Neutral Citation Number: [2023] EWHC 788 (Comm)

Case No: CL-2018-000304

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

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

Date: 05/04/2023

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

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

- -
- -

Jonathan Crow CVO, KC and James Weale (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Thomas Grant KC, Anna Dilnot KC and Katherine Ratcliffe (instructed by **Quillon Law LLP**) for the **Defendant**

Hearing dates: 21,22 and 23 March 2023

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Approved Judgment

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

....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the trial of the liability issues that arise on this contempt application, commenced by an application notice dated 14 November 2019 and amended on 25 February 2022. The claimants submit that the application is "*straight forward*" and is said to have been brought "*... to bring to the attention of the court serious and deliberate breaches by Mr Deripaska....*" of undertakings given by him in the circumstances I describe more fully below. The issues that arise broadly, therefore, are (a) whether in the circumstances that have happened, the defendant breached his undertakings to the court and (b) whether he did so contumeliously. This last point is relevant only to penalty if otherwise the alleged breaches are established, but all parties are agreed that the issue is to be determined at this trial if and to the extent it arises.

2. The trial took place between 21 and 23 March 2023. I heard oral evidence from Mr Andrew McGregor, the defendant's former solicitor while he was a partner at Reynolds Porter Chamberlain ("RPC") and the defendant, who gave evidence remotely from his lawyers' offices in Russia in Russian via interpreters.

Procedural History

3. The contempt application arises in the context of a long running and bitterly fought dispute between the claimants and defendant concerning the redevelopment of a 10 hectare site in Moscow by a joint venture vehicle called Navio Holdings Limited ("Navio") that has now been held to have been owned ultimately by the second claimant and the defendant. The claimants maintain that following a disagreement between the second claimant and the defendant, the defendant staged what the claimants characterise as an "*armed takeover*" of the joint venture and/or its business. The claimants commenced arbitration proceedings against the defendant and a special purpose vehicle controlled by the defendant called Filatona Trading Limited ("Filatona") pursuant to a shareholders agreement to which they were parties.

4. The arbitration culminated in an Award by the Arbitral Tribunal in which it found the claimants' case proved and directed the defendant and Filatona to buy out the second claimant's interest in Navio for approximately US$ 95 million. By subsequent awards, the Arbitral Tribunal ordered them to pay interest and costs in addition.

5. The defendant challenged these outcomes in these proceedings under s. 67 and s. 68 of the Arbitration Act 1996. These challenges failed following a five week trial before Teare J and although permission to appeal was granted to the defendant in relation to one ground, that appeal was dismissed on 6 February 2020. An application for permission to appeal to the Supreme Court was dismissed in December 2020.

6. On 16 April 2018, after the tribunal had published the substantive Award referred to above, but before the Commercial Court had heard the defendant's challenges, the United States Department of the Treasury imposed wide-ranging sanctions on the defendant and a number of companies controlled by him, including two material to

this application being (1) EN+ Group PLC, a company registered in accordance with the laws of the Bailiwick of Jersey and (2) B-Finance Limited, a company registered in accordance with the laws of the British Virgin Isles ("B-Finance"). It is not necessary that I take up time setting out why the government of the United States considered these steps to be appropriate, nor is it appropriate to do so, not least because they are in dispute in proceedings in the United States.

7. On 19 April 2018, the claimants' then solicitors, wrote to the defendant's then solicitors, expressing concerns that, as a result of the imposition of sanctions, there would be no assets against which the Awards referred to above could be enforced, and seeking security for both the sums awarded and costs. No satisfactory response having been received, the claimants applied for and obtained a worldwide freezing order against the defendant, expressly on the basis identified by Ms Berard (a partner in Clifford Chance and one of the solicitors then acting for the claimants) in her affidavit in support of the application that:

> "On 6 April 2018, and as has been widely publicised in the international press, Mr Deripaska was made the subject of sanctions by the United States authorities. Those sanctions have had a significant and direct impact on Mr Deripaska's assets, and it appears that Mr Deripaska is now taking steps to liquidate certain of his most significant assets in the short-term. Further, the claimants are concerned that the wider effect of the sanctions is to encourage Mr Deripaska to repatriate his assets to Russia, where for the reasons set out below, I believe he retains substantial influence and/or otherwise take unjustifiable steps to restructure his assets in a way which will make it more difficult for third parties to enforce against them."

It was this concern that led to paragraph 7 of the worldwide freezing order being qualified by requiring that in determining the value of the defendant's assets for the purpose of managing the effect of the freezing order "*... no account should be taken of any such assets based in Russia...*" Thereafter the solicitors acting for the defendant obtained a licence under the US sanctions legislation permitting them to act for the defendant and they issued an application seeking the discharge of the worldwide freezing order on the basis of the undertakings that lie at the heart of this application.

8. Broadly, the undertakings were proposed on the basis that the defendant was the ultimate beneficial owner of a company called Fidelitas International Investments Corporation, a company registered in accordance with the laws of the Republic of Panama ("Fidelitas"), which in turn owned all or nearly all the shares in B-Finance, which in turn owned 245 million unencumbered shares in EN+ Group PLC. After negotiations, which I need not take up time setting out, the claimants withdrew their application to continue the worldwide freezing order on the basis of undertakings from the defendant, B-Finance acting by its director Mr Anton Vishnevskiy ("AV") and RPC (by now the defendant' solicitors) acting by their then senior partner. It is common ground, but in any event I find and conclude, that the undertakings must be read together and each must be interpreted in the context of what the others provide.

9. Insofar as is material, the undertakings given by AV on behalf of B-Finance were in the following terms:

> "…
>
> 2) I am the sole Director of B-Finance Limited, a company organised and existing under the laws of the British Virgin Islands ·.. (the "Company"). The ultimate beneficial owner of the Company is Mr Deripaska.
>
> 3) I confirm and warrant that: (i) the Company is the legal owner of over 245,000,000 unencumbered shares in EN+ Group Plc (a company incorporated under the laws of Jersey) ("EN+"). Of these 45,500,000 are held in certificated form. (the "Shares"); and (ii) the Company does not have any current or contingent liabilities which could result in a claim being made against the Shares. The total value of the Shares using the share price as at close on 19 June 2018 was £186,730,506.16. In reality, that value is likely to be considerably more.
>
> 4) I consider it to be in the best interests of the Company to enter into the below undertakings and I confirm and warrant that I have authority to give the undertakings contained in this letter and to bind the Company in so doing. …
>
> 5) I further hereby undertake to the court in connection with the above proceedings, in my capacity as Director and on behalf of the Company, as follows:
>
> (a) The Company will arrange for original share certificates in respect of the Shares ("the Share Certificates") to be deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London. (b) The Company will not dispose of the Shares or otherwise deal with them pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim Nos CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018-000121 between the Claimants on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Arbitration Claims"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and the fulfilment of any obligation imposed on Mr Deripaska and/ or Filatona by the Court or such written agreement, following which all undertakings contained in this letter shall immediately lapse.
>
> (c) I and the Company will irrevocably instruct RPC to (i) hold the Share Certificates and not to deal with or dispose of or otherwise deal with the Shares in any way pending the final outcome of the Arbitration Claims, or (if sooner) further order

of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and the Claimants (on the other) and (ii) provide an undertaking to the High Court of England & Wales to that effect.

(d) In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Arbitration Claims in favour of the Claimants, and in the event Mr Deripaska fails within 42 days to comply with any obligations to make payment required under the terms of any such Order or agreement or by the terms of any Share Purchase Agreement or Order as may be ordered or agreed, the Company will take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance (following which all undertakings contained in this letter shall immediately lapse). In this event, the Company will make such irrevocable instructions as are necessary such that the said sale proceeds shall be received into RPC's bank account and paid by RPC directly to the Claimants or as otherwise ordered or agreed so as to satisfy any liabilities of Mr Deripaska and/ or Filatona Trading Limited under a final judgment.

(e) The Company has not incurred and will not incur any liability that would have the effect of preve1nting, impeding or obstructing the fulfilment of the undertaking at sub-paragraph (d) above.

6) This letter shall be governed in all respects by English law and the courts of England shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter. For the avoidance of doubt, the Company and I hereby irrevocably submit to the English Court in relation to all matters arising out of the undertakings set out above. Furthermore, the Company and I will accept service of any documents which relate to these undertakings at the address set out in paragraph (2), above. …"

The defendant's undertaking was in the following terms:

"…

2) I write further to: (i) the letter of today's date from Mr Anton Vishnevskiy, the director of B-Finance Limited and the undertakings to the court set out in that letter (the "B-Finance Letter")….

3) I confirm and warrant that, as stated in the B-Finance Letter, 1 am the ultimate beneficial owner of B-Finance Limited ("B-Finance"). I understand that both Mr Vishnevskiy and B-Finance's holding company, Fidelitas International Investments

Corp ("Fidelitas"), are satisfied that it is in the best interests of B-Finance to give the undertakings. …

4) Once the undertakings have been provided by Mr Vishnevskiy on behalf of B-Finance, 1 understand that Fidelitas is unable to take any step to frustrate compliance with, and/or enforcement of, the undertakings. Nevertheless, and for the avoidance of doubt, I hereby further undertake to the court in connection with the above proceedings, as follows:

a) I shall not take any step or procure the taking of any steps, whether directly or indirectly, in my capacity as ultimate beneficial owner or in any other capacity, which has the effect of preventing, impeding or obstructing the fulfilment of the undertakings set out in the B-Finance Letter as they may fall due for performance.

b) I shall take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcement.

c) I undertake to repeat these undertakings in an affidavit if so required.

5) I have had explained to me by my English lawyers the terms of the undertakings which I have given to the Court (set out above) and the consequences of breaching them. I understand that if those undertakings are breached I (and/or B Finance) may be held to be in contempt of court and that I (and/or B-Finance and/or its directors as the case may be) may be imprisoned, fined or have my/their/its assets seized.

6) This letter (and all matters arising out of it) shall be governed in all respects by English law and the courts of England and Wales shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter.

7) For the avoidance of doubt, service of any documents relating to this undertaking may be effected by service on my English solicitors on the record (currently Reynolds Porter Chamberlain LLP).

8) I understand that a copy of this letter will be kept on the Court file as a record of the undertakings which I have given. ..."

[Emphasis supplied]

10. Finally, the defendant's solicitor provided an undertaking the following terms:

> "…
>
> I write further to the letter of today's date from Mr Anton Vishnevskiy, the director of B-Finance Limited ("the Company") and the undertakings to the court set out in that letter. …
>
> I confirm that original share certificates ("the Share Certificates") in respect of 45,500,000 shares ("the Shares") in EN+ Group Plc (a company incorporated under the laws of Jersey) have been deposited at the offices of Reynolds Porter Chamberlain LLP ("RPC") in London.
>
> I hereby undertake to the court in connection with the above proceedings and pursuant to irrevocable instructions I have received from the Company (which owns the Share Certificates and the Shares) that RPC will hold the Share Certificates and not dispose of or otherwise deal with the Shares in any way pending the final outcome of proceedings currently ongoing in the High Court of Justice under Claim No.s CL-2016-000775, CL 2017-000515, CL 2017-000638 and CL 2018- 000121 between Navigator Equities Limited and Vladimir Chernukhin on the one hand and Mr Deripaska, Filatona Trading Limited and Navio Holdings Limited on the other (the "Proceedings"), or (if sooner) further order of the court or written agreement between Mr Deripaska and Filatona Trading Limited (on the one hand) and Navigator Equities Limited and Vladimir Chernukhin (on the other).
>
> In the event of any final judgment (i.e. after the outcome of any appeal) being made in the Proceedings in favour of the Claimants or any such settlement, and in the event Mr Deripaska fails within 42 days to make any payment required under such judgment or settlement, I hereby undertake that pursuant to irrevocable instructions I have received from the Company RPC will take appropriate steps to facilitate the sale of such number of the Shares as are required to satisfy any Order of the Court as regards a judgment debt or other order to complete the purchase of Navigator's shares in Navia Holdings Ltd on terms that the proceeds of such sale are paid to this firm and further undertake to remit such proceeds as required by the Court or agreement between the parties up to the amount ordered by the Court or agreed.
>
> This letter shall be governed in all respects by English law and the courts of England and shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this letter...."

I now return to the chronology of events.

11. Although various general licences were issued by the US authorities that permitted EN+ Group PLC to continue its trading operations, it is common ground that its business was severely compromised by the sanctions imposed on it. Its business was and is very substantial. Amongst other activities it is the holding company for Rusal, one of the world's largest aluminium producers. There was a real concern, shared by others including the governments of a number of states where Rusal carried on business, that unless the sanctions imposed on EN+ Group PLC were lifted the continued existence of the company was at risk and with it the livelihood of its many direct and indirect employees in those states.

12. The chairman of EN+ Group PLC in 2018 was Lord Barker. He, supported by others, developed a scheme known in these proceedings as the "Barker Plan" that was designed to persuade the US authorities to revoke the sanctions imposed on EN+ Group PLC. It depended on persuading the US authorities that the defendant had been removed from control of the company. This was achieved by:

    i) diluting the defendant's ultimate shareholding from 70% to around 45%;

    ii) VTB Bank taking ownership of shares in EN+ Group PLC previously pledged to it by the defendant or by entities controlled by the defendant, with the voting rights of those shares being exercised by an independent American voting trustee; and

    iii) the donation by the defendant of shares in EN+ Group PLC to a charitable foundation again with the voting rights being exercised by an independent trustee.

    The result of these arrangements was that the defendant's shareholding was reduced to no more than 44.95% and his voting rights were reduced to around 35% of EN+ Group PLC's issued share capital. This, in combination with the board being reconstituted so that a majority consisted of independent directors rather than appointees of the defendant, or entities ultimately beneficially controlled by him, sufficiently satisfied the US authorities that the sanctions on EN+ Group PLC were revoked from 27 January 2019. As will be apparent from what follows, the arrangements summarised above took effect after 20 December 2018, when the critical shareholder meeting, on which this application is founded, took place.

13. It is now necessary that I summarise some changes to Russian company law that took effect from 3 August 2018. From that date, a new statute entitled "The Federal Law on International Companies No 290-FZ dated 3 August 2018" ("Russian IC Law") took effect, which apparently enabled foreign corporations to change their domicile from the country of their incorporation to two special administrative areas within the Russian Federation, where they could benefit from various advantages including fiscal advantages not available elsewhere in the Russian Federation. The Russian IC Law apparently permits a foreign corporation to constitute itself as either an "*International Limited Liability Company*" or an "*International Joint Stock Company*" without the need to dissolve itself and transfer its assets to a newly formed entity – see Articles 1(1) and 3(2) - by voting in accordance with its constitution to change its governing law to Russian law. The two special administrative zones within the Russian Federation to which foreign registered companies could re-domicile under

the Russian IC Law were created by another law enacted at or about the same time as the Russian IC Law. By Article 4(1) of the Russian IC Law, from the date a re-domiciled entity was registered as required by the administrative provisions within the law, the governing law of the International limited liability or joint stock company would become Russian law, and would thereafter be governed by Russian Federation legislation. I refer to the Russian IC Law in more detail below.

14. Jersey's companies law is codified in the Companies (Jersey) Law 1991, as amended ("Jersey Companies Law"). That law apparently permitted Jersey registered companies to take advantage of provisions such as those contained in the Russian IC Law, providing that the proposal by the company concerned to re-domicile was approved by a special resolution of the company and the Jersey Financial Services Commission ("Commission") had authorised the company to seek what is described in the legislation as "*continuance*" in another jurisdiction - see Article 127 Q to Article 127 U of the Jersey Companies Law. The effect of continuance pursuant to these provisions is set out in Article 127 V. Unsurprisingly, given that a company cannot be domiciled in two different jurisdictions at the same time, it is in these terms:

> "when a company is, in accordance with the terms of authorization of the Commission. Under Article 127 U, continued as a body corporate under the laws of the other jurisdiction to which the authorization relates:
>
> (a) It thereupon ceases to be a company incorporated under this law..."

15. On 1 November 2018, EN+ Group PLC's Board approved a proposal that it seek to re-domicile in the Russian Federation.

16. On 20 December 2018, a general meeting of the shareholders of EN+ Group PLC took place at which the shareholders passed special resolutions approving the continuance of that company as an International Joint Stock Company in Russia, in accordance with the Russian IC Law. At that time B-Finance held over 53% of EN + Group PLC's share capital and thus could have blocked the passing of the special resolutions. It did not do so, but on the contrary voted in favour.

17. There is a dispute between the parties as to whether B-Finance voted in this way on the specific instructions of the Defendant or whether it voted in accordance with general guidance provided by the defendant prior to the general meeting being convened ostensibly to do all things necessary to give effect to the Barker Plan. The defendant's case is that re-domiciling the company to Russia was critical to the outcome of the Barker Plan because VTB Bank would not otherwise agree to the debt for equity swap referred to above that was critical to the reduction of the defendant's beneficial shareholding in EN+ Group PLC and that those in day to day control of B-Finance voted in favour of the re domiciliation of EN+ Group PLC in accordance with guidance given by the defendant to do all things necessary to support the Barker Plan. The claimants do not accept that to be true and maintain that inferentially the defendant must have given specific instructions to support re domiciliation at a much later stage. It is not necessary that I resolve whether what the defendant says is true or

not because, even if it is correct, it would not excuse a breach of the undertaking. It is not suggested that the defendant was not aware that the meeting was to take place or what the business of the meeting was to be. I have no doubt at all that those with everyday control of B-Finance would have complied with whatever instructions the defendant gave concerning how it was to vote given that he was the ultimate beneficial owner of B-Finance and in my judgment it is to be inferred that the defendant well knew that to be so. In those circumstances, in my judgment whether the defendant directed B-Finance to vote in favour or failed to qualify earlier guidance by directing it not to do so does not matter.

18. The explanation offered as to why re-domiciliation was critical to the future prosperity of EN+ does not matter either. However critical it was that EN+ be removed from the US sanctions regime, in law that was not capable of excusing breach of the defendant's undertaking if the effect of sanctioning B-Finance's vote in support of the re-domiciling resolutions was to breach the undertaking. The only appropriate course would have been to seek a variation of the undertaking by applying to the court in the absence of consent from the claimants.

19. On 24 December 2018, EN+ Group PLC gave notice that it was applying to the (Jersey Financial Services) Commission for its consent to the continuance of the company as a body corporate governed by the laws of Russia.

20. On or about 17 May 2019, the Commission confirmed that in principle it would sanction re-domiciliation and on 20 May 2019, EN+ Group PLC sent the necessary documentation to the administrators of the Special Administrative Region in Russia where EN+ Group PLC wished to be re-domiciled.

21. On 29 May 2019, RPC communicated with the claimants' solicitors concerning EN+'s proposed re-domiciliation and what RPC maintained should be the effect on the undertakings and in particular those given by RPC. This was the first time they had done so. Although the defendant maintains that the claimants were aware of what was planned, that is nothing to the point so far as liability is concerned since it is not alleged that the claimants consented to EN+ Group PLC being redomiciled in Russia or to the defendant requiring causing or permitting B-Finance to vote in favour of the proposal at the General Meeting on 20 December 2018. It is not necessary therefore that I take up time exploring the parties' respective contentions on this issue at any rate at this stage.

22. Having summarised the events that had occurred down to that date, RPC then stated in its 29 May 2019 letter that.

> "...
>
> 7. We are instructed that
>
> (a) once the continuance of EN+ takes place, its shares will be held in dematerialised form i.e. share certificates will not be issued to shareholders;
>
> (b) the existing shares and share certificates in respect of Jersey-domiciled EN+ will be automatically cancelled

> (including the share certificates held by RPC pursuant to the undertakings previously given by Mr Deripaska, B-Finance and Rupert Boswell of RPC in respect of the 45.5 million certificated shares in EN+ owned by B-Finance (the Undertakings);
>
> (c) all shareholders in Jersey-domiciled EN+ will at the point the Continuance is completed, automatically be granted new shares in Russia-domiciled EN+ on a one-to-one basis; and
>
> (d) EN+'s listed Global Depositary Receipts will continue to be traded on the London Stock Exchange as before (as well as the Moscow Stock Exchange).
>
> 8. The current Undertakings refer to certificated shares in EN+ and are based upon the Jersey share certificates in EN+ being held by RPC. In light of the Continuance of EN+, the undertakings will, with the permission of the court, need to be withdrawn..."

Having asserted that there was no risk of dissipation because assets belonging to the defendant and B-Finance remained the subject of US Government sanctions and so were frozen, RPC then wrote:

> "... in light of the above, your clients are adequately protected from an enforcement perspective independently of the undertakings. Our client therefore does not consider it necessary for there to be put in place an alternative form of security in place of the undertakings …"

RPC concluded their letter as follows:

> "We look forward to hearing your clients' position on the contents of this letter. In the event they consent in principle to the withdrawal of the undertakings, we will circulate a draft consent order to that effect. If they will not, our clients will have no choice but to issue an application to the Court for the release of the current undertakings and appropriate directions."

23. Following further correspondence which takes matters no further and which, therefore, it is not necessary to refer to, on 26 June 2019, the claimants issued an application for various heads of relief, including for the appointment of a receiver, for a worldwide freezing order and/or a payment into court to replace the undertakings referred to earlier and, on 28 June 2019, the defendant issued an application for an order releasing him from his undertaking set out above.

24. Those applications came before Teare J on 3 July 2019. In the result, he ordered the defendant to pay into court the sum of £90,595,749.03 by no later than the 31 July 2019.

25. On 9 July 2019, the re-domiciliation of EN+ Group PLC was completed with that entity thereafter being called EN+ Group International Public Joint Stock Company as required by the Russian IC Law.

26. Following numerous further applications and hearings that again I need not take up time describing, on the 30 September 2019 the defendant procured payment to the claimants of US$ 106.3 million odd in full satisfaction of the sums due under the Awards, together with interest and costs. The claimants have satisfied me to the criminal standard of proof, that is so that I am sure, that only happened as a result of the claimants' applications determined on 3 July 2019.

27. As I have said already, the contempt application was issued on the 14 November 2019, some 45 or so days after the claimants had been paid in full by the defendant in the way I have described above.

28. On 18 February 2020, the defendant issued an application to strike out the contempt application on the ground that it was maliciously motivated. That application succeeded at first instance. The claimants appealed and the first instance order was reversed by the Court of Appeal, principally on the basis that subjective motive is not a ground for striking out a contempt application – see Navigator Equities Limited and another v. Deripaska [2021] EWCA Civ 1799. The Court of Appeal's judgment was given by Carr LJ, with whom the other members of the court agreed.

29. There were then further procedural difficulties, culminating in an application by the defendant for a postponement of this hearing, which was dismissed by Cockerill J on 3 February 2023.

30. Before turning to the principles that apply to a trial of this sort, I should make clear that nothing said by Carr LJ in her judgment overturning the first instance decision striking out these proceedings was intended by her to be a finding binding on me concerning the substantive merits of the application and I have not treated her findings as such. The Court of Appeal proceeded on the assumption that the claimants had a realistically arguable case on the merits that there had been more than a mere technical breach by the defendant of his undertakings to the court. It was not necessary for the Court of Appeal to reach any further or other conclusions concerning the merits of the application for the purposes of the appeal. I do not understand that this is in serious dispute between the parties. None of the findings made in the first instance judgment on the strike out application are ones that I can or should take any account of for the purposes of this hearing, and I have not done so.

Applicable Principles

31. Although the principles that apply to a trial of this sort are well known, it is nevertheless desirable that I set them out at least in summary to the extent necessary to explain the conclusions I reach later in this judgment. In summary:

    i) Given the potential consequences of a finding of contempt, a heightened standard of procedural fairness has to be maintained throughout - see Navigator Equities Limited and another v. Deripaska (ibid.) *per* Carr LJ at [79];

ii) The applicant must prove to the criminal standard of proof, that is beyond reasonable doubt or so that the judge is sure, that the defendant:

a) knew of the terms of the undertaking breached;

b) acted in breach of, or failed to act in compliance with, the undertaking concerned; and

c) knew of the facts that made his conduct a breach.

- See Kea Investments Limited v. Watson [2020] EWHC 2599 *per* Nugee LJ at [19] and Re L (A Child) [2016] EWCA Civ 173 *per* Vos LJ as he then was at [75(v)] and Theis J at [78(8)];

iii) It is not necessary for the applicant to prove that the defendant knew or believed that what he did was a breach of his undertaking (although that will be relevant to sanction and is an issue that I have been asked to determine in the event that it is necessary to do so) - see Kea Investments Limited v. Watson (ibid.) *per* Nugee LJ at [26];

iv) In reaching a conclusion on the issues that must be proved to the criminal standard, it is open to a court to draw inferences from primary facts which have been proved. However, a court may not infer the existence of an essential element, unless the inference is one that no reasonable person would fail to draw - see Masri v. Consolidated Contractors International Company SAL [2011] EWHC 1024 (Comm) *per* Christopher Clarke J as he then was at [145];

v) If it is to be enforced by contempt proceedings, an injunction or undertaking must be expressed in terms that are sufficiently clear and certain to make plain what is permitted and what is prohibited - see AG v. Punch Limited [2002] UKHL 50; [2003] 1 AC 46 at [35] and Navigator Equities Limited and another v. Deripaska (ibid.) *per* Carr LJ at [82(ix)];

vi) Lack of clarity may arise where (i) the language used may have more than one meaning or (ii) in a borderline case where it is inherently uncertain whether the term applies at all or (iii) the language is so technical or opaque as not to be readily understandable by the person to whom the injunction is addressed or by whom the undertaking is given - see Cuadrilla Bowland Limited v. Persons unknown [2020] EWCA Civ 29 *per* Leggatt LJ as he then was at [58];

vii) However, whether a term of an order or undertaking is unclear in any of these ways, is dependent on context and in any event the alleged lack of clarity is irrelevant if it is immaterial to whether the breach alleged has occurred, because there would have been a breach whichever possible construction applied - see Cuadrilla Bowland Limited v. Persons unknown (ibid.) *per* Leggatt LJ at [60];

viii) In relation to context, the words of an undertaking are to be given their natural and ordinary meaning and are to be construed in their context, including historical context and with regard to the object of the order – see Pan Petroleum AJE Limited v. Yinka Folawiyo Petroleum Limited [2017] EWCA

Civ 1525 *per* Flaux LJ at [41(3)] and Navigator Equities Limited and another v. Deripaska (ibid.) *per* Carr LJ at [82(vi)];

ix) A contempt application must comply strictly with the formal requirements imposed by CPR rule 81.4(2); and

x) The applicant is confined strictly and solely to attempting to prove the contempt allegations set out in the application notice and the court is confined to considering only those allegations – see Re L (A Child) (ibid.) *per* Vos LJ at [75(iii)] and Theis J at [78(2)] and Kea Investments Limited v. Watson (ibid.) at [220], where Nugee LJ held that:

> " … the Court must confine itself to the terms of the count as specified in the Particulars of Contempt, and that if it is sought to go outside them, it is necessary formally to apply to amend them (which has not been suggested in respect of this count). I also agree that since it is a requirement of CPR r 81.10(3)(b) that the application notice must be supported by an affidavit setting out all the evidence on which the applicant relies, a respondent to a committal application who wishes to know in precisely what way he is said to have been in breach of the order is entitled to look not only at the terms of the Particulars of Contempt scheduled to the application notice, but at the supporting affidavit to discover what the applicant relies on."

The Contempt Allegations

32. Although described in the amended application notice as "*breaches*", that carries with it the implication that what is alleged is as alleged. I consider, therefore, that use of that word is best avoided, particularly where allegations are being made against individuals whose first language is not English. With that qualification, what the claimants allege against the defendant and what is properly the subject of the application is set out in paragraph 22 of the amended application notice in these terms:

> "**Ground of Contempt**
>
> 22. By reason of the matters set out above, Mr Deripaska has breached the undertakings and is in contempt of Court as follows:
>
> a. At a meeting of EN+ shareholders held on 20 December 2018 Mr Deripaska, being the ultimate beneficial owner of B-Finance, procured and/or permitted B-Finance to vote in favour of a special resolution to approve the Continuance.
>
> b. Mr Deripaska procured B-Finance to vote in favour of the special resolution in circumstances where the affirmative vote of B-Finance was determinative of whether the Continuance would take place.

c. The effect of the Continuance was:

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

ii. That the share certificate in respect of the Shares "*including the shares certificates held by RPC pursuant to [the Undertakings*]" would be "*automatically cancelled*" to be replaced with shares in the new Russian-domiciled company to be in dematerialised form.

d. By procuring and/or permitting the affirmative vote of B-Finance at the shareholders meeting on 20 December 2018, Mr Deripaska thus breached the Deripaska Undertakings in that he thereby:

Breach 1

i. Took a step which had the effect of "*preventing, impeding or obstructing the fulfilment of*" the undertaking given by B-Finance to "*not dispose of the Shares or otherwise deal with them*" pending the final outcome of the Arbitration Act Proceedings. <u>The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) amounted to a dealing and/or disposal of the shares within the meaning of the prohibition in the undertaking</u>.

Breach 2

ii. Took a step which had the effect of "*preventing, impeding or obstructing the fulfilment of*" the undertaking given by B-Finance that, after final judgment in the Arbitration Act Proceedings and in the event of non-payment of the judgment sum by Mr Deripaska, it would "*take all necessary steps to sell such quantity of the Shares as is required to meet any balance of such payment which may be outstanding, and for the proceeds of sale to be used to satisfy such outstanding balance*". <u>The cancellation of the shares caused by B-Finance's affirmative vote (as procured by Mr Deripaska) meant that the Shares referred to in the undertaking would no longer be available for sale and/or would not be capable of realising any value capable of meeting the outstanding balance of any judgment sum.</u>

Breach 3

iii. Failed to "*take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares*

> *legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcemen*t" by failing to procure B-Finance to vote against the proposal to move the domicile of EN+ to Russia at the shareholders meeting on 20 December 2018. The cancellation of the shares caused by B-Finance's affirmative vote (as procured and/or permitted by Mr Deripaska) meant that the Shares referred to in the undertaking would no longer remain available for direct enforcement.
>
> 22A. Each of the above breaches was committed deliberately by Mr Deripaska (i.e. knowing that they were in breach of the Deripaska Undertakings). In circumstances where Mr Deripaska was directly involved in providing the Deripaska Undertakings and he understood their significance in the context of his beneficial shareholding in EN+, it is to be inferred that Mr Deripaska was cognisant of the terms of the Deripaska Undertakings whilst the proposed redomiciliation was in progress up to and including the date on which the shareholders' vote took place (20 December 2018) and that he knew that his permitting and/or procurement of the vote in favour of the proposed redomiciliation by B-Finance would have breached the Deripaska Undertakings. Moreover, at all material times Mr Deripaska had available to him specialist lawyers in Russia, England and Jersey to advise him in relation to the Deripaska Undertakings insofar as he was in any doubt as to their meaning and effect and/or as to the whether procuring and/or permitting a vote in favour of the redomiciliation of EN+ would constitute a breach of them."
>
> [Emphasis supplied]

For reasons that are obvious, I consider the alleged breaches first before considering deliberateness. I do so applying the principles summarised earlier.

Formal Requirements

33. These are now set out in CPR rule 81.4(2), which requires that a contempt application must include statements in relation to each of the matters specified unless (in relation to paragraphs (b) to (g)) they are wholly inapplicable. As to these:

    i) Paragraph (a) requires the nature of the alleged contempt to be stated. I am satisfied that that requirement has been complied with - see paragraph 25(a) of the application notice, which incorporates what is set out earlier in the application notice. Applying the general principles set out above, that means that the claimants are confined strictly to what is alleged in the application notice to be a breach of the undertaking given by the defendant, being what is set out in paragraph 22(d) of the application notice;

    ii) Paragraph (b) probably does not apply at all, but to the extent that it does it requires the date and terms of the undertakings alleged to have been breached to be set out in the application notice. I am satisfied that this requirement has

been complied with on the assumption that paragraph (b) applies at all in the circumstances of a case such as this;

iii) As to paragraphs (c) and (d), in relation to personal service of the order, that was either dispensed with by the terms of Mr Justice Robin Knowles' order of 19 June 2018 – see paragraph 14 of the application notice - or, in any event, it is manifest that I should dispense with personal service, because the undertaking relied on is contained in a document signed by the defendant who states that he signed it with the benefit of legal advice – see paragraph 5 of the document signed by him set out above. That being so, I am satisfied that both the requirements set out in CPR Rule 81.4(2)(c) and (d) have been complied with and that personal service has been, or by my judgment is dispensed with;

iv) Further in relation to paragraph (c), the requirement for a penal notice to be endorsed on the order does not apply since it is not alleged that an order has been breached by the defendant, but in any event, no injustice has been caused to the defendant by reason of its absence, since he knew that he could be committed for contempt if he breached the undertaking he gave to the court - see paragraph 5 of the document he signed containing his undertaking quoted earlier;

v) Paragraph (f) has been complied with - see paragraph 9(b) of the application notice;

vi) Paragraph (g) has been complied with - see paragraph 13 and 25 (g) of the application notice;

vii) Paragraph (h) has been complied with - see paragraphs 22 to 23 and paragraph 25(h) of the application notice; and

viii) Paragraphs (i) to (s) have been complied with - see paragraph 25(i) to (s) of the application notice.

Further, I record that the defendant:

a) has been legally represented throughout;

b) has had the services of two interpreters working alternately throughout the time he was giving evidence at this trial; and

c) although his most recent application for the postponement of this hearing was refused by Cockerill J, I am satisfied that he has had a reasonable time to prepare for the hearing, having regard to the whole of the chronology set out above and the relatively narrow factual and legal basis of this application.

Further and again for the avoidance of doubt I record that Jacobs J dispensed with personal service of the contempt application and its associated documentation - see paragraph 2 of his order of 11 February 2022. Finally, I also record that notwithstanding the order in which the alleged breaches are set out in the application

notice, Mr Crow KC, in presenting the application on behalf of the claimants, did so in reverse order. It is for that reason that I adopt a similar approach in this judgment.

The Alleged breaches – General Considerations

34. As I have said already and repeat, the claimants are confined to the alleged breaches set out in the application notice.

35. The common theme of each of the alleged breaches is that the change of domicile of EN+ Group PLC from Jersey to a special administrative region in Russia resulted in the 45.5 million certificated shares that B-Finance had undertaken not to dispose of or otherwise deal with being "... *automatically cancelled ..."* and replaced with"... *new shares ... in a new Russian-domiciled company ..."* – see the emphasised parts of the breaches set out in paragraph 22(d) of the amended application notice reproduced above. If that is not, or arguably may not be, the effect of the re-domiciliation of EN+ Group PLC, then this application must necessarily fail. No other basis on which it might succeed has been identified in the breaches alleged. Although paragraph 22(c)(ii) of the amended application notice refer to the automatic cancellation of the share certificates, that is premised on the shares to which they relate being automatically cancelled as alleged in paragraph 22(c)(i) and replaced with shares in anew Russian domiciled company. The share certificates are not mentioned in any of the alleged breaches particularised in paragraph 22(d).

36. The claimants' case as set out in the amended application notice is based on (a) the contents of the letter of 29 May 2019 from RPC to the solicitors then acting for the claimant, the relevant part of which is set out above; and (b) the contents of a witness statement of Mr McGregor dated 28 June 2019. The claimants have chosen not to adduce any expert evidence from a lawyer qualified to express an opinion as to either Jersey or Russian law. There is no provision of English company law that is equivalent to or has the same effect as the provisions of Jersey company law summarised earlier, or, for that matter, the provisions of the Russian IC Law also referred to earlier. This leads Mr Grant KC to submit on behalf of the defendant that absent such evidence supporting the claimants' case on the issue I am now considering, the claimants cannot demonstrate to the criminal standard that the re-domiciliation of EN+ group PLC from Jersey to Russia had the effect of cancelling the shares the subject of the undertakings or, for that matter that the effect of re-domiciliation was to create a new company. Mr Grant submits on this basis that this application must necessarily fail.

37. In his written submissions in support of this application, Mr Crow submitted that the effect of the re-domiciliation was the cancellation of the certificated shares and their replacement with shares in EN+ Group IPJSC, which he characterised as a separate entity – see paragraph 3.3 of his written opening. This reflects exactly the case as set out in the application notice. At paragraph 37.3 he repeated the submission that the effect of the redomiciliation process was:

> "...
>
> (i) to cancel the shares in EN+ Jersey;

> (ii) to render the certificates held in RPC's London offices worthless; and
>
> (iii) to ensure that the applicants would be forced to rely on the Russian courts for the purposes of any enforcement against shares in EN+ Russia (insofar as the undertakings applied to them, which is not accepted)"

The second point is not one that appears in any of the three breaches particularised against the defendant in paragraph 22(d) of the amended Application Notice, other than (arguably) impliedly as a consequence of the alleged automatic cancellation of the shares. The third point is mistaken because the undertakings do not confer even conditional title to the shares on the claimants but only a right to require B-Finance to sell them if the conditions precedent to such a sale were satisfied. That obligation is enforceable in England because B-Finance both agreed to the courts of England having exclusive jurisdiction in relation to any dispute concerning its undertaking and submitted to the jurisdiction of the English courts by the terms of its undertaking, the relevant parts of which are set out above.

38. At paragraph 48 and following, Mr Crow places some reliance on Carr LJ's conclusions on the appeal in these proceedings referred to earlier and in particular on her conclusion at [97] that:

> "the simplest analysis of the change brought about by the redomiciliation is (at least arguably) as follows. Before the Redomiciliation took place, Mr Deripaska owned shares in a Jersey registered company. This property comprised a bundle of rights under the Constitution of the Jersey Company and Jersey Law, which were enforceable against other shareholders and the company in Jersey. After the redomiciliation, those shares were cancelled and EN+ Jersey ceased to exist in Jersey. In their place, Mr Deripaska came to own shares in a Russian incorporated company, giving him rights governed by the Constitution of the Russian company, and Russian law, and which were enforceable in Russia. The Jersey shares and the shares in EN+ Russia were two very different items of property, which could not be equated either at all or in any event, for the purposes for which the Jersey shares had been transferred under the undertakings...." [Emphasis supplied]

and on Carr LJ's further comment that:

> "Although there therefore appears to be an attempt under Russian law to equate the content of the rights given to shareholders and Russian law to the rights they had under Jersey law, from the perspective of a third country, England, they are plainly not the same rights, because they are not conferred under or enforceable in accordance with the same legal system..."

As I have said earlier in this judgment, these conclusions are not binding on me. Carr LJ was not reaching any final conclusions on the merits of the contempt application because it had not been determined, much less was she reaching conclusions applying the criminal standard of proof. Although Mr Crow described these conclusions as "*provisional*" in truth they concerned issues that it was not necessary for the Court of Appeal finally to decide, and in my judgment they must be left out of account by me in reaching a conclusion on the issues I have to decide.

39. Next, Mr Crow relies on the fact that initially it appeared to be common ground that the effect of the redomiciliation was that the shares the subject of B-Finance's undertaking were cancelled and in consequence the share certificates deposited with RPC had become worthless. This is most clearly stated in RPC's letter of 29 May 2019 - see paragraph 7 set out earlier. It also derives some support from Mr McGregor's 28 June 2019 witness statement in support of the defendant's application to withdraw the undertakings, where at paragraph 52 he stated that on re-domiciliation:

> "... the existing shares... in respect of Jersey domiciled EN+ will... automatically be cancelled …"

whereupon, as he put it at paragraph 63:

> "B-Finance would become the legal/registered owner of the new electronic shares in Russian EN+."

40. Whilst I accept that this was the position being adopted on behalf of the defendant at that stage, in my judgment it is nothing to the point. That is not the position being adopted now. In reality both sides to this dispute have taken diametrically different positions in relation to the issue I am now considering where they have perceived it to be in their best interests to do so. I refer to the position adopted on behalf of the claimants in relation to this issue below. In my judgment the issue is an issue of law that must be resolved on the material available, with it being clearly understood that this is an application to commit thereby engaging the heightened levels of procedural fairness that apply to such applications and the requirement that the claimant prove the breaches it alleges to the criminal standard – see the summary of applicable principles set out above. The effect of re-domiciliation is not a question of English law, but of Jersey and Russian law, which, being foreign law, has to be proved as a matter of fact. In consequence it is for the claimants to prove to the criminal standard that the effect of re-domiciliation, as a matter of Jersey and/or Russian law, is to cancel the shares the subject of the B-Finance undertaking and to create a new company or at least new shares in their stead.

41. What RPC or Mr McGregor have said concerning this issue is immaterial and irrelevant, as for that matter is what the claimants' solicitors have said concerning the issue in the past, unless some form of estoppel is relied upon, which it is not.

42. All that led Mr Crow to submit at paragraph 67 of his written opening, that since the RPC letter was sent and Mr McGregor's statement was served:

> "Mr Deripaska's legal team has devoted considerable energy to arguing that the Redom was in the commercial interests of

> EN+'s shareholders and that notwithstanding the Redom (i) EN+ continued to exist; (ii) the shareholders, including B-Finance, continued to hold shares in EN+ and (iii) B-Finance continued to be bound by its undertaking not to dispose of or deal with those shares in EN+ Russia ... However, in the context of this contempt application, that line of argument is entirely irrelevant. The question for this court is not whether, after the Redom, EN+ remained in existence as the "same" legal entity or whether the shareholders continue to hold shares in it, or whether their shares were worth more or less as a result of the Redom. The applicants were not shareholders in EN+. They were creditors of Mr Deripaska. In that capacity, their only interest was in the availability of the assets for enforcement. That is what the undertakings were designed to protect"

In my judgment, this formulation ignores (i) the point that the breaches alleged by the claimants all focus exclusively on a factual allegation that, following re-domiciliation, the shares the subject of the B-Finance undertaking were automatically cancelled; and (ii) the point that the effect of the B-Finance undertaking was not to give the claimants even a conditional right or interest in the Shares as defined but a right to require B-Finance to sell them in certain defined circumstances and pay the proceeds to RPC for onward payment to the claimants in discharge of whatever sums finally became payable to them under the arbitral awards then under challenge in these proceedings.

43. In his written submissions on the issue I am now considering, Mr Grant submitted on behalf of the defendant that:

i) The effect of redomiciliation is to be determined by reference to the laws of Jersey and Russia, a submission that I accept without hesitation;

ii) No expert evidence of Russian or Jersey law has been adduced by the claimants. This is so notwithstanding that Carr LJ expressed some implied surprise about its absence - see [86] of her judgment in the appeal in these proceedings;

iii) It is not for the defendant to adduce such evidence because it is for the claimants to prove the essential facts it alleges, including propositions of foreign law, to the criminal standard – a proposition that I also accept applying the principles summarised above - and in this case that consists of or includes proving to the criminal standard that the effect of re-domiciling EN+ from Jersey to Russia was to automatically cancel the Shares with which the allegedly breached undertakings were concerned;

iv) This is not one of those cases where an English court can safely reach conclusions simply by reading the Jersey Companies law or the Russia IC Law;

v) No relevant proposition of Russian law appears in the application notice; and

vi) In the result, the claimants have not pleaded or proved to the criminal standard that the effect of re-domiciling EN+ Group PLC to Russia has been that the shares the subject of the B-Finance undertaking have been cancelled and therefore this application must necessarily fail.

44. As a matter of general principle, if a party relies on foreign law, that party must both plead and prove the relevant law as a matter of fact - see Dicey Morris & Collins; Conflict of laws [16th edition], at paragraph 3-002. Although the primary focus of that proposition is on statements of case and the trial of the claims to which they relate, the point concerning pleading is at least as material in the context of a contempt application notice applying the principles summarised earlier in this judgment.

45. What must be pleaded in a contempt application is what the defendant needs to know in order to be able to defend himself. The level of detail required will depend upon the circumstances - see Deutsche Bank AG v. Sebastian Holdings Incorporated [2020] EWHC 3536 (Comm) per Cockerill J at [80]. Whilst I accept that relevant provisions of Jersey law are set out in paragraph 19 of the application notice, no attempt has been made to identify what if any of the provisions referred to are said to have the effect of automatically cancelling the shares in EN+ Group PLC. If, as would appear impliedly to be accepted y that omission, any automatic cancellation must have occurred as a matter of Russian as opposed to Jersey law, I doubt whether the claimants are entitled to rely on any propositions of Russian law without setting out succinctly in the amended application notice what law is relied upon and what its effect is alleged to be. Plainly, that hasn't been done in this case. If and to the extent the claimants must rely upon Russian law to make good their assertion that the EN+ shares were cancelled upon re domiciliation of that company to Russia, then that must be a case which necessarily fails. The remainder of this judgment proceeds on the basis that this conclusion is wrong.

46. I now turn to the evidence available to me concerning the effect of re-domiciliation of EN+ from Jersey to Russia. As I have explained, there is included in the evidence a copy of the Jersey Companies Law and a translation of the Russian IC Law. Aside from there being no reference to it in the application notice, there is no evidence as to how the Russian IC Law should be interpreted as a matter of Russian law. Although it has been suggested that there will be some cases where foreign law issues can be resolved without expert assistance by a judge looking at the foreign statute concerned – see Brownlie v. FS Cairo (Nile Plaza) LLC [2021] UKSC 45 per Lord Leggatt JSC at [148] – and Mr Crow submits that is what I should do in this case - in my judgment some caution is required before a judge adopts such a course at any rate at the trial of a contempt application. As Lord Leggatt made clear, whether to adopt this course is acutely case specific. In my judgment if foreign law was to be relied on to make good the central assertion in the claimant's case that the Shares were automatically cancelled then that required expert evidence. That is so because this is a committal, where heightened standards of procedural fairness are required to be observed and where a court must be satisfied to the criminal standard that the case advanced against the respondent has been made out. Where foreign law is in play those requirements will usually mean that expert evidence will be required, at least where:

i) the foreign law issue – here the effect of re-domiciliation as a matter of Russian law - is central to the application; and/or

ii) the concepts involved are not ones for which an English law analogy is available; and/or

iii) the outcome may depend in part on general principles of applicable law other than the statute to which reference has been made – in this case that might include Russian corporate law and securities law or practice outside what is set out in the Russian IC Law; and/or

iv) the relevant foreign statute is available only in translation – as is the Russian IC Law – because there may be dangers associated with relying on translations of foreign statutes without expert assistance to understand context and explain nuance.

These factors lead me to be cautious about concluding the allegations made by the claimants about the effect of the change of domicile as a matter of Russian law have been made out to the criminal standard.

47. Turning first to the Jersey Companies Law, it addresses two possibilities, being first a company incorporated outside Jersey wishing to re-domicile to Jersey and secondly, a Jersey registered company wishing to re-domicile to a jurisdiction outside Jersey.

48. Article 127 H of the Jersey Companies Law applies to the first of these situations and contemplates the continued existence of the company concerned after re-domiciliation within Jersey - see Article 127 H(1). This is emphasised by Article 127 L, which provides for the amendment rather than the replacement of such a company's memorandum and articles of association or its equivalent corporate constitution. The effects of continuation, once granted, are set out in Article 127 P. The effect seems to be one of continuation rather than dissolution and reconstitution, no doubt for the purpose of avoiding the cost, delay, and difficulty of such a process and because the existence of such a process in an offshore jurisdiction specialising in the provision of financial services is no doubt beneficial.

49. The mirror opposite, being that of a Jersey registered company wishing to re-domicile in a foreign jurisdiction, is addressed at Article 127 Q and following of the Jersey Companies Law. Assuming the company concerned votes in accordance with the requirements of its Articles of Association in favour of re-domiciliation, the administrative steps that then have to be taken are set out in Article 127 O and following. Critically for present purposes, the consequence of a Jersey company being permitted to re domiciled overseas is set out in Article 127 V in these terms:

> "127 V Effective Continuance Oversees
>
> When a company is, in accordance with the terms of authorisation of the Commission under Article 127 U, continued as a body corporate under the laws of the other jurisdiction to which that authorization relates:

(a) It thereupon ceases to be a company incorporated under this law …"

50. Thus it would appear that upon EN+ Group PLC re-domiciling to Russia, it ceased to be a company incorporated under the Jersey Companies law. However, at any rate, as a matter of Jersey law, it did not cease to exist. Indeed, the whole intent and purpose of the legislative scheme would appear to be to permit companies to change domicile, whilst otherwise continuing as a going concern. A provision that had the effect of dissolving the company concerned would of course defeat that purpose and the purpose of the elaborate requirements embedded within the Jersey Companies law that have to be satisfied before the Commission will consent to a change of domicile. Unsurprisingly therefore, there is no provision within the Jersey Companies law, which provides for either the dissolution of a company seeking to change its country of domicile or for the cancellation of the shares of such a company on it changing domicile. It follows that the central premise of the claimants' case, namely that the shares in EN+ Group PLC were automatically cancelled on re-domiciliation and the entity in Russia was a new entity are simply wrong, and certainly not proved to the criminal standard, as a matter of Jersey law.

51. Just as the impact of transferring the domicile of an originally foreign registered company to Jersey depends on Jersey law, the impact of transferring the domicile of a Jersey registered company to Russia in reality depends on Russian law. As to that and before turning to the Russian IC Law, it is worth noting that the effect of Article 127 T(2)(a) of the Jersey Companies Law would appear to be that the (Jersey Financial Services) Commission will not permit re-domiciliation by a Jersey registered company unless the laws of the country the company wishes to change domicile to has broadly similar laws concerning the continuation of the company concerned to those that Jersey applies to companies applying to change domicile to Jersey. That the Commission approved the re-domiciliation of EN+ from Jersey to Russia suggests that the Commission was satisfied that this was the effect of the Russian IC Law.

52. As I have said, no expert evidence has been provided as to the effect of the Russian IC Law on companies re-domiciling to Russia pursuant to that law. The conclusions that I have reached concerning the effect of that law are therefore ones that must be heavily qualified for that reason. Subject to those qualifications:

    i) Article 1(2) appears to contemplate the continued existence of any entity to which it applies because it refers to that entity as having resolved to "*change its governing law*" - a concept which impliedly suggests that the entity concerned will otherwise continue in operation as before;

    ii) Article 4 appears to set out the, or some of the, consequences of *"... changing the governing law of a foreign legal entity*". They are all at least realistically arguably consistent only with the continued existence of the entity re-domiciling to Russia rather than the creation of a new company and with the continued existence of the shares in the re domiciling entity rather than their automatic cancellation. Those provisions include:

        a) On becoming registered in the Russian Federation, the governing law of the entity concerned " … *shall become Russian law* … ", which

suggests that the Russian IC Law is intended to operate broadly as the equivalent provisions in the Jersey Company Law are intended to operate and that the re-domiciling entity is not dissolved and replaced with a new entity as the claimants allege but rather is intended to continue as before subject to a change of governing law and a change of name – see Article 4(1);

b) The entity is treated as having been established at the date when it was first formed originally, which again suggests that the entity concerned is treated as a continuing operation - see Article 4(2)(1);

c) Registration in Russia is not to trigger the usual consequences of liquidation, reorganisation or insolvency, thereby again implying the continuation of the entity rather than its dissolution and replacement with a new company. - see Article 4(2)(d); and

d) Specifically in relation to Shares *"... the shares of a foreign legal entity shall be recognised as the shares of a joint stock company with the status of an international company...*" as from the date of its registration in Russia – see Article 7(1). That is consistent with the notion of the entity continuing as a going concern simply with a change of governing law and name and with the shares in the entity otherwise carrying the rights and obligations that they had before the change of domicile and with the number of shares within each category of shares being unaltered by registration – see Articles 7(4) and (13) - and with share ownership being unaltered by re-domiciliation to Russia – see Article 7(12). This implies that all existing classes of shares are preserved unaltered and the number of shares in each class owned by each shareholder is likewise unaffected.

53. All this leads Mr Grant to submit but the effect of the applicable Russian law, at least to a level of realistic arguability, and in reality to a rather higher standard than that, on the material available, which is the translation of the Russian IC Law, is that (a) the company has changed its domicile and name, but otherwise continues unaltered; (b) the shareholders and the numbers of shares they each hold remain the same; and (c) the rights appurtenant to the shares remain the same as they were before the change in domicile.

54. This analysis is consistent with the information provided to shareholders in the formal information documentation provided prior to 20 December general meeting, paragraph 1.4 of which stated:

> "The continuance regime [in Russia] came into force on 3 August 2018, allowing foreign corporate entities which meet the relevant criteria to migrate to Russia without having to incorporate a new entity and with the benefit of preserving their corporate identity … . The company meets these criteria."

55. It was also the understanding of the claimants' solicitors at the time when applying on behalf of the claimants for security and other relief following receipt of RPC's letter of 29 May 2019 informing them of the proposed re-domicile of EN+ Group PLC from

Jersey to Russia. It was agreed between the parties that the transcript of the evidence of Ms Berard given at the hearing of the application to strike out these contempt proceedings should be admissible as evidence at the hearing before me. Her evidence on the issue I am now considering starts at page 151 of the transcript for day one of that hearing, which records between lines two and seven that she was asked:

> "Q... you understood that the shares in EN+ Jersey would be recognised automatically as shares in EN+ Russia when continuance occurred?
>
> A: yes."

The judge asked her to confirm that what she had agreed was her understanding, was her understanding at the time she swore the affidavit she was being asked about and that her answer reflected her understanding as to how re-domiciliation would work "... *as a matter of corporate law and corporate share ownership*..." to which she replied "*yes that is correct*" - see the transcript for day 1, page 152 at lines 17 to 22. The point for present purposes is not whether Ms Berard was right about this or not, although on the information available to me I consider she probably was. Rather, her answers emphasise the need for the claimant to produce evidence which proves to the criminal standard that that Ms Berard is wrong if this contempt application is to succeed on the basis of the alleged breaches set out in the amended application notice.

56. Broadly I accept Mr Grant's submissions in relation to the points considered above. It is at least realistically arguable that the effect of the Russian IC Law is that the effect of re-domiciling a company to Russia pursuant to the Russian IC Law is not either to dissolve the existing entity and replace it with a new company or to automatically cancel existing shares in the re domiciling entity but merely to recognise them as the shares in the re-domiciling entity following the change of its governing law and name. This is how the effect of re-domiciliation was described to shareholders in paragraphs 3.1 to 3.3 of the formal information supplied to them prior to the 20 December general meeting. It is how shares in a company re-domiciling to Jersey would be treated under the Jersey Companies Law and as I have said already, the Commission would not have permitted EN+ Group PLC to re-domicile from Jersey to Russia unless it was satisfied that was the effect of the Russian IC Law.

57. Although, following re-domiciliation to Russia, the shares in EN+ were "dematerialised" rather than being the subject of share certificates, that is immaterial for the purposes of this application. First, this application is not premised on shares that become dematerialised being thereby automatically cancelled, nor could it be in the absence of evidence to that effect, of which there is none. Dematerialisation is an administrative process by which share certificates are replaced with electronic records of ownership and for some years now has been the basis on which the majority of global securities are held and transacted because of the enhanced security and speed of processing transactions that this system offers. Dematerialised shares are dealt with electronically using systems and records maintained by a central custodian. It has no impact on the underlying securities or their value and more importantly for present purposes there is no evidence in this case that dematerialisation of the EN+ shares had any such impact or that the shares could not be dealt with in the ordinary course by their holders as a result of them becoming dematerialised. A share certificate is not

the share unless the shares concerned are bearer shares. The EN+ shares are not and not suggested to be bearer shares. Bearer shares apart, in English law at least a share certificate is no more than *prima facie* evidence of ownership. It is not suggested that the position is any different as a matter of Jersey law.

58. In this case it was never intended that RPC should sell the shares the subject of the undertakings and was simply provided with the share certificates as a rather modest additional form of security and presumably as a means by which transfer of the Shares to a purchaser could be related to the receipt of funds by RPC for onward transmission to the claimants. However, this application has not been made on the basis that the defendant breached his undertakings to the court by reason of the shares in EN+ becoming dematerialised – see paragraph 22(d), from which it is apparent that each alleged breach is premised exclusively on the effect of re-domiciling EN+ to Russia being the cancellation of the shares. If reliance was to be placed on dematerialisation for any purpose other than in relation to alleged automatic cancellation that required a separate alleged breach (or additions to the current alleged breaches) setting out that allegation, albeit expressed as succinctly as the alleged breaches have been, if the law concerning how contempt allegations are to be set out summarised at paragraph 23(ix) above was to be complied with.

59. All this leads Mr Grant to submit that this application must fail because the claimants have not proved to the criminal standard that the effect of redomiciling EN+ was either to create a new company or automatically cancel the shares the subject of the B-Finance undertaking. I agree. When EN+ Group PLC redomiciled from Jersey to Russia its effect was that it became governed by the laws of Russia and changed its name to EN+ Group IPJSC, but otherwise, at least realistically arguably, it continued in existence as before or at any rate the claimants have not proved that the contrary was the case, either to the criminal standard or at all. Similarly, Mr Grant submits that the claimants have not proved to the criminal standard that the shares in EN+ Group PLC were "*automatically cancelled*" on re-domicile of the company to Russia. On that issue, again I agree that allegation has not been proved to the criminal standard. That the shares became dematerialised on redomicile does not even arguably have that effect or at any rate there is no evidence that suggests that it does.

60. Against that background I now turn to each of the alleged breaches in the order they were approached by Mr Crow in his submissions.

Alleged Breach 3

61. The claimants allege that in breach of his undertaking the defendant:

> "Failed to "*take all steps as are necessary to ensure that the underlying assets (being the 45,500,000 unencumbered shares legally owned by B-Finance in EN+ Group Plc) remain available for direct enforcement*" by failing to procure B-Finance to vote against the proposal to move the domicile of EN+ to Russia at the shareholders meeting on 20 December 2018. The cancellation of the shares caused by B-Finance's affirmative vote (as procured and/or permitted by Mr

> Deripaska) meant that the Shares referred to in the undertaking would no longer remain available for direct enforcement"

This allegation is premised on the effect of redomiciliation being that all existing shares in EN+ Group PLC were cancelled as a result of it being redomiciled to Russia. As I have held, the claimants have failed to prove to the criminal standard that such was the effect of redomiciliation. Although the shares are now dematerialised that has no impact on the shares as opposed to the need for share certificates. In my judgment alleged breach 3 depends upon proof to the criminal standard that the shares in EN+ Group PLC were cancelled upon it changing its domicile to Russia. That has not been proved for the reasons I have explained. On that basis this allegation must fail.

62. There was a significant amount of time taken up at the trial concerning the true meaning of the phrase "*... direct enforcement ...*" in the defendant's undertaking. This issue is not one that is material in light of the conclusions I have reached above, since the B-Finance shares have not been proved to have been cancelled as alleged. However, I set out my conclusions on this issue below given that it was the subject of significant disagreement between the parties.

63. The claimants submit that "*direct enforcement*" meant direct enforcement of a judgment based on the Awards in their favour against the certificated shares in EN+ Group PLC. In my judgment, that is mistaken for the reasons I set out below.

64. The awards are, and therefore any judgment enforcing the awards can be, only against the defendant and Filatona and are not and cannot be against B-Finance, which was not a party to the arbitrations and is not a party to these proceedings. B-Finance did not pledge the Shares by its undertaking set out above. It undertook to sell them (or a portion of them) and use the proceeds to discharge the defendant's liability to the claimants in the event that the conditions precedent set out in the undertaking were satisfied. The shares were not at any stage sited in England. It follows that the claimants could not obtain title to the shares by, for example, applying for a charging order over them.

65. In my judgment, the only "*direct enforcement*" that could have been intended by the parties was enforcement of the obligations set out in the B-Finance undertaking at paragraph 5(d). It was not at any stage agreed nor was there an undertaking to the effect that the shares would be transferred to the claimants or that the claimants would be able to execute directly against them. The sole obligation was on B-Finance to sell them in defined circumstances. In the event that B-Finance did not sell them when obliged to do so under the terms of its undertaking, then direct enforcement would be limited to enforcing B-Finance's obligation to sell. Whilst there is no doubt that B-Finance had agreed to the courts of England and Wales having exclusive jurisdiction in relation to any dispute arising in relation to that obligation, the obligation defines what could be enforced – that is the obligation to sell and pay over the proceeds as agreed.

66. The certificates lodged with RPC were (*prima facie*) documents of title. The shares were not bearer shares so the certificates could not be bought and sold by RPC and indeed RPC was not under an obligation to sell anything under the terms of its undertaking. Arguably however, depositing the share certificates with RPC would

prevent B-Finance disposing or dealing with the shares otherwise than in accordance with its undertakings on the basis that the certificates were documents of title that would be transferred to a purchaser on sale. On this basis it is plainly realistically arguable that dematerialisation would circumvent that arrangement. However, that is not what has been alleged.

67. As I have explained it has not been proved that the shares in EN+ were cancelled as alleged. That being so they remained as available for sale by B-Finance after re-domiciliation as before and remained as much the subject of the undertaking concerning dealing and disposal given by B-Finance as before. It is not alleged, nor is there any evidence, that (i) the shares were worth less as a result of redomiciling the company to Russia than would have been the case had the company continued to be domiciled in Jersey (and some evidence that they were worth more), or (ii) following re-domicile of the company in Russia, B-Finance was not able to sell its shares in accordance with its undertaking if the conditions set out in its undertaking were satisfied, or (iii) there would be less of a market for B-Finance's shares following the company's change of domicile, or (iv) the price obtainable for its shares in EN+ would be lower as a result of re-domiciliation than would have been the case had EN+ remained domiciled in Jersey, or (v) any sale by B-Finance in order to satisfy its undertakings would not be recognised by either the central custodian of the dematerialised shares or the courts in Russia.

68. Whilst I accept that dematerialisation rendered the share certificates redundant as documents of title, that is not what has been alleged in the amended application notice and so is immaterial for present purposes. What matters for present purposes is that the shares were not cancelled as alleged and so were as available for direct enforcement as they ever had been as that phrase is to be understood.

Alleged Breach 2

69. The claimants allege that the defendant acted in breach of his undertaking not to take any step that had the effect of preventing, impeding or obstructing the fulfilment of B-Finance's undertaking by procuring or permitting the affirmative vote at the shareholders meeting on 20 December 2018. That allegation is premised on the effect of redomiciling the company in Russia being the automatic cancellation of the shares and the grant of new shares in a new Russian domiciled company. As I have explained the claimants have not proved B-Finance's shares in EN+ were cancelled as a result of the company being re-domiciled in Russia either to the criminal standard or at all.

70. In addition, in this alleged breach, it is alleged that the result of redomiciling the company to Russia meant the Shares would not be capable of realising any value capable of meeting the sums due to the claimants. However, as I have said earlier there is no evidence that such was the effect of redomiciling the company and in any event this allegation too is premised on the shares having been cancelled and that is the allegation that has not been proved.

Alleged Breach 1

71. This allegation involves two points of substance. First it depends on the effect of changing the domicile of the company from Jersey to Russia being the cancellation of

the shares in the company and the issue of new shares in a new company. This has not been proved to the criminal standard and for that reason, alleged breach 1 must fail.

72. The second point concerns whether by procuring or permitting the affirmative vote of B-Finance that was a dealing or disposal of the shares. As Mr Crow accepted (with respect, correctly) in the course of his oral submissions, generally voting in exercise of a power to do so conferred on a registered shareholder will not be dealing with or disposing of the share.

73. I accept there may be cases where this view should not prevail but this is not one of them. Mr Crow's submission to contrary effect was premised on the submission that:

> " … voting a controlling interest in a company in favour of a resolution which results in the shares no longer existing is capable of being regarded as a dealing with or disposal of the shares. And on the facts of this case, we submit that is how the vote should be regarded."

However, as I have found, it has not been proved to the criminal standard that the shares ceased to exist as a result of the change in domicile.

74. I reject the alternative submission that by procuring the vote, the defendant either impeded or obstructed the fulfilment by B-Finance of its undertaking not to dispose or deal with its shares for exactly the same reason.. As Mr Crow made clear in his oral submissions, this alternative submission was premised on the shares ceasing to exist. It was for the claimants to prove that was the effect of the change in domicile and they have not done so.

Contumeliousness

75. It was for the claimants to prove to the criminal standard that the effect of changing EN+'s domicile from Jersey to Russia was to automatically cancel the shares referred to in the undertakings. They have failed to do so. In those circumstances, it is inappropriate that I should make findings in relation to the allegation at paragraph 22(a) of the Application notice.

Conclusion

76. The sole basis on which it was alleged that the defendant had breached his undertakings to the court was that the effect of redomiciling EN+ from Jersey to Russia was that the shares the subject of B-Finance's undertaking would be automatically cancelled on re domicile taking place and that they would be replaced with new shares in a new company. It was for the claimants to prove that was so to the criminal standard and they have not done so. It follows that this application fails and is dismissed.