witness statement or pleading would be immune from the sanction of committal proceedings under CPR 32.14, 31.23 or section 6 of Part 81. That, however, would be inconsistent with the principle that domestic and foreign witnesses should be equally liable for contempt if they sign false witness statements and what Moore-Bick LJ stated in *KJM Superbikes Ltd v Hinton*, on which the judge relied and which is set out at [15(v)] above.

40. The negative impact on the court's disciplinary powers is likely to be particularly marked in the case of a foreign registered company with no assets in this jurisdiction but which has chosen to institute proceedings here or is properly sued here. In the light of the extent to which commercial litigation in this jurisdiction is of an international character and involves foreign companies, and has done so over the last century, if the appellant's submissions are correct, the problems would not be theoretical or marginal.

41. The question is whether the decision in *Masri (No. 4)* and the approach taken in it by the House of Lords puts this into question. I have concluded that it does not. Lord Mance gave three reasons (see [19] and [23] of his speech) for his conclusion that CPR 71.2 does not apply extra-territorially and did not apply to an officer of a corporate judgment debtor who habitually resided in Greece. The first was that the connection between the judgment and the officer was weak and analogous to that which exists between the court in ongoing proceedings and a witness who could give important evidence that would assist the court. The second was that CPR Part 71 is concerned with obtaining information in aid of the enforcement of a private judgment and the court is acting in aid of such private rights. The third was that, in that context, there was no wider public interest, as there was in *Re Seagull*.

42. In my judgment, the nature of committal proceedings is very different from the nature of the power of the court under Part 71 to obtain information from judgment debtors. The rationales for the two procedures are also very different. Mr Béar's submissions underplay the public interest element underlying the modern law of civil contempt. The twofold character of civil contempt in modern law is well-established. As well as the authorities relied on by the judge (see [15(ii)] above), in *Jennison v Baker* [1972] 2 QB 52 at 61 and 64, Salmon LJ stated that "the public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered". He also said, of the purpose of enforcing an injunction, that it is to vindicate "(a) the rights of plaintiffs (especially the plaintiff in the action) and (b) the authority of the court. The two objects are in my view inextricably intermixed." Similarly, in *JSC BTA Bank v Solodchenko (No. 2)* [2011] EWCA Civ 1241, reported at [2012] 1 WLR 350, which concerned non-compliance with a court order, Jackson LJ stated (at [45]) that punishment for non-compliance with a court order "upholds the authority of the court" and has "everything to do with the public interest that court orders should be obeyed". It is thus clear that it is for the public good that the order of the court should not be disregarded.

43. It is for that reason that I consider the judge was correct in concluding that the nature of contempt proceedings meant that this case is closer to the decision in *Re Seagull* than that in *Masri (No. 4)*. In *Re Seagull*, the affairs of the insolvent company were properly subject to investigation in this jurisdiction and, although section 133 of the Insolvency Act 1986 did not expressly state that it applied to officers outside the jurisdiction, it was held to so apply. Peter Gibson J (as he then was) stated ([1993] Ch

345 at 354) that it was the obvious intention of section 133 that those responsible for the company's state of affairs should be subject to a process of investigation in public and "Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction". He added:

> "Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice. That seems to me to be a wholly improbable intention to attribute to Parliament."

I consider that, for the reasons given earlier in this section of my judgment, these observations are equally applicable in the context of CPR 81.4.

44. A second reason for regarding the directors and officers of a company subject to a court order as in a different position to that of ordinary witnesses or non-parties is that (as stated at [32] above) a company can only act, and therefore comply (or not comply), with the court order through the acts of those officers and agents. The consequence of the arguments on behalf of the appellant would be to put in question the fact that officers and agents are often required by a court order to take action on behalf of the company, for example in relation to the asset disclosure element of a freezing order: see e.g. *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2013] EWHC 1323 (Comm), reported at [2013] 2 All ER (Comm) 1137 at [30] *per* Field J.

45. The observations of Gloster J in *Masri and Manning v Consolidated Contractors International Co SAL* on which the judge (see [15(iv)] above) relied are also of assistance, although they must be seen in the light of the decision of this court in that case. In 2007 a receiver had been appointed by way of equitable execution over the defendant company's rights to income from an oil concession. The directors of the company were all resident in Lebanon and applied to the Lebanese court for the appointment of judicial administrators. The Lebanese court made an order forbidding the judicial administrators from observing the order of the English court. On 1 December 2010 Gloster J made a further order *inter alia* restraining the company from receiving or taking such oil for its own account and giving the receiver power to control the sales of the oil in the name of the company. The order was directed at "the defendant or its officer or director or any other person acting…in the capacity of, or in place of, a decision-making organ of the defendant".

46. The reason Gloster J gave ([2011] EWHC 409 (Comm) at [88]) for concluding that the House of Lords in *Masri (No 4)* did not consider whether a director or officer out of the jurisdiction could be liable for contempt of court was that this would have required the House to consider two matters which it had not. The first was the construction and legislative intent of RSC Order 45 Rule 5, the predecessor to CPR 81.4(3). The second was the implication of the "*Babanaft* proviso" which provides that the terms of freezing and some other orders will affect the officers or agents of a respondent to such orders although they are outside the jurisdiction of this court. In reaching her conclusion that foreign directors of such a company and the judicial administrators appointed in that case by the Lebanese court are subject to the jurisdiction, she, in particular, took account of the fact that this provision expressly provided that a judgment or order may be enforced by committal proceedings against a director or other officer of a corporate defendant. She stated (at [89]) that it followed

from this that the director or officer was the person who, under the rule of attribution "applicable to the [order] and any contempt proceedings…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". It was in that capacity rather than any third party capacity that she regarded the English court as having personal jurisdiction over the foreign director or officer.

47. This court ([2011] EWCA Civ 746) overruled the part of Gloster J's order that affected the judicial administrators of the company in question on the ground that they had been appointed by the Lebanese court and were officers of that court. It held that the exercise of jurisdiction over them in those circumstances was exorbitant and reflected an insufficient regard to principles of comity. The remainder of the order was properly made, although (see [62]) it was at the more intrusive end of the court's jurisdiction. It was the involvement of the officers of a foreign court and of that court itself that was the reason the majority of the court varied Gloster J's order. That is not a feature of the present case. Arden and Rimer LJJ did not (see [60] and [79]) express a view on Gloster J's observations.

48. Toulson LJ dissented and would have set aside the receivership order in its entirety. But for him too, the position of the judicial administrators was important. He stated (at [47]) that "the English court undoubtedly has a legitimate interest in trying to enforce payment of a judgment debt owed by parties which accepted its jurisdiction", but (at [51]) that holding out the threat of contempt proceedings against the judicial administrators who had not accepted the English court's jurisdiction was in reality an unjustified form of interference with the jurisdiction of the Lebanese court.

49. I also reject Mr Béar's other submissions in support of his argument that CPR 81.4(3) does not have extra-territorial effect. This is a very different situation to that considered in the *Derby v Weldon* litigation. That involved the exercise of contempt jurisdiction over foreigners with no pre-existing connection with those proceedings. In this case, Sheikh Abdullatif is the director of companies which are subject to the jurisdiction of the English court because they have instituted proceedings here and those companies are in contempt of this court because of their breach of an order of the court in the exercise of that jurisdiction. The rule of attribution in CPR Part 81.4(3) is not equivalent to enforcing the penal law of this country in another jurisdiction. What Kroll is seeking in these proceedings is to enforce, in England, an order made by the English Commercial Court in proceedings against persons, the companies, which are properly before that court.

50. Any problems about impracticability of enforcement are also, in my view, not of great significance in the context of the facts of this case. Sheikh Abdullatif is a director of the companies which are claimants in the underlying proceedings. They wish to continue litigating in this jurisdiction. They wish to call him as a witness. In a case where CPR 81.4(3) is invoked in respect of a director of a defendant company, it will only be where the court has jurisdiction over the company that Part 81 will apply. In those circumstances, if the director is out of the jurisdiction and stays out, and the company has no assets, there may be problems of enforcement, but the problems of enforcement in one sub-set of cases that fall within the rule are not such, in my judgment, as to lead to the conclusion that the Rule Committee did not intend this provision to have extra-territorial effect.

51. The final strand of this part of Mr Béar's submissions was that, even if as a matter of general principle, CPR 81.4(3) can have extra-territorial effect, it would be wrong for the court to exercise powers of committal in a case such as this where the predominant motivation for the application to commit is to advance the applicant's interests as a private litigant. The reasons which, in my view, justify giving the provision an extra-territorial effect, and the twofold character of civil contempt have led me to reject this submission. There may come a point in which the motive of advancing personal and private interests in a particular case makes it inappropriate (see, albeit in the context of criminal contempt, *JSC BTA Bank v Ereshchenko* [2013] EWCA Civ 1961 at [74] – [76]) but that would not justify the effective negation of this part of the rules in cases involving a foreign director or officer.

(ii) CPR Part 6 and gateway (3) of PD6B 3.1

52. The conditions for service out of the jurisdiction under gateway (3) which were in particular contention in this appeal are; whether the application notice qualified as a "claim form", whether there is a "real issue" between Kroll and DAAR and BA and between Kroll and Sheikh Abdullatif. Mr Béar submitted that the judge erred in concluding that, they are satisfied in this case. First, he argued that the application notice could not qualify as a "claim form" because the application notice must, to qualify, be for relevant "proceedings" which are, in this context, the substantive proceedings commenced by Kroll on 19 June 2012, and not the committal proceedings. He submitted that the reliance on general references to "committal proceedings" was misplaced and is of no assistance in construing the technical requirements of CPR 6.2. Although many committal applications do involve separate proceedings, that does not mean that all committal applications do. He submitted that the usage of the term "proceedings" in other contexts in the CPR should be seen as no more than a convenient label. He also submitted that the anomalies identified by the judge, which would only arise if the judge was correct about the scope of CPR 81.4(3), were overstated.

53. Mr Béar also maintained that the observations of Lord Donaldson MR in *Derby & Co Ltd v Weldon (Nos. 3 and 4)* [1990] Ch 65 at 82 that a person who is wholly outside the jurisdiction of the court is "either not to be regarded as being in contempt" or "it would involve an excess of jurisdiction to seek to punish him for that contempt" are a strong indication against the existence of a power to deploy gateway (3) in these circumstances. He also submitted that the difference between applications under sections 2 and 3 of CPR 81 would only be anomalous if the English court exercised powers in relation to criminal contempt extra-territorially.

54. He similarly contended that there is no "real issue" between Kroll and Sheikh Abdullatif within gateway (3) because, on its true meaning and purpose, it is concerned with causes of action and not applications for committal. He relied for this submission on cases such as *The Brabo (No 2)* [1949] AC 326 at 333 – 340 and the *Seaconsar Far East* case [1994] 1 AC 438 at 450 – 452 as showing that the rules governing service out have always concerned themselves with causes of action.

55. I have concluded that here too Mr Béar's critique of the judge's approach and conclusions should be rejected. The essential question is whether "proceedings" within CPR 6.2 include an application for committal. That involves determining whether such an application is made on a "claim form" which is defined by reference

to "claim" which "includes petition and any application made before action or to commence proceedings". It is, in my view, clear that an application for committal is the commencement of proceedings. That this is so is, as the judge stated, seen from the wording of CPR 31.23(1) and 32.14(1), which refer to "proceedings for contempt of court". It may be possible to dismiss references in notes to the rules which refer to "contempt proceedings" as no more than convenient labels, but that, in my judgment, is not a proper approach to the use of those words in the rules. In any event, a label is a means of identifying the item labelled.

56. I also reject the argument that not all contempt applications involve separate proceedings. Those for breach of a solicitor's undertaking are also (see CPR 81.11) commenced by a Part 23 application. Although an application for committal for interference with the due administration of justice within section 3 of Part 81 must be made by a Part 8 claim form, it is clear (see CPR 81.12(2)) that section 3 applies whether or not there are existing proceedings. I accept Mr Graham's submissions that one of the reasons that CPR 81.10(3)(a) requires the grounds on which a committal application is made to be set out in full is that an application made under CPR 81.10(2) involves new proceedings.

57. The judge was in my view correct to state that the submissions on behalf of Sheikh Abdullatif would, if accepted, result in anomalies which make it improbable that CPR 6.2 and CPR 81.10(2) should be given the interpretation for which he contends. I have summarised what the judge said about the anomalies at [17] above. The striking anomalies would be that applications under section 3 of Part 81, that is including those for criminal contempt, might be made against non-parties outside the jurisdiction, but those under section 2 of Part 81 would not, and those concerned with false statements of truth and false disclosure would be subject to different rules depending on whether the application is begun by means of a Part 23 application notice or Part 8 claim form.

58. Finally, I accept Mr Graham's submission that the submission on behalf of Sheikh Abdullatif that there is no "real issue" between Kroll and him mischaracterises the term "cause of action". As Diplock LJ, as he then was, stated in *Letang v Cooper* [1965] 1 QB 232 at 242-243, a cause of action "is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". Gateway (3) makes no reference to "causes of action", but only to "a real issue" between the person making the claim and the persons against whom the claim is made. There is clearly a real issue between Kroll and DAAR and BA as to whether the companies fall within the scope of CPR 81.4(1). Under the rule of attribution in CPR 81.4(3) there is clearly a real issue as to whether the jurisdiction to seek an order for the committal of Sheikh Abdullatif exists. The cause of action against Sheikh Abdullatif asserts a factual situation, that is DAAR and BA's contumacious breaches of the preservation, undertaking and delivery order and Sheikh Abdullatif's responsibility for the same.

(iii) Article 22(5) of the Brussels I Regulation

59. Article 22(5) is stated to apply "regardless of domicile". Mr Graham's case was essentially that the judge's reasoning on the position established in the European decisions was correct and those words mean that the domicile of the defendant, or indeed the claimant, is irrelevant to the application of Article 22, and that this court

should conclude that *Choudhary*'s case was *per incuriam* the decisions of the European Court of Justice to which I have referred at [24] above, and should not follow it.

60. Since I have concluded that the appeal on CPR 81.4(3) does not succeed, it is not necessary to rule on Kroll's cross-appeal. In these circumstances, any view expressed as to whether the decision in *Choudhary*'s case was *per incuriam* and as to the effect of the decisions of the European Court of Justice would be *obiter*, and therefore would not resolve the issue. The court has, however, heard full submissions on this point. Moreover, since, if Article 22(5) enables this court to assume jurisdiction against a person who is not domiciled in a Member State, a claimant will be able to serve out without obtaining the permission of the court, the question is one of practical importance. For those reasons, albeit with some hesitation, I have concluded that it is appropriate to express a view on the *Choudhary* point, while recognising that it will not resolve the question.

61. I first briefly summarise the submissions. Apart from the three cases relied on by the judge, Mr Graham submitted that interpretation is supported by Article 4(1) of the Brussels I Regulation, the Jenard Report on the 1968 Brussels Convention (set out in 22 OJ C59, 5 March 1979), which stated (at page 34) that "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", the judgment of Lawrence Collins LJ in *Masri v Consolidated Contractors International (No. 2)* [2008] EWCA Civ 303, reported at [2009] QB 450 at [109], and commentaries such as Layton and Mercer, *European Civil Practice* (2nd ed. 2004 at 4-021), Briggs and Rees, *Civil Jurisdiction and Judgments* (5th ed. 2009 at 2.53), and Briggs (2009) BYIL 614 at 615 – 616. Mr Graham submitted that, in these circumstances, this court should decline to follow *Choudhary* because it was reached *per incuriam* and should instead follow the clear and consistent case law of the ECJ as section 3 of the European Communities Act 1972 requires it to do.

62. Mr Béar submitted that the decision in *Choudhary* was not *per incuriam* because two of the three ECJ decisions on which Kroll relies were cited to and by the court in that case. He submitted that this court could not assume that the court in *Choudhary* was unaware of the relevant passages in the *Group Josi* and *Owusu* cases simply because it did not refer to them. More fundamentally, he submitted that Sir John Chadwick's reasoning in *Choudhary* is consistent with the principles and objectives behind Article 22 and the Brussels I Regulation as a whole. The whole point of the Brussels I Regulation was to regulate jurisdiction within the internal market (see *Lucasfilm v Ainsworth* [2010] Ch 503 at [116], a decision on Article 22). Secondly, the passage from the Jenard report relied on by the judge at [42] does not in fact support Kroll's position because the example given was focused on the lack of jurisdiction of the Belgian court and the reasoning is consistent with the inapplicability of Article 22 to a non-EU context. He also submitted that, if Kroll's submissions were correct, claims could be brought in England and served on defendants who had no connection with the UK or anywhere else in the EU without any of the usual safeguards, such as establishing a good arguable case or that this jurisdiction is the proper place to bring the claim, and without any agreement between the United Kingdom and the state in which the putative defendant is domiciled providing for such jurisdiction.

63. There was a second limb to Mr Béar's submissions on Article 22(5). It was that Article 22(5) does not apply to a committal application. This (see [22] above) was rejected by the judge. Mr Béar maintained that he was wrong to do so because such an application is not "proceedings concerned with the enforcement of 'judgments". He relied on the French text of the Jenard report which he argued made it clear that those proceedings meant implementation of the order of the court and not coercion to induce such implementation or punishment for non-compliance. He also relied on the decision in *Reichert v Dresdner Bank AG* C-261/90 [1992] ECR I-2149 at [26], where the ECJ stated that the provision should be given a narrow interpretation as support for a clear implication of a territorial connection with the ongoing process of enforcement, the judgment of Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd* [2008] EWCA Civ 303, reported at [2009] QB 450, and in particular the statement (at [123]) that "…Article 22(5) is concerned with actual enforcement, and not with steps which may lead to enforcement". and the statement of Gloster J at first instance in *Masri (No.2)* [2008] 1 All ER (Comm) 305 at [63] that the exclusive jurisdiction provisions in what was then Article 16 and is now Article 22 should be given a narrow interpretation.

64. The judge's reasoning on the question of whether the jurisprudence of the European Court of Justice means that, notwithstanding the citation of different parts of the judgments by Sir John Chadwick in *Choudhary*'s case, that decision is *per incuriam*, appears to me to be compelling. As to whether Article 22(5) applies to committal proceedings, Mr Béar's submissions were powerful, but, in *Reichert v Dresner Bank AG* it was stated (at [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".

V. Conclusion

65. For the reasons given in [32], [34] – [38], [42] –[44], [49] –[50], and [55] – [58] above, I would dismiss this appeal.

Lord Justice Briggs:

66. I agree.

Lord Justice Richards:

67. I also agree.

Appendix

(1) CPR Part 81 - Applications and proceedings in relation to contempt of court

1. CPR 81.1(1) states that Part 81 sets out the procedure in respect of contempt of court and the penal, contempt and disciplinary provisions of the County Courts Act 1984. Rule 81.2(1) provides that Part 81 "is concerned only with procedure and does not itself confer upon the court the power to make an order for (a) committal; (b) sequestration; or (c) the imposition of a fine in respect of contempt of court". The other material provisions are:

Interpretation

81.3

In this Part –

(a) 'applicant' means a person making –

(i) an application for permission to make a committal application;
(ii) a committal application; or
(iii) an application for a writ of sequestration;

(b) 'committal application'means any application for an order committing a person to prison;

(c) '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; and

(d) 'undertaking' means an undertaking to the court.

Enforcement of judgment, order or undertaking to do or abstain from doing an act

81.4

(1) If a person –

(a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
(b) disobeys a judgment or order not to do an act,

then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.

…

(3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.

…

How to make the committal application

81.10

(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.

(2) 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.

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

(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

(5) The court may –

> (a) dispense with service under paragraph (4) 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.

(2) CPR Part 23 – General rules about applications for court orders

Meaning of "application notice" and "respondent"

23.1

In this Part –

'application notice' means a document in which the applicant states his intention to seek a court order; and

'respondent' means –

> (a) the person against whom the order is sought; and
>
> (b) such other person as the court may direct.

...

(3) CPR Part 6 – Service of documents

1. By CPR rule 6.2(c) "claim" includes "any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly…"

2. CPR rule 6.33(2) provides that the claimant may serve the claim form on the defendant out of the United Kingdom where the claim made against the defendant to be served out is one which the court has power to determine under Council Regulation (EC) 44/2001 of 22 December 2000, the Brussels I Regulation, and no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State, and one of the requirements of CPR 33(2)(b) is satisfied. In this case, the material provision is sub-paragraph (b), that "the proceedings are within Article 22 of the Judgments Regulation." There is a similar provision for proceedings to be served on a defendant in Scotland or Northern Ireland in Rule 6.32.

3. In proceedings to which Rules 6.32 and 6.33 do not apply, by 6.36 "the claimant may serve the 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". That paragraph of the Practice Direction provides:

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

(4) Council Regulation (EC) No. 44/2001 of 22 December 2000

> "**Recital 11**: The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> **Recital 12**: In addition to the defendant's domicile, there should alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.
>
> …
>
> **Article 4**

(1) If the defendant is not domiciled in a Member State, the jurisdiction of the courts in each Member State shall, subject to Article 22 and 23, be determined by the law of that Member State.

…

Section 6

Exclusive jurisdiction

Article 22

"The following courts shall have exclusive jurisdiction, regardless of domicile:

…

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