Neutral Citation Number: [2020] EWCA Civ 1602

Case No: A2/2020/1221

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
HHJ JOHNS QC (Sitting as a Judge of the High Court)
[2020] EWHC 1868 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2020

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ROSE
and
LORD JUSTICE STUART-SMITH

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Between:

SANJIV VARMA **Appellant**

- and –

PAUL ATKINSON & GLYN MUMMERY (as Joint Liquidators of Grosvenor Property Developers Limited (in liquidation)) **Respondents**

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William McCormick QC (instructed by **Preiskel & Co**) for the Appellant
Rory Brown and **Andrew Shipley** (instructed by **Gunnercooke LLP**) for the Respondents

Hearing date: 10 November 2020

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Approved Judgment

Lady Justice Rose:

1. The Appellant, Mr Varma, appeals against the order made on 13 July 2020 by HHJ Johns QC sitting as a judge of the High Court following his judgment handed down on that day ([2020] EWHC 1868 (Ch)). In that judgment, Judge Johns held that he was satisfied to the criminal standard of proof that Mr Varma had committed eight contempts of court by breaching court orders and by making false statements in affidavits and a witness statement made in these proceedings. The underlying proceedings are brought by the Respondents who are the joint liquidators of a company called Grosvenor Property Developers Ltd ('Grosvenor'). The court orders were designed to identify, locate and recover for the benefit of Grosvenor's creditors about £6 million of Grosvenor's money which the Respondents claimed had been misappropriated such that the money or its traceable proceeds was now in the defendants' hands.

2. HHJ Johns' judgment dealt with issues relating to Mr Varma's liability and adjourned the issue of sentence to a later date. Permission to appeal on four grounds was granted by Floyd LJ on 24 August 2020. Floyd LJ stayed the further hearing on sentence and expedited the hearing of this appeal. A few days before the hearing of the appeal, Mr Varma replaced his legal team and Mr McCormick QC, who had not appeared below, was instructed to represent him on the appeal. Mr McCormick demonstrated an impressive grasp of the complexities of the case and a more realistic assessment of the merits of the different aspects of the case than his predecessors. We are grateful to him and to Mr Brown, who has acted for the Respondents from the start of the proceedings, for their cooperative approach which narrowed the issues before us and enabled them to focus their submissions on the most important points.

The background to the claim and the proceedings so far

3. Grosvenor was incorporated on 16 December 2016 for the purpose of acquiring the Grosvenor Hotel in Bristol. The hotel was derelict at the time and investors were sought to fund the redevelopment of the premises into studio flats to be used for student accommodation. The only step that appears to have been taken to further that purpose was collecting in about £7.6 million from investors. The hotel was never purchased and nothing was done towards redevelopment — it appears that the whole enterprise was a fraud. The Respondents estimate that at most about £540,000 was spent on what might be regarded as legitimate company expenditure, the rest was misappropriated. A winding up petition was presented against Grosvenor on 26 July 2018 and it was placed in compulsory liquidation by order made on 14 November 2018.

4. The Respondents were appointed to be the joint liquidators on 6 December 2018. They interviewed Mr Varma initially in February 2019 but when he failed to cooperate further they issued an application on 27 March 2019 seeking an order that he attend for private examination and for relief under section 234 of the Insolvency Act 1986. An order in that application was made by ICC Judge Jones on 2 April 2019 requiring the delivery up by Mr Varma of all documents belonging to Grosvenor or evidencing his dealings with the company or its property.

5. The Respondents' application was later expanded to included four further defendants so that the proceedings were ultimately pursued against (1) Mr Varma who was

alleged to be a de facto director of Grosvenor at all material times and the ultimate owner and controller of the company and its assets, (2) Mr Arjun Khadka who was the sole statutory director of Grosvenor from 9 June 2018 until the company went into liquidation, (3) Grosvenor Consultants FZE ('GCFZE') a company registered in the United Arab Emirates of which Mr Varma was the sole director, owner and shareholder, (4) Mr Siddhant Varma, Mr Varma's son, alleged to be a recipient of Grosvenor money or its traceable proceeds, and (5) Mr Jonathan England, the sole shareholder, de jure director and company secretary of Grosvenor from its incorporation until his resignation on 9 June 2018.

6. On 1 May 2019 a worldwide freezing order was made without notice by Birss J against Mr Varma, Mr Khadka and GCFZE preventing them from removing from the jurisdiction assets to the value of £3,250,000 ('the Birss order'). Siddhant Varma was a respondent named in the Birss order but was not subject to the freezing injunction. Paragraphs 9 and 10 of the Birss Order provided that Mr Varma, Mr Khadka, GCFZE and Siddhant Varma must within 48 hours disclose their assets exceeding £2,000 in value to the Respondents' solicitors and confirm that information by affidavit within seven working days.

7. Among the assets that were specifically named in the Birss order as subject to the freezing injunction were diamonds and jewellery that, the order stated, Mr Varma and Mr Khadka claimed that Grosvenor had purchased from GCFZE or alternatively the proceeds of sale if they had been sold. The Birss order provided that Mr Khadka must deliver up to the Respondents' solicitors by 4 pm on 6 May 2019 those diamonds and jewellery that he and Mr Varma asserted that he was at that time holding for Grosvenor.

8. Those diamonds and jewellery ('the Jewellery') became an important part of the case pursued by the Respondents not only against Mr Varma and Mr Khadka but also against Siddhant Varma. In brief, it was Mr Varma's case that a substantial proportion of the money which the Respondents alleged had been misappropriated had in fact been paid by Grosvenor to Mr Varma's company, GCFZE, when Grosvenor bought from GCFZE a large amount of jewellery belonging to Mr Varma's mother. That Jewellery had been gifted by her to Mr Varma and then by him to GCFZE. This was the justification, he said, for a series of payments made by Grosvenor to GCFZE during the second half of 2017, amounting in total to £3,122,841.

9. Mr Varma's evidence about the sale of the Jewellery, which he claimed was worth more than Grosvenor had paid for it, was initially supported by two of the documents that he delivered up in response to the order of 2 April 2019 made by ICC Judge Jones. The first document was an invoice dated 27 June 2017 for the sale of the Jewellery from GCFZE to Grosvenor for £4.95 million. The second document was dated 11 June 2018 between Grosvenor and GCFZE and entitled "Settlement, Receipt, Release and Discharge". This included recitals stating that Grosvenor had asserted claims against GCFZE, that the parties wished to settle the claims, and that Grosvenor accepted receipt of assets listed in a schedule in settlement of its claims against GCFZE. The assets listed in the schedule were the Jewellery referred to in the earlier invoice. Mr Varma's case appeared to be that Grosvenor had bought the Jewellery from GCFZE in June 2017 paying the £4.95 million price in part by the transfers of the £3,122,841 shortly thereafter and in part by releasing a year later

unspecified claims it had against GCFZE. As to why Grosvenor had bought the Jewellery from GCFZE, Mr Varma's explanation has varied over time.

10. The Respondents have all along regarded this story and the two documents with scepticism but have maintained the position that either the documents are a sham and the transfer of the money from Grosvenor to GCFZE was a straightforward transfer of company money for no consideration or, if the documents are genuine and evidence a transaction which actually took place, Mr Varma and Mr Khadka must still deliver up either the Jewellery or its proceeds of sale because they are undoubtedly now Grosvenor's assets and should be put towards satisfying Grosvenor's creditors in the liquidation. They have also maintained, as they are entitled to do, that even if the Jewellery did exist and was bought by Grosvenor, that amounted to a misuse of the company's money. Such a purchase was outside the purpose for which Grosvenor was set up and there appears to be no good reason why money provided by investors intending to acquire an interest in flats to be let out as student accommodation should be spent on buying Mr Varma's mother's jewels.

11. The Jewellery is also relevant to the claim brought against Siddhant Varma as I explain further below. The Respondents have never contended that Siddhant was involved in the fraudulent operation of the Grosvenor business or that he owed any fiduciary duties to the company. Their claim against him was for knowing receipt and other claims directed at Grosvenor's property, in particular a Bentley car and £2 million transferred to him by his father out of the £3,122,841 paid to GCFZE by Grosvenor.

12. It remains a mystery what has happened to the Jewellery which, according to Mr Varma's version of events, has been owned by Grosvenor since June 2017. It is not clear whether it is said that it is still being held by Mr Khadka on behalf of Grosvenor or whether it has been sold. In any event neither the Jewellery nor any money has, as I understand it, yet been paid over to the Respondents despite their tenacious pursuit of these proceedings.

13. On 15 May 2019 at the return date for the interim injunction, Falk J continued the freezing order in force and made various further orders against Mr Varma and GCFZE for the disclosure of assets ('the Falk order'). Mr Varma made affidavits of 7 and 16 May in purported compliance with the Birss and Falk orders. Among the several orders subsequently made in these proceedings, two are relevant to the present appeal. Mr Adam Johnson QC (as he then was) made an order on 3 July 2019 in which, amongst other things, he (i) issued a bench warrant for the arrest of Mr Khadka, (ii) ordered Mr Varma to attend to be cross-examined before a High Court Judge, and (iii) ordered Mr Varma to instruct GCFZE's bank in the UAE to disclose to the Respondents' solicitors bank statements for any and all of GCFZE's bank accounts ('the Johnson order'). On 1 August 2019 Mr Andrew Hochhauser QC ordered that Mr Varma forthwith sign and send letters, drafts of which were to be provided to him by the Respondents' solicitors, to three recipients through whose hands the Respondents believed some of Grosvenor's money had passed ('the Hochhauser order').

14. On 10 May 2019, shortly after obtaining the Birss order, the Respondents served Points of Claim in relation to the relief that they were seeking against the five defendants. The claim against Mr England was that in breach of his fiduciary duties

he had misapplied about £6.5 million by allowing various payments to be made from Grosvenor's money. The largest single payment identified was £2,972,841 transferred to GCFZE in a series of 10 payments between 1 August and 26 October 2017 out of Grosvenor's bank account "allegedly for the purchase in Dubai of diamonds and jewellery which were allegedly family heirlooms belonging to Mr Varma …". A further payment of £150,000 was alleged to have been permitted by Mr England in June – August 2017 out of Grosvenor's money in a different account, also to GCFZE and also allegedly or apparently as part payment for the Jewellery. That made up the £3,122,841 to which I have already referred. The claim against Mr Varma was that in breach of his fiduciary duties as a de facto or shadow director, he has misapplied Grosvenor money in the same way as Mr England and that:

> "if the Dubai Diamonds exist, without declaring a personal interest in the transaction offered them for sale to [Grosvenor] for an unknown price and caused the purchase of the same by [Grosvenor] for an unknown sum (assumed from the analysis of the said bank accounts to be at least £3,122,841) …"

15. The claim against Mr Khadka asserted that "If the Dubai Diamonds exist, they are currently in Mr Khadka's possession or control". This assertion was based on information provided by Mr Varma in his interview with the Respondents on 26 February 2019. The Points of Claim go on to record that by letter dated 3 April 2019 Mr Khadka told the Respondents that he was holding the Jewellery which had been given to him by Mr Varma on 11 June 2018. The Respondents plead that despite their repeated demands, Mr Khadka has failed to deliver up the Jewellery or such other Grosvenor property as he might have in his possession or control.

16. The claim against GCFZE for knowing receipt was put by the Respondents on two alternative bases; first that the Jewellery existed and had been sold by GCFZE to Grosvenor for at least £3,122,841 in which case GCFZE was liable for knowingly receiving money paid over by Mr Varma in breach of his fiduciary duties or secondly that the Jewellery did not exist and the transaction described by Mr Varma and Mr Khadka was a sham in which case GCFZE was liable to pay back the money as received in a transaction at an undervalue.

17. The claim against Siddhant Varma was initially limited to an allegation that he had received a Bentley car paid for by Grosvenor money. Subsequently, the Points of Claim were amended in November 2019 to add a claim that Siddhant Varma had received £2 million of Grosvenor's money, channelled through one of Mr Varma's personal Dubai bank accounts, and had used it to invest in a property in Charles Street, Mayfair. It was alleged that Siddhant Varma 'well knew' that the money was the traceable proceeds of a breach of fiduciary duty by Mr England and/or Mr Varma so that it was unconscionable for him to retain it. In his robustly worded Amended Points of Defence served on 23 March 2020, Siddhant Varma pleaded that he did not know how his father and Mr England had conducted the business of the company. He set out his explanation for the £2 million paid to him as follows. He said that his paternal grandmother Nirmala Varma spoke to him in mid-2017 at which time her health was failing. She told him that she had given Mr Varma his share of his inheritance from her estate whilst she was still alive and that this consisted primarily of jewellery. She said she had told Mr Varma to sell the jewellery and give Siddhant Varma £2 million which would represent his inheritance from her estate. This

intention on her part had been confirmed to him later by both Mr Varma and by a handwritten letter from his grandmother to Mr Varma which his father had shown him. When he received the £2 million from Mr Varma's Dubai bank account on 8 August 2017, therefore, he assumed that that was where it came from and, given that he knew his grandmother to be a wealthy woman with a great deal of jewellery, he had no reason to question the source of or reasons for the £2 million.

18. The claims brought against Mr Varma and GCFZE were heard and determined at a trial before Deputy Insolvency and Companies Court Judge Agnello QC at a hearing spread over three days between November 2019 and April 2020. Judge Agnello handed down her judgment on 13 May 2020. She recorded that Mr Varma had appeared before her acting in person and that there had been no attendance or representation of the other defendants although she was sure that they had all been served with the applications and evidence in support. She noted that Mr Varma and GCFZE were debarred from defending the claims against them because they had failed to comply with 'unless' orders directing them to file Points of Defence. She said that the Respondents still had to satisfy her on the balance of probabilities that they had established their case and that judgment should be entered in their favour. Mr Khadka was not debarred from defending the claim, though he had failed to serve Points of Defence and was by then out of time to do so. The claims against Mr England and Siddhant Varma were not before her and ultimately she also adjourned the claim against Mr Khadka, dealing only with the claims against Mr Varma and GCFZE in her judgment.

19. She dealt first with the allegation that Mr Varma was a shadow director. She referred to his assertion that he had acted at all times as a consultant to Grosvenor and/or that he acted on behalf of a 'controlling person' called Maneet Singh who he said was the beneficial owner of Grosvenor. Judge Agnello concluded at [42] that the evidence before her did not support the existence of Mr Singh or indicate that he played any role in Grosvenor and its affairs as described by Mr Varma. She concluded at [58] that Mr Varma was a de facto director of the company. She considered a payment of £925,000 made into Mr Varma's account in an Emirates Bank from an account held by Grosvenor's solicitors Kennedys on Mr Varma's instructions. Although Mr Varma had originally asserted that this money was needed to pay an invoice for contractors working on the Bristol hotel development, he later said in his eighth witness statement that the payment was his commission for the sale of the Jewellery by GCFZE. The judge said that she was not satisfied that either explanation was true, and held that this sum was clearly misappropriated by Mr Varma: [62].

20. Judge Agnello then considered a series of other payments made to Mr Varma, upholding the claims in respect of some but deciding in respect of others that the Respondents had failed to show that the money came from Grosvenor. She then turned to the £3,122,841 paid by Grosvenor to GCFZE between June and October 2017. She noted that Mr Varma did not contest that the payments had been made. His case, she said, was that the payments had been made at the instruction and direction of Mr Singh and that they were made for the acquisition of diamonds and jewellery by Grosvenor from GCFZE: [102]. She recorded Mr Varma's explanation as to why Grosvenor had bought the Jewellery as being that Mr Singh had been concerned about Grosvenor's bank deposits losing value during the period between collecting in the funds from investors and paying out the money for the purchase and development of

the hotel. He had therefore decided to invest those funds in the Jewellery which had been bought from GCFZE and ultimately delivered to Mr Khadka when he became the director of Grosvenor. Judge Agnello regarded this explanation as implausible and lacking in credibility: [112]. Although Mr Khadka had stated that he had the Jewellery, he had failed to hand it over or produce any evidence that it actually existed and was in his possession. No valuations had been provided and there were no photographs or evidence of any bank safe where the Jewellery was kept. There was also a complete lack of evidence about the existence and role of Mr Maneet Singh. The invoice and the Settlement Agreement were before her and, despite Mr Varma and GCFZE being debarred from defending the application, she addressed the question of what they showed. The 'most suspicious document' was the Settlement Agreement, apparently signed by Mr Varma on 11 June 2018 in Mumbai. The Respondents asserted this was fabricated, particularly because among other sums claimed in the account was money spent at Selfridges in London by Mr Varma using the company bank card on that day. The Settlement Agreement, Judge Agnello said, raised more questions than it answered. She explained why she did not regard the invoice as defeating the Respondents' claim: [119]. She had no doubt that the £3,122,841 was paid over to GCFZE by Mr Varma in breach of the duties he owed to Grosvenor and that GCFZE was a knowing recipient of the money. She made orders accordingly that Mr Varma pay over sums of £1,361,513 (which sum included the £950,000 supposedly paid as Mr Varma's commission on the Jewellery sale) and £3,122,841 and that GCFZE also pay over £3,122,841.

21. On 9 September 2019 the Respondents issued the application to commit Mr Varma to prison for contempt of court, supported by an affidavit of Séamas Gray, a partner in the solicitors acting for the Respondents. The hearing of the application to commit took place before HHJ Johns QC in mid-June 2020, that is a month after Judge Agnello had handed down her judgment against Mr Varma and GCFZE and shortly before the trial of the claim against Mr Khadka, Mr England and Siddhant Varma. The Respondents recognised that they had to establish their case against Mr Varma to the criminal standard of proof before Judge Johns without relying on the findings of Judge Agnello. Mr Varma was represented by counsel at the hearing.

22. In his judgment, Judge Johns set out the procedural history of the proceedings. Before considering each of the alleged contempts in turn, he said that the key issue for him in the committal application was whether he was satisfied beyond reasonable doubt that Mr Varma's story about the sale of the Jewellery by GCFZE to Grosvenor was untrue. He concluded that he was so satisfied and gave seven reasons for that conclusion. First, it was inherently implausible that a company set up to develop a hotel to provide student accommodation would decide to turn its cash into jewellery and gemstones. Secondly, he said:

> "… there is no real evidence of the existence of the jewellery and diamonds. These items have certainly not been produced to the liquidators to help repay creditors. There are not even photographs of them. I was told that photographs have been taken of them by or for Mr Maneet Singh and Mr Arjun Khadka. But no such photographs have been produced and Mr Varma did not even give clear evidence that he has sought them from Mr Singh or Mr Khadka; even with his liberty at stake.

> There is no record of insurance for the valuables, despite them apparently being worth £4.95m. There are only, by way of documents, the invoice of 27 June 2017 and the Settlement Agreement. But I found myself unable to place any reliance on those for reasons I will explain."

23. The third reason for rejecting the evidence of the transaction was the conflict between the explanation of the payment of £925,000 given by Mr Varma and the description of that payment in the instructions given by Mr Varma for the making of the payment at the time. Mr Varma now said that this was his commission on the sale of the Jewellery but the documents at the time of the transfer of the money described it as payment in relation to the building project at the hotel. Judge Johns said that there was no legitimate purpose for that payment "but rather a series of pretended bases of which payment in respect of the jewellery and diamonds was just one". The fourth reason was that the judge rejected the evidence of the involvement of Mr Singh in Grosvenor and therefore the evidence that it was he who had decided that Grosvenor should buy the Jewellery. Fifthly, the Settlement Agreement was "a very odd document" and did not fit with the rest of the story about the Jewellery transaction. He found that the document had been created to make the pursuit of Grosvenor's money more difficult and was not reliable evidence of a jewellery sale. Sixthly, he rejected Mr Varma's evidence that there had been a deed of gift by which he had gifted the Jewellery to GCFZE but that he was unable to produce it because it was locked in a fingerprint lock safe in Dubai. Judge Johns said he was satisfied that there was no such safe and no cache of exculpatory documents. Seventhly, he referred to the findings of Judge Agnello that the £3,122,841 was not paid in respect of the Jewellery though he could give that finding only limited weight since Mr Varma had been debarred from defending the claim and a higher standard of proof applied in the committal application.

24. Judge Johns then considered each alleged contempt. He found that six of the alleged contempts were not established and that some other allegations were overlapping. Of the eight findings of contempt made by Judge Johns, the following are the findings that are most relevant to this appeal:

    i) Finding 1: Mr Varma was in breach of the Falk order by including a false statement in his affidavit of 16 May 2019, namely the statement that the £3,122,841 was paid out by Grosvenor to GCFZE "against the sale of jewellery and diamonds to the company".

    ii) Finding 3: Mr Varma was in breach of paragraph 10 of the Birss order in that he had failed to swear an affidavit on behalf of GCFZE setting out GCFZE's assets.

    iii) Finding 4: Mr Varma was in breach of paragraph 4 of the Johnson order because he failed to send a letter to GCFZE's Emirates bank instructing it to disclose bank statements to the Respondents by the deadline specified in the order.

    iv) Finding 5: Mr Varma was in breach of paragraph 3 of the Hochhauser order which required him to sign and return "forthwith" letters prepared by the

Respondents' solicitors and addressed to three businesses. Mr Varma had not provided the signed authority letters until 15 August 2019.

v) Finding 7: Mr Varma was in breach of the Falk order by making a false statement in his affidavit of 16 May 2019 by stating that GCFZE had used the £3,122,841 transferred to it by Grosvenor to meet its financial obligations and debts when it was clear that £2 million of that sum was transferred first to Mr Varma's personal account and then to Siddhant Varma.

25. As I have said, the hearing before Judge Johns took place on 9 – 12 June 2020. Shortly after that hearing, but before Judge Johns handed down judgment, a further hearing took place over seven days before ICC Judge Prentis of the Respondents' claims against Mr Khadka, Mr England and Siddhant Varma. Siddhant Varma was represented by counsel at the hearing but none of the other defendants attended or was represented. Judge Prentis noted that Siddhant Varma was not alleged to have been involved in the management of Grosvenor so that the trial before him would have to be determined without hearing evidence from any of the direct contributors to the fraud. In particular, he said that whether the Jewellery actually existed or not was a matter which would have to be determined without evidence from anyone who had or ought to have seen it: [8].

26. Judge Prentis dealt first with the claim against Mr England for paying away the bulk of Grosvenor's money. He described Mr England's defence which was, broadly, that he was acting at all times as a nominee for Maneet Singh and had himself very limited control over the business of the company. Mr England's account in his Defence was that Mr Singh would send him WhatsApp messages instructing him to make certain payments and Mr Singh would follow this up with a more formal letter of instruction if the payment amount was over £5,000. A number of these purported authorisation letters were produced to the court. Judge Prentis found that these were fabrications and that Mr England's account of his dealings with Mr Singh was false, not least because a forensic expert testing the letters using Electro Static Detection Apparatus concluded that the pattern of impressions on the paper indicated that they were signed in a stack one on top of another at or near the same time. Judge Prentis concluded that Mr England was "not a misled innocent" and that he had acted dishonestly throughout. He was liable for over £6.5 million.

27. Judge Prentis then turned to Mr Khadka. The relief sought against him as set out in the Points of Claim was, as I have described, that he deliver up the Jewellery. Judge Prentis described the documents purporting to evidence the sale of the Jewellery between GCFZE and Grosvenor. In addition to the invoice and the Settlement Agreement, he described a purported letter before him, dated the same day as the invoice, by which Mr Singh (acting for Grosvenor) asked Mr Varma (acting for GCFZE) to hold the Jewellery just sold to Grosvenor on trust for Grosvenor and to keep it at Mr Varma's parents' home in Mumbai. The letter from Mr Singh said "I understand these will be kept at your parents' home in Mumbai where I inspected & checked the items earlier today. I confirm they are in accordance to the details mentioned in your invoice and as per the valuation carried out by me last week." There was a further purported letter before Judge Prentis dated 9 June 2018 from Mr Singh to Mr Varma instructing him to hand all the assets of the company including the Jewellery to Mr Khadka who had just taken over from Mr England as the sole de jure director of Grosvenor. The judge quoted from the various statements of Mr

Khadka suggesting in some instances that he had sold the Jewellery and now held the proceeds and in other instances that he still had the Jewellery. These included the email of 3 April 2019 to the Respondents' solicitors in which Mr Khadka had confirmed that he still held the Jewellery and invited the Respondents to let him know if they wanted the Jewellery or would prefer that he sell it and transfer the proceeds to them. Mr Khadka had not been heard from since that email; he had not responded to the proceedings nor acted on the Birss order that he deliver up the Jewellery. Judge Prentis concluded that Mr Khadka's failure to deliver up the Jewellery was an ongoing breach of his fiduciary duties and the claim against Mr Khadka in misfeasance was therefore made out. Mr Khadka was liable to Grosvenor for the value of the Jewellery which the judge took from the June 2017 invoice to be £4.95 million.

28. Judge Prentis then dealt with the claim against Siddhant Varma. The key question was what he had known about the fraud from which he received various sums, in particular the £2 million. Siddhant had later transferred that sum to his solicitors as a part contribution to the purchase price of a property in Charles Street, Mayfair. The money was then lost because the property had been sold and the proceeds had been insufficient to satisfy charge holders taking priority over Siddhant. Siddhant therefore also raised a change of position defence to the claim for the recovery of the money.

29. The claim against Siddhant Varma required the judge to grapple with the version of events pleaded by Siddhant Varma. Judge Prentis noted that Siddhant did not formally challenge the Respondents' evidence that the £2 million transferred by Mr Varma was Grosvenor's money. He found that it was the traceable proceeds of Mr Varma's and Mr England's breaches of fiduciary duty. Judge Prentis referred to Siddhant's case that he had been told that his paternal grandmother had decided to sell some of her jewellery in order to anticipate the inheritance that Siddhant and Mr Varma would otherwise receive on her death and that Siddhant was to receive £2 million from the proceeds. Acknowledging that this was inherently implausible, Judge Prentis was nevertheless satisfied that it was true and that Siddhant's receipt of the money was not unconscionable. Judge Prentis accepted the evidence given at the trial before him by Siddhant's mother that they were a wealthy family such that she and Siddhant were used to a lavish lifestyle of conspicuous consumption here and abroad. He also accepted evidence that the Punjabi Indian community from which the family came traditionally held their wealth in jewellery and gemstones and used it to transfer wealth between the generations. Although Siddhant Varma had been caught out in various lies both in other documents and in some of his evidence before the court, Judge Prentis was not prepared to treat him as a wholly unreliable witness. He accepted Siddhant's evidence that he had no knowledge of the business in Bristol and that he had trusted and respected his father as a wealthy and successful businessman. He accepted Siddhant's evidence about the phone call from his grandmother in mid-2017 telling him about her intentions that he receive the £2 million and that this had been followed up by his being shown a letter from her to Mr Varma to the same effect. His defence was also supported by the way that the grandmother's estate had been divided when she died in January 2018 and by evidence from Ms Dumra, Siddhant's mother, that her mother-in-law had owned a great deal of valuable jewellery. After a careful and comprehensive analysis of many different pieces of evidence pointing in opposing directions, Judge Prentis held that the claim of knowing or unconscionable receipt against Siddhant therefore failed.

The application to admit new evidence

30. Mr Varma lodged his appellant's notice against Judge Johns' judgment on 30 July 2020. On 6 November 2020, he lodged an application to admit new evidence pursuant to CPR 52.21(2). Some of this new evidence comprised the statements of witnesses who had given evidence at the hearing before Judge Prentis and which had been provided to the Respondents on 10 June 2020 in preparation for that hearing; a date which also, coincidentally, fell in the middle of the committal hearing before Judge Johns. We heard submissions as to whether this evidence had or had not been available to Mr Varma before the hearing before Judge Johns and as to whether the Respondents had been under a duty to disclose the evidence at the contempt hearing. In the event, Mr Brown did not contest the admission of the evidence and I have taken it fully into account.

31. The new evidence comprises the following:

i) a witness statement dated 7 November 2020 from Mr Khadka signed by him and witnessed by an advocate in Mumbai. He refers to the Settlement Agreement which he says he executed on behalf of Grosvenor. He says that as instructed by Mr Singh in June 2018, he inspected the Jewellery which was shown to him by Mr Varma's mother and brother at Mrs Varma's house in Mumbai. He says further that he commissioned an additional valuation of the Jewellery which he recalls was 'circa £5m'. Unfortunately, he has been unable to locate the valuation report or any correspondence with the valuer. He says he took delivery of the Jewellery from Mr Varma in Mumbai on 11 June 2018 in return for Mr Varma handing over the Settlement Agreement.

ii) A witness statement from Ian Williams, a non-practising solicitor who has known Mr Varma for many years. He produces a photocopy of a certified copy of the passport of Maneet Singh that was sent to him in the context of some unrelated possession proceedings in which Mr Varma was involved in late 2016 and early 2017. He says further that he recalls speaking to Mr Singh on the telephone with Mr Varma possibly twice in the context of a different receivership.

iii) A witness statement of Peter Neidle, the solicitor who had certified the copy of Mr Singh's passport. His evidence is that he would not have certified the copy without seeing Mr Singh in person with the original of his passport.

iv) The fourth witness statement of Siddhant Varma made in May 2020 for the purpose of the hearing before Judge Prentis. In this he gave detailed evidence about amongst other things his understanding that the £2 million he received was an advance inheritance from his grandmother. As I have said, Judge Prentis largely accepted that evidence as providing an explanation that negated the assertion that Siddhant's receipt of the money was unconscionable.

v) A witness statement dated 10 June 2020 by Manju Dumra, Siddhant's maternal grandmother, about her gift to Siddhant's fiancée of a diamond ring that had belonged in her family for many years. This was evidence that Judge Prentis regarded as supporting Siddhant's contention that the giving of gifts of valuable jewellery was customary within wealthy Punjabi families.

vi) A witness statement of Taru Dumra, Siddhant's mother and Mr Varma's ex-wife, dated 10 June 2020 confirming that Mr Varma's family were very wealthy and that Mr Varma had shown her a letter from his mother regarding her intention to give jewellery to Mr Varma worth about £4.5 million from which approximately £2 million was to be given to Siddhant.

vii) A witness statement from Virginia Furst, Siddhant's partner, dated 10 June 2020 describing the diamond ring she had been given by her mother in law when she became engaged to Siddhant.

viii) A witness statement from Alyson Reilly, a partner at the Respondents' solicitors, about the valuation and likely provenance of Ms Furst's diamond ring.

ix) A copy of a hand written letter dated 17 February 2017 from Mr Varma's mother to Mr Varma saying that she is going to give him nine items of jewellery which she then lists, telling him that he should sell them and give Rupees 20 crores (one crore being 10 million rupees so that 20 crores is about £2 million) to Siddhant. This is accompanied by an advocate's letter dated 6 June 2020 certifying that Mrs Varma had signed the letter in his presence on 17 February 2017.

x) A letter from a UAE company MBC Auditing and Accounting saying that the jewellery and diamonds mentioned in Mrs Varma's letter had been given by Mr Varma to GCFZE and then sold for £4.95 million from which £2 million was paid to Siddhant in accordance with Mrs Varma's wishes.

The Grounds of Appeal

32. The first two grounds of appeal were wisely abandoned by Mr McCormick. Most of the submissions at the hearing were directed at Grounds 4 and 5. The new evidence was also relevant to those grounds so I will address them first before dealing with Ground 3 which raises discrete points.

33. Ground 4 asserts that a serious procedural irregularity has arisen because of the inconsistent findings made by Judge Johns and Judge Prentis. Judge Johns had questioned the very existence of the Jewellery and had upheld a finding of contempt arising from a statement in Mr Varma's affidavit referring to the sale of the jewellery from GCFZE to Grosvenor. That must have been because he was satisfied beyond reasonable doubt that there had been no transaction by which the Jewellery had been acquired by Grosvenor from GCFZE. By contrast, Judge Prentis had not only found that the Jewellery did exist but had ordered Mr Khadka to deliver up the Jewellery or its value. Such an order could only be based on a finding that Mr Khadka had held the Jewellery in his capacity as director of Grosvenor, that is to say that the Jewellery now belonged to Grosvenor and must have been bought by Grosvenor from GCFZE. Judge Prentis further dismissed the claim against Siddhant Varma on the grounds that he accepted that Siddhant had genuinely believed that the £2 million paid to him was the share of the value of the Jewellery that his grandmother had wanted him to inherit.

34. Ground 5 alleges that there has been a procedural irregularity because documents that were available at the hearing before Judge Prentis had not been available before Judge

Johns. That was an irregularity that made Judge Johns' findings of contempt unjust. Ground 5 was rendered redundant by the admission of the new evidence before us.

35. The new evidence primarily goes to two matters, the existence of Mr Maneet Singh and the existence of the Jewellery as the source for the £2 million given to Siddhant Varma. What is the relevance of those matters to the grounds of appeal challenging the findings of Judge Johns at the committal trial? Mr McCormick did not put his case too high but argued that, given that findings of contempt have to be established to the criminal standard, it is at least possible that if this evidence of Mr Singh's existence, of the existence of the Jewellery and of the sale of the Jewellery from GCFZE to Grosvenor had been before Judge Johns, he might not have been satisfied to the required standard that Mr Varma's evidence was untruthful. Mr Varma's version of events was roundly rejected by the judge when he was standing alone at that hearing. If Mr Varma had been able to rely on this evidence from his family - evidence which Judge Prentis later accepted as credible despite extremely competent cross-examination of the witnesses - there must be a real prospect that Judge Johns would not have been satisfied that the allegation that Mr Varma had made a false statement in his affidavit of 16 May. That finding of falsehood had then infected Mr Varma's credibility before the judge in respect of his evidence in relation to the other findings, whereas he might have been given the benefit of the doubt if the new evidence had been presented to Judge Johns.

36. I can deal briefly with the evidence about Mr Singh. Mr Varma contends that the evidence of Mr Williams and Mr Neidle shows that Mr Singh does indeed exist and has in the past been involved with Mr Varma's business dealings. Judge Johns expressed himself highly sceptical about Mr Singh, suggesting that he may have been invented by the defendants to the claim. That was one element that caused him to reject the credibility of much of the evidence put forward at the committal trial by Mr Varma.

37. In my judgment the new evidence goes nowhere near undermining Judge Johns' assessment of the issue before him about Mr Singh. Judge Johns' statement at [45] that the evidence overall "does not support the involvement or even the existence" of Mr Singh does not amount to a finding that Mr Singh did not exist. His focus, correctly, was on whether there was any evidence to support Mr Varma's case that Mr Singh was the controller of Grosvenor and that it was Mr Singh who had decided that Grosvenor should acquire the Jewellery from GCFZE. Both Judge Johns and Judge Prentis rejected the evidence of Mr Singh's involvement in the management of Grosvenor, Judge Prentis in the context not only of the Jewellery transaction but as an important plank of the defence put forward by Mr England. Even if the new evidence establishes that Maneet Singh was involved in an earlier receivership of a company in which Mr Varma was also involved, that does not negate the reasons Judge Johns gave for rejecting Mr Varma's evidence about Mr Singh.

38. Judge Johns was most conscientious about testing the evidence before him against the high standard of proof, but I am sure that nothing in the new evidence about Mr Singh and his passport could have altered his conclusions.

39. The position about the existence or otherwise of the Jewellery is more complicated. However, I am also satisfied first that there is no real inconsistency between the judgments of Judge Johns and Judge Prentis and secondly that the new evidence does

not undermine Finding 1 made by Judge Johns. Again, I do not read Judge Johns' judgment as making a firm finding that the Jewellery did not exist. It is important to revisit the context in which the point arose. The Falk order had required Mr Varma to swear and serve an affidavit 'setting out truthful, full and accurate answers to the questions set out in Schedule A to the First Affidavit of Paul Atkinson dated 10 May 2019." The allegation of contempt in the Respondents' application for committal was that in answer to Mr Atkinson's question:

> "Question 5: When the Company paid circa £3.1m into the account of Grosvenor Consultants FZE, what happened to these funds after that?"

Mr Varma had answered in his affidavit:

> "Answer 5: The funds were paid against sale of jewellery and diamonds to the company. Grosvenor Consultants FZE used some [of] the money to meet its financial obligations and debts, some of the monies was used towards expenses and some of the money was used towards failed and abortive transactions in Dubai/UAE. Details of the above are in Dubai and I can only access them when I can go to the UAE and can provide you with the same."

40. This answer was ultimately the subject of two findings of contempt. Finding 1 was in respect of the first sentence about payment being consideration for the purchase of the Jewellery and Finding 7 was about the use that GCFZE had made of the £3,122,841 which failed to disclose that £2 million of that money had been transferred to Mr Varma and then to Siddhant Varma.

41. As to Finding 1, I have set out the seven reasons Judge Johns gave why he was satisfied that Mr Varma's story about the sale of the Jewellery was untrue. One must bear in mind that at that stage Mr Varma was not seeking to explain the transaction between Grosvenor and GCFZE by reference to his mother's wish to make a substantial gift to him and to Siddhant. Instead, Mr Varma said that he had given the Jewellery to GCFZE under a deed of gift kept in a fingerprint locked safe in Dubai and that Mr Singh had then decided that Grosvenor should buy it. The only explanation Mr Varma had given as to why Mr Singh wanted Grosvenor to buy the Jewellery was the explanation recorded in Judge Agnello's judgment that Mr Singh had been concerned to maintain the value of the invested funds prior to their use to buy the hotel and pay for the redevelopment. Even if the new evidence had been before Judge Johns and he had accepted, as Judge Prentis did, that the Jewellery had come from Mrs Varma and had been intended to form part of the inheritance of Mr Varma and Siddhant, that does not provide any plausible reason why Mr Varma would gift the jewels to GCFZE or why Grosvenor would then buy the jewels from GCFZE.

42. The new evidence certainly does not improve the credibility of the invoice of 27 June 2017 or the Settlement Agreement of 11 June 2018. In his new witness statement, Mr Khadka repeats his assertion that the Settlement Agreement was signed at a meeting between him, Mr Varma and Mr Varma's brother in Mumbai on 11 June 2018 and handed over in return for the Jewellery. He does not engage with the finding of Judge

Johns at [46] that Mr Varma had been in London then or with the judge's reasons for rejecting the evidence of Mr Varma's brother. If the new evidence had been before him, Judge Johns would still have been fully satisfied that the statement in the first sentence of Mr Varma's answer to question 5 in his 16 May affidavit was false.

43. Judge Prentis' concern was primarily with whether the evidence before him supported Siddhant Varma's defence that so far as he was concerned, he had been told and believed that the £2 million was his inheritance from the sale of his grandmother's jewels. In order to conclude that the defence was made out, the judge did not have to find that the Jewellery actually existed or that it had been bought and sold as between Grosvenor and GCFZE. His findings as regards the Jewellery and Siddhant Varma do not touch on the transaction between Grosvenor and GCFZE since whether or not it was true, the money was still the result of a breach of fiduciary duty.

44. Many of the doubts expressed by Judge Johns about the existence of the Jewellery still remain even taking into account the judgment of Judge Prentis and the new evidence. There are still no photographs of the Jewellery, no documents evidencing their valuation, insurance or ultimate sale. Mr Khadka claimed in April 2019 that he still held them on behalf of Grosvenor but his recent witness statement does not explain why he did not respond to the proceedings or comply with the Birss order or the judgment of Judge Prentis. That statement is ambiguous on the question whether he still holds the Jewellery or has sold it and, if the latter, what he has done with the money.

45. I recognise that Judge Prentis found for the Respondents in their claim in misfeasance against Mr Khadka. Any order of the court that Mr Khadka deliver up the Jewellery or its value must be based on the premise that the Jewellery exists, that it belonged to Grosvenor and that it, its proceeds of sale or other traceable assets are being held by Mr Khadka on Grosvenor's behalf in breach of his duties toward the company. But Judge Prentis was careful in [88] to explain the basis for his conclusion. He noted that Mr Khadka's evidence about the Jewellery was inconsistent but that the most recent email from him to the Respondents purported to confirm that he was in the course of returning the Jewellery to them. He said that the train of correspondence may not be taken as an accurate account of the underlying transactions concerning the Jewellery but that that could not "count in favour of Mr Khadka, who has presented his correspondence and also his witness statement as truthful". Properly understood, Judge Prentis' findings in relation to the gift of the Jewellery to GCFZE and its sale to Grosvenor went no further than upholding the Respondents' claim that *if* the Jewellery existed and *if* it had been sold by GCFZE to Grosvenor and *if* Mr Khadka has held the Jewellery or its proceeds on behalf of the Grosvenor then he must certainly account for that to the Respondents. That was an appropriate order for him to make given the claim put forward by the Respondents and the evidence before him from Mr Khadka and Mr Varma, regardless of whether he was satisfied that the sale of the Jewellery had actually taken place.

46. I would therefore dismiss this ground of appeal on the basis that there is no inconsistency between the findings of Judge Johns and Judge Prentis and that the new evidence could not have raised any doubt in Judge Johns' mind as to whether Finding 1 was made out.

Ground 3: the mental element required for a finding of contempt

47. Ground 3 challenges Findings 3, 4 and 5. In respect of Findings 3 and 4, Mr Varma asserts that Judge Johns erred in holding that the contempts were made out when he had accepted Mr Varma's evidence that he had not realised that his failures to act as ordered by the court were breaches of the court orders.

48. Finding 3 relates to the eighth allegation in the committal application alleging a breach of the Birss order. Paragraphs 9 and 10 of that order dealt with the provision of information:

> "9.1 Unless paragraph (9.2) applies, the Respondent must within 48 hours of service of this order and to the best of his ability inform the Applicant's solicitors of all his assets worldwide exceeding £2,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.
>
> 9.2 [privilege against self-incrimination]
>
> 10. Within 7 working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information."

49. The term 'Respondent' was defined in paragraph 4.1 of the order as meaning Mr Varma, Mr Khadka and GCFZE.

50. The committal application at paragraph 8.2 alleges that Mr Varma is the sole owner and controller of GCFZE. It states that Mr Varma has acted in breach of the order in that he has failed to swear and serve an affidavit on behalf of GCFZE providing information about its assets. It was clear that Mr Varma had not sworn an affidavit on behalf of GCFZE so the question for Judge Johns was whether that put Mr Varma in breach of the order. Judge Johns referred to the principle that a director may be personally liable in contempt for a breach of an order by a company if he is responsible for the act or omission constituting the breach: [117]. He held that Mr Varma's evidence was that he performed the role of director for GCFZE and no other person had been identified as able to make an affidavit on the company's behalf. Mr Varma's position was that he did not realise that the order placed him under any obligation to make the affidavit for GCFZE. The judge held that that was no defence because it is not a necessary ingredient of contempt that the contemnor knows that he is breaching the order or that he intends to breach the order.

51. Finding 4 concerns the breach of the Johnson order of 3 July 2019. Paragraph 4 of that order provided that Mr Varma must by 4 pm on 11 July 2019 send by email and special delivery a signed letter of instruction enclosing a copy of the order to Emirates NBD Bank instructing the bank to disclose bank statements for any accounts held by GCFZE. Paragraph 5 provided that if Mr Varma failed to do so, a Master of the High Court was empowered to send the letter instead. Judge Johns found that Mr Varma had not provided a letter until 26 July when he attended court for cross examination. By that time Chief Master Marsh had sent a letter as provided for in the order. Mr Varma argued before Judge Johns that he had applied for permission to appeal against

the Johnson order and for a stay of its terms. Permission and the stay were not refused until 22 July 2019. Judge Johns held, again, that that was no answer:

> "130. I should make clear that given the request for permission to appeal and for a stay and Mr Varma not having the benefit of being legally represented at this stage, I was not satisfied on hearing his evidence that he had an intention to breach the order. But that is relevant, it seems to me, only to sentence."

52. Despite Mr McCormick's well-presented arguments to the contrary, I am sure that the judge was right to conclude that Findings 3 and 4 were made out on the facts as he found them. *Arlidge, Eady & Smith on Contempt* (5th ed) at para. 12-93 cites the judgment of Warrington J in *Stancomb v Trowbridge UDC* [1910] 2 Ch 190, 194. He expressed the principle as follows:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt if he or it in fact does the act and it is no answer to say that the act was not contumacious in the sense that in doing it there was no direct intention to disobey the order."

53. *Arlidge* then lists a long line of authority confirming that principle; motive is immaterial to the question of liability. In para. 12-101, the learned authors refer to the case of *Irtelli v Squatriti* [1993] QB 83 as hinting at "a degree of apparent coalescence between the requirements for mens rea in civil and criminal contempt". In that case the defendants were injuncted from selling, disposing or otherwise dealing with a property of which they owned the freehold. They later executed a charge over the property in favour of another. At the first instance hearing they did not attend and were found liable for contempt. On appeal, the Court of Appeal discharged the order on the basis that "it was impossible to conclude that the appellants had intentionally breached the injunction". There are various unsatisfactory features about the judgments in *Irtelli*. The first, as Lewison LJ pointed out during argument, is that the record in the law report of counsel's submissions on behalf of the appellants indicates that he did not assert that they were not liable for contempt, but submitted rather that the breach of the order was 'merely technical'. Secondly, the court was not referred to the contrary authorities such as *Stancomb* or *Knight v Clifton* [1971] Ch 700. The court was, on the other hand, referred to *Supply of Ready Mixed Concrete* [1992] QB 213, a decision of the Court of Appeal which was later overturned on this point by the House of Lords: *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 ('*Pioneer*').

54. In my judgment *Irtelli v Squatriti* cannot stand in the light of the many earlier and later cases which establish that once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach. In *Pioneer*, Lord Nolan (with whom Lord Mustill, Lord Slynn of Hadley and Lord Jauncy of Tullichettle agreed) quoted from the opinion of Lord Wilberforce in *Heatons Transport (St Helens) Ltd. v Transport and General Workers' Union* [1973] AC 15 to explain the policy behind the principle: (479G of *Pioneer*)

> "The view of Warrington J *[in Stancomb]* has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional."

55. Findings 3 and 4 provide two examples of facts where the distinction is important. Mr Varma knew of the court order directing GCFZE to provide an affidavit, he knew that he was the sole director and controller of that company and that no affidavit had been provided. That is enough to fix him with liability for the breach of the order. He knew also that he had been ordered by the court to send letters of instruction to GCFZE's Emirates bank and that he had refrained from sending them. He is liable for that breach even if, as the judge accepted, he thought he did not need to comply whilst his application for permission to appeal and for a stay was pending. There was no error of law by Judge Johns. Mr Varma's lack of knowledge is relevant to the sentence to be imposed but it is not relevant to the finding of contempt.

56. Finally, Mr Varma challenges Finding 5 which concerns Mr Varma's failure in breach of the Hochhauser order to send the letters of authority 'forthwith' because he delayed 13 or 14 days before sending the letters. Instead of sending the letters provided to him by the Respondent's solicitors, Mr Varma tried to bargain with them that he would send the letters once they returned his passport to him. Judge Johns recorded at [139] that the facts surrounding the breach did not appear to be in issue. He therefore found that the allegation of breach was made out.

57. Mr McCormick criticises this finding on the basis that there was insufficient analysis during the course of the hearing before Judge Johns and in his judgment as to how long Mr Varma was permitted to take before he sent out the letters. He was prepared to accept that the term 'forthwith' means simply 'as soon as is reasonably practical': see *In re Seagull Manufacturing Co Ltd (In Liquidation*) [1993] Ch 345 p.359G. However, he said that Mr Varma was not asked during the course of his cross-examination whether there had been any reason for the time taken and so had not been given an opportunity to explain what he understood his obligation under the order to be.

58. There is no merit in this criticism. Mr Varma had plenty of opportunity to put forward any explanation he could for why it took him from 2 August to 15 August to send the letters. It is not the task of counsel for the applicant seeking to commit a potential contemnor to elicit further excuses from him in cross-examination when none is put forward in his evidence in chief. If the judge had been concerned about the adequacy of the evidence available to him, he could have asked his own questions when Mr Varma's was giving evidence to ensure that the issue was explored to his satisfaction. There is no basis for upsetting the judge's finding in relation to this contempt.

Conclusion

59. In the light of the reasons given above, I would grant Mr Varma's application to admit the new evidence but dismiss the appeal.

Lord Justice Stuart-Smith:

60. I agree.

Lord Justice Lewison:

61. I also agree.