[2024] EWHC 2781 (Comm) Case No: CL-2006-000270; CL-2010-000804

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KING'S BENCH DIVISION)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday, 1 October 2024

BEFORE:

HIS HONOUR JUDGE PELLING, KC
(Sitting as a Judge of the High Court)

BETWEEN:

MICHAEL WILSON & PARTNERS LTD

Claimant

- and -

JOHN FORSTER EMMOTT

Defendants

MR WILSON appeared on behalf of the Claimant
MR GRAY AND MS TWOMEY appeared on behalf of the Defendants

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

JUDGE PELLING:

1. This is the hearing of two applications, being (a) an application by the defendant to strike out a committal application by the claimant against the defendant, and (b) an application by the claimant for permission to amend the committal application notice. The application to amend is to substitute for the old text in the application notice an entirely new text. An application by the claimant to set aside an order made by me on 26 February 2024 was also listed. I dismissed that application for reasons I gave in an ex-tempore judgment I delivered during the course of the hearing. There remains to be determined an application by the defendant for an order that I certify the application to set aside the February order as totally without merit.

2. The claimant was represented at the start of the hearing by counsel, Mr Dolby. His retainer was terminated by Mr Wilson on behalf of the claimant partway through the hearing but after most of the argument had been completed. The defendant was represented by Mr Gray and Ms Twomey, who are instructed by solicitors acting under the legal aid scheme available to those against whom allegations of contempt have been made. I record that a recurring complaint made by Mr Wilson, both at the hearing of these applications and others, is that the defendant is someone with significant wealth, who he alleges should not be in receipt of legal aid. I made clear to him in the course of the hearing, as I have made clear to him before, that this is not a matter for me but is a matter, if it is to be taken up at all, that must be taken up with the legal aid authorities.

3. Mr Gray sought to strike out the contempt proceedings by reference to what he submits to be serial procedural failings by the claimant "MWP") since the application was first commenced, which he seeks to bolster by reference to the length of time that these proceedings have been outstanding, that the majority of the allegations relate to alleged breaches of a worldwide freezing order that was discharged as against the defendant ("Mr Emmott") in 2010, made in an application commenced in excess of ten years thereafter, and the cost of these proceedings have become a disproportionate burden on the public as well as consuming a disproportionate quantity of court resources. The amendment application does not meet that point. In addition, the amendment application is opposed on the basis that the amendments as drawn do not comply with

the procedural requirements that apply to contempt applications. In addition, there are a number of allegations made on the face of the draft amended contempt application that are unarguable on their face and in respect of which permission cannot sensibly be given on any view and should in any event be struck out – see in this regard Navigator Equities Limited v Deripaska [2021] EWCA Civ 1799, [2022] 1 WLR 3656 ("Deripaska 1") *per* Carr LJ (as she then was) at paragraphs 102 to 108.

4. The general principles that apply to contempt applications are well established and were those most recently restated by the Court of Appeal in Navigator Equities Limited v Deripaska [2024] EWCA Civ 268, [2024] BCC 526 ("Deripaska 2"), by Males LJ at paragraph 47. Of the principles identified, those that are most directly material to these applications are, first, that a contempt application must comply strictly with the formal requirements of CPR Part 81, and secondly, that the applicant is to be confined strictly and solely to attempting to prove the allegations in the application notice. This last point is important in this case, because it necessarily means that if an allegation is made that cannot be made good on its face, it must be struck out, or, as here, permission to amend must be refused. It also impacts on the point made concerning the manner in which MWP has sought to prove the allegations made, which led to the directions I gave last February. Further, in my judgment, both applications must be determined against the overarching point that a heightened standard of procedural fairness in favour of the defendant has to be maintained throughout in contempt proceedings; see in this regard Deripaska 1, per Carr LJ (as she then was) at paragraph 89.

5. Before turning to the applications, I should note that (a) unless a court otherwise orders, a contempt application must be supported by written evidence given by affidavit or affirmation; see CPR Rule 81.4(1), (b) an alleged contemnor is entitled to know precisely what it is said that he has done wrong and must be able to do so from what is set out in the application notice itself – see Deutsche Bank AG v Sebastian Holdings Inc [2020] EWHC 3536 *per* Cockerill J at paragraph 75 to 76. What is required in the application notice is a succinct summary of the applicant's case to be read in light of the background knowledge known to the parties – see Sebastian Holdings ibid at paragraph 80 and 94 to 95. The notice should not be a long narrative document, because such narrative obfuscates rather than clarifies what allegations are being made.

What is required is a succinct statement of what is alleged, supported by an affidavit or affidavits that seek to prove the allegations made. In this context, it will almost always not be satisfactory to rely on affidavits sworn for other purposes, nor to rely on multiple different affidavits sworn for different purposes that address the same points but in differently formulated ways.

6. Although generally it is preferable to reserve submissions concerning delay, prejudice and potential injustice to the substantive hearing rather than seeking to advance such submissions by application to strike out – see in this regard Sebastian Holdings ibid at paragraph 47 – this is generally because, if such allegations are made good at the substantive hearing, they are likely to result in contempt application being dismissed, whereas strikeout applications may result in increased costs and delay. That said, where, as here, the complaint is of fundamental defects in the application notice and of assertions that on any view cannot be established at trial, those can and in most cases should be resolved at an early stage, particularly when many allegations are made and the length of the substantive hearing is likely to take multiple numbers of days. If there are clear procedural defects that are likely to be fatal to the application or parts of it, then to my mind grasping the nettle at an early stage is likely to reduce the public resource that has to be made available to determine the application and will reduce costs, which in this case are being met so far as the defendant is concerned from public resources.

7. In my judgment, that point is of particular significance in this case, because the applications arise in the context of litigation between the parties that started decades ago, has vexed every court in this jurisdiction up to and including the Supreme Court and the Privy Council as well as courts at all levels in numerous other jurisdictions, including but not limited to Australia and the BVI. This litigation has been condemned by the Court of Appeal now some years ago as pathological litigation in a judgment which also warned of the need to ensure that only proportionate resource were made available to these proceedings. Since then, application after application, usually but not always by MWP, have been listed and no less than three ECROs have been made against MWP, one most recently by the Court of Appeal this year and two others by me. In my judgment, therefore, I must be astute to control this satellite litigation by

requiring MWP to comply strictly with the procedural requirements that apply and eliminate allegations that cannot succeed or which are made without regard to or otherwise than in compliance with the procedural requirements that apply. Furthermore, where, as here, attempts have been made to facilitate the correction of defects by an application to amend, it will be only in the most exceptional circumstances that further generosity will be extended to a claimant who is refused permission in relation to the proposed amendments to resolve procedural failings.

8. The strikeout application by the defendant is for an order striking out the committal application for failure to comply with my order of 28 February 2024. That order was itself the result of an attempt by the defendant to have the application struck out for procedural irregularity. By the time of the February hearing, the contempt application alleged that Mr Emmott had committed up to six breaches of personal undertakings and up to 15 breaches of various orders by which it was alleged he had been bound. The submissions made on behalf of Mr Emmott were that the allegations of breach of orders were not sufficiently clearly set out or particularised as to enable him fairly to understand what was being alleged and generally did not comply with the requirement that each allegation set out which order it was alleged had been breached, when and by what alleged act or omission.

9. There was also severe criticism of the evidence relied upon to support the allegations. There was a complaint that the tenth affidavit of Mr Wilson was not in truth an affidavit at all. The level of particularisation in the application notice clearly fell short of what was required by both CPR Part 81 and the case law in this area. One example will do. In breach 9, it was alleged originally that the defendant had breached "*the orders against him*" without specifying which, and then that he did so by causing *"... shares… options and warrants to be dealt with, dissipated and hidden away…*" without specifying which assets were being referred to and when the acts relied upon are alleged to have occurred, or indeed giving any particulars as to what dealings were being relied upon. Notwithstanding the specific criticisms of this formulation at the February hearing, regrettably it is replicated in many of the breaches alleged in the proposed amended application notice, which is, as I have said, in effect an application to amend by substituting a new text for what had gone before.

10. This need to specify the dates of the alleged breaches is important, because, as I have said, the worldwide freezing orders against the defendant were discharged on 21 April 2010, as is made apparent on the face of the proposed amended contempt application notice. The contempt application was brought ten years after the discharge of the relevant freezing orders. This is the subject of a separate complaint. It does not justify, in my judgment, striking out the application, applying the reasoning of the Court of Appeal in Deripaska 1 unless the delay can be said to render the application an abuse of process. I return to that point later in this judgment.

11. In the course of the February hearing, Mr Gray developed the point that the application suffered from a number of procedural defects. Rather than dismissing the contempt application at that stage, I sought to establish a set of procedural directions designed to restore order to the application. I did so because at that stage I could not be satisfied that it was appropriate or proportionate to strike out the application in its entirety, not least because the alleged breaches of the undertakings relied on were of much more recent origin than the alleged breaches of the freezing borders. This approach necessitated looking at the application notice itself, the evidence in support and the bundle which had been filed to be used at the contempt application hearing. In relation to the application notice, I gave the claimant the opportunity to apply to amend it by setting out what was required by the rules and case law. The nature of what was required was discussed at length during the course of the hearing in February, particularly with Mr Dolby on behalf of MWP, and I was satisfied that he understood what was required. The transcript in my judgment shows clearly that was so.

12. In relation to evidence, in order to address the point that there would need to be an affidavit in support of the amended application, I directed that there should be one affidavit that proved the allegations that were to be advanced in the amended application notice, and a single bundle limited to material relevant to the contempt application alone so that the application could proceed to trial in an orderly manner. The need to give specific directions in relation to the bundle derives from difficulties experienced in the past concerning the volume of material inserted into bundles and the

absence of any evidence linking all such material together. The volume and complexity of bundles prepared by MWP has been the subject of adverse criticism not merely by me in the past but of other courts as well, including but not limited to the Court of Appeal. All this is apparent from the transcript of the February hearing. The point made by Mr Gray is that Mr Emmott was faced with a bundle of correspondence, parts of judgments, various orders and so on without any attempt having been made to marshal the material in a coherent manner so as to enable Mr Emmott and his advisors to be able to identify what was being alleged and what evidence was being relied upon by MWP to support each such allegation.

13. In the result, I gave directions as follows:

> "The claimant must file a draft amended contempt application, an application for permission to amend its contempt application by 16.00 London time on 3 April 2024 which specifically addresses the following:
>
> (1) the claimant must provide a brief summary of facts alleged to constitute the contempt set out numerically and in chronological order;
>
> (2) the claimant must identify each allegation of contempt as far as possible in chronological order, and in relation to each it must (a) identify the order or undertaking and the paragraph or paragraphs of each such order and undertaking which it is alleged to have been breached, (b) the nature of the alleged breach and (c) must provide a cross-reference to the evidence relied on as its evidence in support of each alleged breach.
>
> (3) The claimant must by 16.00 London time on 3 April 2024 (i) file and serve a single affidavit limited to directly evidencing the allegations of contempt the claimant seeks to prove and (ii) file and serve an amended contempt bundle which is self-contained, properly paginated and contains complete copies of all documents relevant to each allegation, being those documents referred to either on the face of the draft amended contempt application or in the body of the affidavit referred to in (i) above.
>
> (4) All previous documents filed and served in the contempt proceedings are not to be included in any future bundle save to the extent they are documents referred to either on the face of the draft amended contempt application referred to in (ii) above or in the body of the affidavit referred to in paragraph (3)(i) above."

14. The underlying purpose of this was (a) to facilitate a properly drawn application and (b) to ensure that there was a single affidavit from Mr Wilson seeking to prove the allegations being made, it not being suggested that any other witness was to be relied upon at that hearing, and (c) a bundle containing documents exhibited to the affidavit in support of the application or otherwise referred to on the face of the application notice. I fixed time for compliance which reflected precisely the time Mr Dolby said it would require, that is to say, 35 days. This again is expressly referred to in the transcript of the hearing.

15. There were post hearing disputes about the form of the order but not about its broad effect, which is unsurprising since the directions given reflected what had been discussed and seemingly agreed in the course of the hearing. Thereafter MWP failed to comply. Instead, MWP sought extensions and then it sought to set aside paragraphs (2) to (4) of the order, even though no application for permission to appeal had been made and the time for doing so had long since passed. In the end, I extended the time for MWP to apply to amend the application notice, even though an application notice had not been issued within the time directed by the February order, and the application to amend was issued by the extended date. The application to amend, as I have said, is opposed, no affidavit having been sworn or even proposed in draft, so that there is no indication on this application of the evidence said to support the allegations in the proposed draft amended application notice.

16. I should make clear at this stage that I reject Mr Emmott's application that I should reject the application to amend out of hand and in its entirety and strike out the contempt application. I do not accept that it can be fairly said that the document fails to particularise all the allegations being made or that all of the allegations made are bound to fail on their face, and I remain of the view that the argument that the claims based on breach of the undertakings are an abuse should be determined at the substantive hearing. Those allegations are of more recent origin than the alleged breaches of the freezing orders MWP seeks to rely on, and MWP has an argument that by giving the undertakings, Mr Emmott was able to delay first the reduction of the scope and then the discharge of the worldwide freezing orders he had obtained against MWP for far longer than would otherwise have been the position, and thus it cannot be said that the

breaches of the undertaking are merely formal or technical. Thus, it seems to me, applying the principles identified Carr LJ in Deripaska 1, those allegations must be determined at a hearing.

17. In those circumstances, I conclude that it would be wrong to strike out the application in its entirety, as I have said. Rather, I consider the appropriate course is to give permission to amend to the extent that it is appropriate and then fix default directions in relation to the filing of affidavit evidence and bundles in support but at the same time give the defendant a fair opportunity to file evidence in answer, if so advised, acknowledging that there is no obligation on the defendant to file any evidence in answer to the allegations that are made.

18. That being so, it is necessary to turn to the application to amend, which, as I have said already twice, is an application to substitute in its entirety new text for the text in the original application notice. There is much in my judgment that has been included in the draft that is not required or indeed appropriate, applying the principles I have identified, particularly those parts expressed, as is all too often the case in this litigation, at any rate so far as MWP is concerned, in unnecessarily tendentious and prolix terms and which have as their effect obfuscation rather than clarification. I am prepared to give permission in relation to what is alleged in paragraphs 1 to 3 of the draft, although I note that the existence of the Temujin Partnership has never been accepted by the defendant, nor has any court concluded he was a member of it in proceedings to which he was a party. That is an issue that, as I understand it, will be resolved in proceedings before the courts of New South Wales to be heard over a period of five days commencing on 18 November 2024. I have to return to that issue when considering a number of draft pleaded breaches.

19. I refuse permission to amend by including footnote (1) because it creates the impression that MWP will rely on breaches of the foreign court's orders there referred to. If there has been a breach of such orders, it is of no consequence to the English courts on a contempt application, and the defendant should not be faced with the cost and inconvenience of attempting in a contempt application to deal with such allegations

in relation to orders apparently granted over the years by courts in other jurisdictions. I have no difficulty in giving permission to amend in the terms set out in paragraphs 5 to 14. There are no cross references to any affidavit evidence in support of the allegations made, but those can be addressed by the default directions I propose to make leading to a trial.

20. Paragraph 15 of the draft identifies two freezing orders on which MWP relies, which I refer to below as the EPIL order referred to in paragraph 15.1 of the draft and the Emmott order referred to in paragraph 15.2 of the draft. Much of the narrative as to the effect of the EPIL order is inappropriate but in the end will depend upon what the orders actually state and mean as a matter of true construction. There is no challenge to that narrative by Mr Gray.

21. Paragraph 16 pleads the orders were discharged as against the defendant on 21 April 2010. I give permission for that paragraph and indeed paragraphs 17 and 18, provisionally at this stage since if I conclude permission should be refused for all the alleged injunction breaches, this paragraph will become surplus.

22. I refuse permission in relation to paragraph 19 because what courts outside England and Wales have directed is immaterial to this application, will lengthen the hearing of the application, will increase costs, including costs incurred in the defence of Mr Emmott at public expense, and will waste court resources and not assist materially to determine the issues that arise. If and to the extent the material is of any evidential value, it can and should be addressed in the affidavit in support, not on the face of the application notice, although, as I have already indicated, I do not at the moment see how the evidence assists.

23. I refuse permission to amend in the terms of paragraph 20 of the draft. Paragraph 20.1 is a matter for construction of the order at trial and adds or should add nothing to the breaches alleged later in the draft. Paragraphs 20.2 to 20.4 are narrative that has no place in the application notice and, if relevant at all, which I doubt, should appear in the affidavit in support. Paragraph 20.5 is objectionable because it makes highly

contentious and generalised allegations that have no place in the application notice. Either the allegations should appear in the breaches alleged or they should not appear at all. In any event it is objectionable for want of particularity and because it is not made s]clear to which breaches what is alleged is said to be relevant to. It is also objectionable because it purports to make allegations in relation to a period that includes a period after the date when the orders were discharged as against the defendant, as MWP pleads in paragraph 16 of the draft. Exactly similar criticisms arise in relation to paragraph 20.6. It may be that the orders were obtained against the entities identified but those entities are not parties to the application. If it is to be alleged that Mr Emmott is liable, notwithstanding discharge against him of the EPIL order, as alleged in paragraph 16 of the draft amendment, that would have to be set out and it is not.

24. I refuse permission to amend in the terms of paragraphs 21 to 25. An attempt is made to rely on the third and fourth affidavits of Mr Wilson. However, these have not been provided. Any exhibits thereto have not been provided either, and they were not sworn in support of the application. Paragraph 24 is at best evidence and should not appear in the application notice. There is in addition a particular difficulty in that it is alleged in paragraph 25 that the defendant is a Temujin partner. The defendant disputes that is so, and it is in nobody's interest that an English court should attempt to resolve that issue, particularly applying the criminal standard of proof, when that is to be determined at a trial between the parties in Australia taking place this coming November. I return to that point later in this judgment.

25. I refuse permission in relation to paragraph 26 in relation to breach 2 because it does not specify the date or dates on which it is alleged such payments were made. The defendant is entitled to know the date when it is alleged payments relied on were made, the amount and the payee, so that he can admit or deny the allegations made as appropriate. It is also objectionable because it refers to the defendant "*acting together with his Temujin partners*", which engages the issue mentioned a moment ago. A similar concern arises in relation to paragraph 27. Similar considerations apply to breach 3 because paragraph 30 refers to the defendant acting "*as a Temujin partner*". Given this difficulty and the allegation that the funds are alleged to belong to the

Temujin Partnership, I do not see how these allegations can be made good without addressing the defendant's alleged membership of the partnership. Thus either permission must be refused or granted subject to a stay pending resolution of the proceedings in Australia. The alternative is for these proceedings to continue with MWP being required to prove the Temujin Partnership in the contempt proceedings to the criminal standard. That is likely to extend very significantly the length of the hearing and the amount of evidence which will have to be deployed in relation to the allegations made. Similar considerations apply to paragraphs 33 to 35, which concern breach 4. Independently of the issue I have considered so far, I refuse permission to refer to the third and fourth affidavits sworn by Mr Wilson for the reasons already given.

26. I refuse permission in relation to breach 5. I do so because (a) the allegation relates to activity on or about 20 June 2012, which is two years after discharge of the orders against the defendants. It also engages the Temujin Partnership issue – see in particular paragraphs 36, 37, 38 and 39.

27. I refuse permission in relation to breach 6 because it relates on its face to events taking place on or after early 2015, which is about five years after the freezing orders against Mr Emmott that are relied upon had been discharged. It also engages the Temujin Partnership issue, as is apparent from paragraphs 41, 42 and 43. Independently of that, I refuse permission in relation to paragraph 47, because it is entirely unparticularised and appears to relate to events occurring since November 2018 and is over eight years after discharge of the orders against the defendant which are relied upon by the claimant.

28. I refuse permission in relation to breach 7 because it is entirely unparticularised as to date of the refusal relied on. There can be no excuse for this. It was precisely this type of absence of particularity that was relied upon by Mr Gray at the hearing in February and which led me to make the orders that I did. Similar considerations apply to breach 8, and I refuse permission in relation to that allegation as well.

29. I refuse permission in relation to breach 9. It appears to relate to an offer of an undertaking to MWP. It is not alleged that the offer was accepted. Offering an undertaking which is not alleged to have been accepted is not even arguably a breach of the worldwide freezing orders relied on, or, if it is, such has not been alleged and in any event can be at best a technical breach only and as such is not one which is appropriate to permit to proceed.

30. I refuse permission to amend in terms of what is alleged to be breach 10. I do so because what is alleged to have occurred is alleged to have taken place on 11 August 2011. Paragraph 57 is objectionable because it purports to rely on a witness statement of an individual not given in these proceedings, which is dated 16 March 2012, that is, five months before the alleged occurrence of the event said to constitute the breach apparently relied upon. If evidence from Mr Mariniere is to be relied on in support of a contempt application, it must be in an affidavit sworn in the contempt application itself which deals with the events which are led to constitute the breach relied on. Paragraph 58 is objectionable because of its want of particularity as to dates and the nature of the events relied upon. As I have, said this is an excuse given the basis of Mr Gray's submissions in February.

31. Breach 11 suffers from the problem relating to the allegation that the defendant was a Temujin partner, as does breach 12. Both also suffer from the sort of lack of particularisation that was the source of complaint at the February hearing. The complaint made seems simply to have been ignored. Breach 13 suffers from that difficulty but also from the fact that (a) it alleges entirely unparticularised dealings with shares options and warrants, which was precisely the objection made by the defendant in February, and (b) because it appears to depend upon an allegation that MWP became the owner of 67 per cent of the Temujin Partnership in October 2015. I am unclear as to the materiality of this allegation because it is unexplained, which of itself is objectionable, but if it is immaterial, it should not be there, and if it is, then the acquisition postdates the discharge of the orders as against the defendant. Precisely similar points arise in relation to breach 14 and breach 15, and I refuse permission in relation to them for similar reasons.

32. Breach 16 is one I must also refuse permission for. The worldwide freezing orders on which the claimant relies are alleged to by MWP to have been first granted on 21 August 2006 in relation to the EPIL order and December 2006 in relation to the Emmott order. It follows that nothing alleged in paragraphs 70 to 71 could be a breach of either, since each relates to events that predate the making of the freezing orders relied on. Paragraph 72 fails to particularise what is being alleged. Paragraph 73 is likewise wholly unparticularised. It is only those paragraphs that could even arguably give rise to a breach of the freezing orders, subject to being properly particularised.

33. Permission must be refused in relation to breach 17 for want of particularity. It alleges the defendant dealt with or dissipated money, shares or other benefits without identifying what sums, shares or otherwise are relied on and when it is alleged whatever transactions are relied on took place. Timing is critical in the circumstances of this case because, as I have endeavoured to explain elsewhere in this judgment, allegations have been made in relation to events which either postdate or, on one occasion, predate the making of the relevant orders. Breach 18 suffers from the same want of particularity to which I referred elsewhere as well as engaging the question whether the defendant is a Temujin partner and may involve allegations in respect of activities after the discharge of the worldwide freezing orders. I refuse permission to amend in the term sought for those reasons.

34. Finally, I am bound to refuse permission in relation to breach 19 because it alleges conduct from in or about 2017, which is seven years after discharge of the freezing orders against the defendant. It is also unparticularised.

35. I fully accept that the effect of the authorities requiring proper particularisation must be applied sensibly with the level of detail depending on the circumstances of the case, although it is worthwhile noting the points made by Males LJ in Deripaska 2 concerning the point that the way in which these allegations are made form very strictly the basis of or the agenda for a hearing of contempt. However, subject to the qualification that particularisation must be applied sensibly, a defendant is entitled to know precisely what it is alleged he has done that is in breach of whatever order or

undertaking is relied on. That requires a date or date range, a succinct summary of what is alleged to have occurred within that date or date range. Generalised allegations that an alleged contemnor "*caused cash, success fees, bonuses, share options and warrants to be dissipated and hidden away*…" is not good enough.

36. Where does this leave this application? As I have said, I have no difficulty with the amendments in relation to the alleged breaches of the cost undertakings. Those are sufficiently satisfactorily pleaded and, subject to the provision of evidence in support and a bundle dealing with them, those allegations can proceed to a trial in early course. However, the proposed amendments to the allegations of breach of the freezing orders all suffer from significant defects. The amendments so as to allege breaches 5, 6, 10 and 19 must be refused as involving allegations that postdate the discharge of the freezing orders.

37. Breaches 2, 3, 4, 5, 6, 11, 12, 13, 14, 15 and 18 all involve allegations that the defendant is a partner in the Temujin Partnership. As I have endeavoured to explain in this judgment, that of itself is not a ground for refusing permission to amend, but it gives rise to a real prospect that this court will have to undertake a similar task to that which is shortly to be undertaken by the courts of New South Wales. If there is a finding in those proceedings that the defendant was a Temujin partner in the Temujin Partnership, then that would, I think, create an issue estoppel between the parties, although no submissions have been made in relation to that point by either party. If however this is correct, then it is not a proportionate use of the court's time and resources or those of the parties, nor is it a proportionate expenditure of public funds for that issue to be litigated in the context of a contempt application where the onus of proof would require MWP to prove to the criminal standard the existence of the partnership and Mr Emmet's membership of that partnership.

38. Had that been the only issue, I would have considered whether it was appropriate to grant permission but stay that part of the application that concerns alleged breaches of the freezing orders until after determination of the proceedings in the courts of New South Wales. However, that is not the only problem, as I have endeavoured to explain.

Other than in relation to breach 1 of the freezing order there are allegations made of conduct outside the period covered by the freezing orders relied upon, and there is in general a want of particularity that permeates the alleged breaches of the freezing orders, again aside possibly from breach 1. Had MWP complied with the order made in February and filed affidavit evidence that sought to prove the allegations, it might have been possible to take a more generous view on particularisation, but that is not what has occurred. Therefore the particularisation issue has to be resolved by reference exclusively to what appears on the face of the proposed amendment. It will be apparent from what I have said earlier that in relation to alleged breach 1 of the worldwide freezing orders, I have said that in principle permission could be given providing paragraph 24 was excised because it is evidence at best and paragraph 25 is excised because of the reference to the defendant being a Temujin partner, which as I see it is immaterial to the allegation made. Subject to those points, there is no reason why that allegation could not be determined at a trial together with the alleged breaches of the cost undertakings.

39. In the result (1) I give permission to amend in the terms of paragraphs 1 to 14 excluding footnote (i); (2) I refuse permission to amend in relation to any of the alleged worldwide freezing order breaches other than paragraphs 22 to 23 in relation to alleged breach 1. In consequence I permit the amendments in terms of paragraphs 15 to 18. Save as permitted above, permission to amend is refused.

40. Given the terms on which the defendant originally challenged the contempt application and that the February order gave the defendant an opportunity to regularise matters but the defendant has failed to do so in the respects I have identified in the course of this judgment, the next question that arises is whether I should give the claimant a further opportunity to do so. I conclude that I should not. The allegations made are on any view stale, having been made some ten years after the orders said to have been breached had been discharged. The principles that apply to applications of this sort are well established, and the points relied upon by the claimant should not have arisen in the first place. In those circumstances I consider that aside from the amendments set out above, the committal order should be struck out.

41. I will hear the parties as to what directions are needed to take what remains of the application to trial. Provisionally that should require directions for evidence in support to be filed, and I will hear the parties further on whether that should be on unless terms, and then for evidence in answer to be filed if so advised.

42. I have considered whether to stay or strike out the application on the basis that there is no real prospect of a court imposing a penalty in respect of the surviving allegations. Tempted as I have been to do so, since the result of not doing so will be that yet more days of Commercial Court time will be deployed on what on any view is satellite litigation in this long-drawn-out litigation process, I consider it would be inappropriate to take that step in relation to the cost undertakings for the reasons I explained earlier in this judgment and because I cannot rule out the possibility of a penalty being imposed if the surviving allegations, including principally the cost allegation breaches, are made out to the criminal standard.

43. The issue that remains is whether I should certify MWP's set-aside application as totally without merit. In order to do so, I must be satisfied not merely that the application should be dismissed but that it was so flawed that it was bound to fail and should never have been issued.

44. The application sought the set-aside of paragraphs 2, 3, 4, 5, 6 and 7 of the February order. The application was only moved in respect of paragraph 3, whilst paragraphs 4 to 7 could be said to be consequential on success in challenging paragraphs 2 or 3 or both. In the result, the challenge to paragraph 2 was never made. Paragraph 3 reflected what was discussed in the course of the hearing leading to the order and formed part of the submissions made by the parties as to what should be put in the order once drafting of the order came to be considered. There was no application for permission to appeal either to me or to the Court of Appeal. It is self-evident on the face of CPR Part 81 that a contempt application must be supported by an affidavit sworn in those proceedings. Although MWP complained it should not have been limited to one affidavit, that requirement was imposed to meet the point that only Mr Wilson was to give evidence and had attempted to give evidence in support of the application and the sole point was that his evidence should be contained in one affidavit sworn in support of the

application, not by attempting to rely on parts of multiple different affidavits sworn at earlier stages in support of earlier applications. If MWP considered further time was required or compliance should be postponed until after the application to amend the application notice was moved, it could have applied for such an order, but it did not. In truth, the application was an attempt to re-argue what had already been decided in a way which is impermissible. It is that which renders the application totally without merit, and in those circumstances I propose so to certify it. The issue that remains therefore concerns directions for the determination of the allegations that survive.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge