Neutral Citation Number: [2019] EWHC 2249 (Ch) Case No: BL-2019-000541

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
BUSINESS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2019

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

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Between :

(1) DISCOVERY LAND COMPANY, LLC Claimants
(2) TAYNOUTH CASTLE DLC, LLC
(3) RIVER TAY CASTLE LLP

- and –

(1) JIREHOUSE (a body corporate) Defendants
(2) JIREHOUSE PARTNERS LLP
(3) JIREHOUSE TRUSTEES LIMITED
(4) JIREHOUSE SECRETARIES LIMITED
(5) ESQUILINE ASSET MANAGERS LIMITED
(6) ESQUILINE FINANCE LIMITED
(7) STEPHEN JONES
(8) JOHN CLARK

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Edward Levey (instructed by **Davis Woolfe Limited**) for the **First Claimant**
David Halpern QC (instructed by **Brown Rudnick LLP**) for the **First to Third Defendants**
Alexandra Felix (instructed by **Birds Solicitors** for the **Seventh Defendant**

Hearing dates: 13, 14 and 15 August 2019

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Approved Judgment

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

Mr Justice Zacaroli:

INTRODUCTION

1. This is an application by the first claimant in the action, Discovery Land Company LLC, to commit the seventh defendant, Mr Stephen Jones ("Mr Jones"), to prison for contempt of court.

2. The alleged contempt consists of:

   (1) breaches of certain undertakings given to the court at a hearing before Nugee J on Friday, 15 March 2019; and

   (2) breaches of certain of the disclosure provisions contained in a freezing injunction granted by Nugee J on Monday, 18 March 2019.

3. The relevant undertakings were given by Mr Jones, in his personal capacity and on behalf of the first to third Respondents, Jirehouse (an unlimited company providing legal services, regulated by the SRA), Jirehouse Partners LLP and Jirehouse Trustees Limited (which I will refer to, collectively, as "Jirehouse"). The relevant orders were made against Jirehouse, but not Mr Jones. The committal application is therefore brought against Mr Jones, for breaching the undertakings given personally, and as a director of Jirehouse responsible for breaches of the undertakings and orders by Jirehouse. Mr Halpern QC, who appears for Jirehouse, acknowledged that Mr Jones is to be treated as synonymous with Jirehouse, such that he is responsible for any breach by Jirehouse of the undertakings or orders.

4. Mr Jones was admitted as a solicitor in February 1986. For more than 20 years he provided international legal and tax planning services through Jirehouse.

BACKGROUND

5. In her skeleton argument, Ms Felix, who appears for Mr Jones, said that the background facts set out in the claimant's skeleton were largely not disputed, although there were some factual errors that required clarification. Her principal point, however, reiterated at the hearing, was that the background is irrelevant and that the court should focus on the specific allegations which form the basis of the contempt proceedings.

6. While I agree that none of the background matters are the subject matter of specific allegations of contempt, it is nevertheless important to have regard to them as they are highly relevant to the allegation (central to the contempt proceedings) that Mr Jones was aware of the diversion of funds to which I refer in detail below, at the time he gave and purported to comply with the undertakings.

7. In the event, the matters that I shall now set out (which are derived largely from the claimant's skeleton and the evidence I was taken to during the hearing by Mr Levey on behalf of the claimant), were not the subject of any correction by Ms Felix during the hearing. For the most part, they are established by the

contemporaneous documents to which I refer, or by admissions made by Mr Jones.

8. The claimant is a property development company based in Arizona. It is part of a property development group founded in 1994 by Michael S. Meldman, its ultimate beneficial owner. Mr John Paul DeJoria ("Mr DeJoria") is a wealthy entrepreneur and US national who was interested in purchasing Taymouth Castle, a property in Scotland (the "Property"). In early 2018 Mr DeJoria became aware that the Property was for sale for approximately US$14 million.

9. The claimant was chosen to 'front' the purchase of the Property for Mr DeJoria. Mr DeJoria (through his family trust) would acquire a 94% interest in the Property and Mr Meldman (through his companies) would acquire a 6% interest.

10. They used a Delaware company, Taymouth Castle DLC, LLC ("TCD") as the vehicle to purchase the Property.

11. On 11 April 2018 the claimant engaged Jirehouse to act on its behalf in relation to the transaction.

12. On or around 16 April 2018, a purchase price of £9,620,000 excluding VAT was agreed. Around the same time, TCD wired US$14,050,000 to Jirehouse Trustees' Client Account, in two tranches.

13. Mr Jones advised that, for reasons of anonymity, the acquisition of the Property should take place through a special purpose vehicle, and he recommended using Esquiline Asset Managers Limited ("EAML") as the special purpose vehicle. EAML is one of a number of companies called Esquiline. I will come back to the relationship between Mr Jones and those companies later.

14. The funds paid by the claimant ought to have been held in the Jirehouse Trustees' client account pending completion of the transaction. However, the claimant recently discovered (only as a result of disclosure made pursuant to the orders made in March this year, which form the backdrop to this committal application) that immediately upon receipt of those monies, they were lent by EAML to another Esquiline company, Esquiline Finance Limited ("EFL") and on-loaned by EFL to two borrowers. The names of the borrowers have not been disclosed to the Court in circumstances I describe below. I refer to them simply as "borrower 1" and "borrower 2". As I will explain later on, those monies have not to date been repaid to EFL, or by EFL to EAML. The sums paid away by EAML included approximately £1.9 million that should have been held by Jirehouse in a retention fund.

15. Shortly before the orders of March this year, the claimant discovered that Jirehouse caused a charge to be placed on the Property in favour of a lender known as Dragonfly as security for a loan facility (the "Dragonfly Facility"). As a result of disclosure made after the orders in March this year, the claimant discovered that nearly £5 million had been drawn down under the Dragonfly Facility, of which £1.9 million had been used to replenish the retention fund which had been paid away to EFL in April 2018.

16. Completion of the transaction was due to take place in December 2018. Come December, however, Jirehouse had a problem, because it did not have the money it was supposed to have in order to pay the seller.

17. There began, therefore, an elaborate series of excuses from Mr Jones. I will summarise these, which are clearly established by the contemporaneous documents I have seen.

18. First, Mr Jones (supposedly alerted to this fact by reason of payments made by Mr DeJoria in response to a reconciliation Mr Jones said he carried out in November 2018) said that now that he understood that the original funds transferred in April 2018 had come from Mr DeJoria. He said that this gave rise to the need to carry out compliance checks on Mr DeJoria before Jirehouse could use those funds. This was a bogus reason, first, because Mr Jones had known since at least June (when he received various emails stating this in terms) that Mr DeJoria had provided the funds and, second, because the money paid in April had long gone.

19. Relying on this supposed compliance issue, on 6 December 2018, the day before completion, Jirehouse requested that the claimant provide a further $9.3 million in order to complete the transaction.

20. Jirehouse gave an undertaking that, once the compliance checks had been completed, it would repay the sum of $9.3 million within two working days.

21. Jirehouse should now have been holding $9.3 million more than it actually needed to complete the transaction. I will therefore refer to this amount as the "Surplus Funds".

22. Second, once sufficient time had passed that the compliance review would have to have been completed, Mr Jones then blamed delay in payment on the fact that the bank, who he said he had instructed to transfer the funds, was working at "*low capacity*" due to the holidays. He assured the claimant that he had given internal authorisation for the payment to be made. This must have been untrue since, as already noted, the money had long been paid away.

23. Third, on 27 December 2018 Mr Jones sought to blame the continued delay in returning the monies on a "*random audit issue*" which he said had been raised by Barclays Bank. Whilst there does appear to have been some form of audit into Jirehouse's account, this cannot have been relevant to the delay given the total absence of the funds.

24. Fourth, between the end of January and early March 2019, Mr Jones first resurrected supposed compliance concerns, and then created further substantial delay by making a suspicious activity report, relying on allegations that Mr DeJoria had been involved in a fraud concerning a Moroccan politically exposed person, and because of alleged connections between Mr DeJoria and the Libyan Government. Not only did Mr Jones make one, then a second, suspicious activity report, he also tipped off the claimant about this (in order to justify the continuing delay in payment), and went to the lengths of obtaining a Leading Counsel's opinion which he shared with the claimant, further justifying the delay. That opinion was given, however, on a false premise, in that Counsel was instructed on the basis that Jirehouse was holding the funds.

25. Fifth, having finally received a "Defence Against Money Laundering" from the National Crime Agency – freeing him to repay the funds supposedly the subject of his suspicious activity report – Mr Jones then sought an indemnity and release from the claimant before he was prepared to release the funds.

26. In early February, in response to concerns expressed by the claimant, Mr Jones agreed with Gibson Dunn (the claimant's then solicitors) that the monies Jirehouse was supposedly holding in a co-mingled account would be segregated into a separate bank account, and that a charge would then be provided over the funds once segregated. He also procured that a letter be written by a firm of auditors, Cooper Dawn Jerrom, to EAML, to confirm the existence of the funds (having first said that he could not provide a screen shot of an account statement, for reasons including client confidentiality, and data protection issues). The letter referred to the auditors having reviewed remittance confirmations made available by EAML in respect of funds sent to Jirehouse Trustees Limited's account with Barclays. It confirmed that sufficient funds presently stood available credit of EAML's account to enable it to discharge the repayment of the Surplus Funds on or before 31 March 2019. The implication appeared to be that the funds were held in an account at Barclays. This was untrue, since they had long ago been paid away to EFL and borrowers 1 and 2.

27. On 6 March 2019, the claimant discovered the charge placed on the Property in respect of the Dragonfly Facility. It was this discovery which led the claimant to apply to the court, which it did on 13 March 2019 – seeking to freeze the Surplus Funds it believed were held by EAML, and seeking information about both the Surplus Funds and the Dragonfly Facility.

ORDER OF 13 MARCH 2019

28. Nugee J made two orders – a freezing order against EAML and the disclosure order against Jirehouse.

29. Jirehouse purported to comply by letter of 14 March 2019.

30. By paragraph 1.1 and 1.2 of the 13 March Order, Jirehouse was ordered to provide the details of the bank account which held the Surplus Funds and provide evidence confirming that the account held at least the sum of US$9.3 million. In its letter of 14 March, Jirehouse said that the position remained the same as in the auditor's letter of 6 February 2019. This was again untrue, for the reasons I have already given.

31. By paragraph 1.3 of the 13 March Order, Jirehouse was required to notify the claimants' solicitors whether any sums had been drawn down by River Tay Castle LLP under the terms of the Dragonfly Facility and, if so, the amounts, the dates of the drawdowns and details as to what had happened to the money. In its letter of 14th March, Jirehouse said the total amount drawn down was £4.9 million, it was drawn down on 12 February 2019, and the funds "remain pledged against a Jirehouse undertaking to the Bank". As will become apparent, this was also untrue.

ORDER OF 15 MARCH 2019

32. Prompted by the disclosure of the drawdown under the Dragonfly Facility, the claimants applied on notice before Nugee J on 15 March 2019 for a freezing order against Jirehouse.

33. Shortly before the hearing, Jirehouse sent an email to the claimants' solicitors. This stated:

(1) The sums held in the account for the benefit of EAML exceeded US$9.3 million. This account was with Hambros Private Bank, but they could not provide the route number of the account for fear of identifying other clients of the firm whose money was held in the account.

(2) The sum of £4.9 million was in a pooled investment account with other clients' money. They were obtaining a redacted bank statement to prove this.

34. In the same email Jirehouse agreed to undertake to the Court as follows:

(1) to use best endeavours to transfer the sum of US$9.3 million into a segregated client account by 20 March 2019;

(2) to use best endeavours to transfer £4.9 million into a segregated account by 23 March 2019;

(3) the two "retention" sums would remain segregated.

35. At the hearing, at which Mr Jones was present, his Leading Counsel undertook, having taken instructions from Mr Jones, first, to procure payment into court of the surplus funds. He reiterated these were currently in an account with Hambros in the name of Jirehouse clients account, held on trust for EAML. He said that the money could be called within 48 hours. Accordingly, the undertaking was to pay the surplus funds into court by 4pm on Tuesday of the next week.

36. Second, Leading Counsel undertook to procure repayment of the loan of £4.9 million to Dragonfly. He said that the funds drawn down were in a separate account at Hambros. There was no reason it could not be paid, subject to any problem arising from the terms of the facility letter with Dragonfly, which Leading Counsel had not then seen.

37. The undertakings were expressly given on behalf of Mr Jones personally as well as on behalf of Jirehouse.

38. At the end of the hearing the judge noted that the order would not be drafted that day so would not get sealed until Monday but said: "but it is not a problem. The undertakings have been given."

39. The order, when drafted and sealed, reflected those two undertakings, which were stated to be given by Mr Jones personally and on behalf of Jirehouse. This committal application relates in part to the breaches of those undertakings. The order also contained a series of undertakings in relation to disclosure. These were substantially repeated in the order of 18 March 2019, and I will set them out when dealing with that order.

40. By the following Monday, Mr Jones sought to resile from the undertakings. At 11:04 on 18 March 2019, he emailed the clerk to Nugee J, copying the claimant's solicitors, to apologise to the court. He said:

> "I offered an undertaking in terms which were to be finalised over the weekend. The EAML funds for the loan repayment happens to be on a longer term investment portfolio arrangement which could not be broken in the time required by the claimant. After clarifying the position this morning with the bank, the funds shown on the statement we gave to the court on Friday last (which happens to be those of an unrelated client in a linked account and potentially available to EAML) are in fact committed to a long-term investment under a bank investment mandate with effect from this Wednesday 22nd March. This means the funds cannot therefore be used to repay the US$9.3 million by 4 PM on Tuesday (tomorrow) and not as I believed to be previously the position with the client."

41. He again apologised for the oversight on his part and that he had not been able to speak to the bank himself on the Friday before offering the undertaking. If he had been he said he would have realised immediately that he could not give it on the proposed terms. In the circumstances he had invited the claimant to seek a freezing order on the terms proposed on Friday which would not be resisted by Jirehouse.

42. There are three points to note about this email. First, the reference to an undertaking "in terms which were to be finalised" was simply wrong. The terms of the undertaking had in fact been clear on the Friday. There had been a one-hour break in the hearing before the parties returned to court to tell the judge what had been agreed in respect of the undertakings. Second, the description of what were referred to as the "EAML funds" for the loan repayment was still substantially misleading, at least by omission, in circumstances where the Surplus Funds had long ago been paid away via EFL to borrower 1 and borrower 2. Third, contrary to what the court was told on Friday 15 March (by email and in court), the funds at Hambros Private Bank were now said not to be held for EAML but belonged to an unrelated client, "potentially available" to EAML.

43. In fact the reason given only excused non-compliance with the undertaking in respect of the Surplus Funds. In his second witness statement, dated 20 March 2019, however, Mr Jones said that for similar reasons to those outlined in his email of 18 March, it now transpired that he would be unable to procure repayment of the Dragonfly Facility by 22 March 2019 nor to make a repayment into Court of that loan.

44. The matter was brought back before the court at 2pm on 18 March 2019. At the hearing, Leading Counsel for Jirehouse accepted that on the previous Friday:

> "we did undertake that we would pay the $9.3 million or the sterling equivalent by 4pm on Tuesday. My instructing solicitor found over the weekend that that was impossible… I accept that was the undertaking that was given."

45. In the circumstances, the court made a freezing order. The recitals to that order (which were not opposed by Leading Counsel for Jirehouse) referred to the undertakings having been given to the court, as recorded in a court order dated 15 March 2019.

ORDER OF 18 MARCH 2019

46. Accordingly on 18 March 2019, Nugee J granted a freezing order and an order for disclosure. The order for disclosure was made against the respondents (i.e. Jirehouse, and not Mr Jones personally). However, Mr Jones remained liable under the undertakings in the 15 March order.

47. The matters which Mr Jones was required to disclose (to the best of his ability) are as follows:

(1) the details (account name, number and sort code) of the bank account which holds the Surplus Funds (Recital 6(i) of the 15 March Order and paragraph 10A(1)(i) of the 18 March Order);

(2) evidence (redacted, insofar as may be necessary to preserve the confidentiality of third parties and/or on the grounds of privilege) confirming that the account holds at least the sum of US$9.3 million (Recital 6(ii) of the 15 March Order and paragraph 10A(1)(ii) of the 18 March Order);

(3) to explain how the said sum of $9.3 million has been dealt with since 6 December 2018 to date, i.e. details (account name, number and sort code) of the bank account(s) in which the said sum was held as at 6 December 2018, and details of all and any subsequent bank transfers since that date (Recital 6(iii) of the 15 March Order and paragraph 10A(1)(iii) of the 18 March Order);

(4) What has happened to the sum of £4,980,479.00, which sum was drawn down under the terms of the said Dragonfly Facility (as defined in the Disclosure Order) on 12 February 2019 since the date of drawdown (Recital 6(v) of the 15 March Order and paragraph 10A(1)(iv) of the 18 March Order.

48. In the 15 March Order, disclosure was required (in the form of an affidavit) by 4pm on Monday 18 March 2019. In the 18 March Order, disclosure was required (in the first instance) within 24 hours of service of the order and (by confirming affidavit) within 3 days of the service of the order.

PURPORTED COMPLIANCE BY MR JONES

Payment obligations

49. It is common ground that Mr Jones has failed to comply with the payment undertakings in respect of both the Surplus Funds and the repayment of the Dragonfly Facility.

50. In his third Affidavit, sworn on 8 May 2019, Mr Jones said that when he attended court on 15 March 2019 he believed that funds were available to repay $9.3 million and to redeem the Dragonfly Facility. He says that he thought the funds

that were in the relevant Hambros account could be made available to repay the relevant funds. In addition "a trusted third party who wishes to remain anonymous" had offered to make funds available, but after the undertakings were given that trusted individual – on 17 March 2019 – changed his mind. He accepted that this was different to the explanation he had given (through Leading Counsel) at the time. He said that he had given that explanation to the Court due to extreme professional embarrassment.

Disclosure obligations: Second Affidavit

51. On 20 March 2019 Mr Jones served his second affidavit, purporting to comply with the 15 March and 18 March Orders.

52. In response to Recital (ii) of the 15 March Order, he stated that:

    (1) The initial funds provided by the Claimants in April 2018 were transferred, on EAML's instructions to the account of EFL at Barclays Bank plc, with sort code 20-94-48 and a/c number 47109977. The bank statements exhibited showed an outward payment of $14.05 million to EFL on 16 April 2018 and further outward payments of just under $2 million on 14 and 16 November 2018 (all but $300,000 of which was to EFL).

    (2) He "now understood" that "these liquidity resources" are no longer available and he "further understood" that EAML advanced the funds to EFL who invested them on short-term liquid investments pending use by EAML for the purchase of the Property. He "now understood" that EFL was seeking urgently to call in those funds.

53. In response to Recital 6(ii) of the 15 March Order, he said that he was unable to provide the information (i.e, evidence confirming that the bank account holds at least the sum of $9.3 million) for the reasons stated in response to Recital 6(i).

54. In response to Recital 6(iii) of the 15 March Order, he said that he was unable to provide the information (i.e. how the $9.3 million had been dealt with since 6 December 2018 to date including account names/numbers/sort codes) for the reasons stated in response to Recital 6(i).

55. In response to Recital 6(v) of the 15 March Order, he said that the sum of £4.9 million was transferred by Jirehouse, on behalf of EAML, to an account of EFL at Barclays, with sort code 20-94-48 and account number 13871428. He "understood" that EFL then used the funds for short-term investments and to discharge EAML's obligations in respect of the Property transaction pending the outcome of the National Crime Agency's decision on the suspicious activity reports filed.

The Committal Application

56. The claimants considered that Mr Jones had failed to comply with the undertakings in the 15 March Order and the disclosure provisions in the 18 March Order, and brought these contempt proceedings by an Application Notice dated 3 April 2019.

57. The grounds relied on fall into two parts. Part A relates to the failure to procure payment. Ground A1 relates to the Surplus Funds and Ground A2 relates to the Dragonfly Facility. Part B relates to the failure to provide proper disclosure. I will summarise them by reference to the Recitals of the 15 March Order, but each ground relies also on the breach of the equivalent paragraph in the 18 March Order. Ground B1 relates to breach of Recital 6(i) of the 15 March Order. Ground B2 relates to breach of Recital 6(ii) of the 15 March Order. Ground B3 relates to breach of Recital 6(v) of the 15 March Order. Ground B4 relates to breach of Recital 6(iii) of the 15 March Order.

Further purported compliance with disclosure obligations

58. Mr Jones served his third Affidavit on 8 May 2019. In it, he said that:

(1) The Surplus Funds had been used by EFL to lend to borrower 1 and borrower 2 (as to which no details were given other than that one of them was developing a golf resort and the other held various assets, including an interest in a mine). The total lending (including previous financing from EFL) was £10 million for one and £8 million for the other. It had been anticipated that the borrowers would sell their respective assets between June and July 2018. A sale of either asset would provide sufficient funds to repay the Surplus Funds. Each of EFL and EAML was insolvent without the repayment of the borrowers' loans. Urgent steps were being taken through a sale of the borrowers' assets;

(2) The funds drawn down under the Dragonfly Facility were applied to pay further costs of the transaction in relation to the Property, to provide liquidity for the retention funds required to be paid to the seller of Taymouth Castle, and towards the EFL Borrower Refinancing Arrangements on behalf of each of the borrowers.

59. He apologised for the delay in providing this "supplemental" information. He said it was due to not appreciating the complexity of the investigations he would have to carry out, and the closing down of Jirehouse. He hoped the court would understand that he had done all that he could to "put matters right and purge any contempt."

60. In light of the fact that it is now known there was no bank account holding the Surplus Funds, Mr Jones could not have complied with Grounds B1 and B2, and these are no longer pursued by the claimants.

BREACHES OF THE UNDERTAKINGS AND ORDERS

61. It is common ground that it is for the claimant to prove the allegations to the criminal standard.

62. The court must be satisfied that it is sure that all the essential ingredients of the contempt have been established: *Therium (UK) Holdings Limited v Brooke* [2016] EWHC 2421 (comm) at [26].

63. It is not necessary, however, for the court to be satisfied to that standard in respect of its conclusion on each disputed piece of evidence before it can be taken

into account: see *JSC BTA Bank v Ablyazov (No 8)* 2013 1 WLR 1331, where Rix LJ cited with approval the following passage in the judgment of Dawson J. in *Shepherd v The Queen* (1990) 170 CLR 573, 579-580:

> "the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact—every piece of evidence—relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

64. Mr Jones has chosen not to give evidence. In a decision dated 7 June 2019, the late Henry Carr J determined that Mr Jones could not be compelled to give oral evidence notwithstanding the fact that he wishes to rely on his affidavit evidence. But Mr Jones was warned that, should he refuse to be cross-examined, there was a risk of adverse inferences being drawn against him. Henry Carr J cited the following passage from the judgment of Whipple J in *VIS Trading v Nazarov* [2015] EWHC 3327, at [57]:

> "In light of that conclusion, I hardly need to go on to consider what significance the first defendant's decision not to give oral evidence might have in relation to my overall evaluation of the first defendant's case. It is very clear that there are substantial gaps in the disclosure provided to date by the first defendant. But the fact is that the matters covered in the first defendant's fifth and sixth affidavits are all matters of fact, within the first defendant's knowledge. If those matters were being explained truthfully, I would have expected the first defendant to give evidence to me in person and submit to cross examination, to demonstrate that he really had done everything possible to comply with the 21 May 2015 Order. He did not do that. The fact that the first defendant did not give evidence, despite his availability for the hearing, does him no credit at all, and I draw an adverse inference against him. The fact that he then put in a sixth affidavit, after the hearing, making a number of assertions, supports that adverse inference. The first defendant is trying to avoid being cross examined. The obvious, adverse, inference to draw is that he is not telling the truth: he knows he has not disclosed all that he can."

BREACH BY NON-DISCLOSURE

65. The Claimants contend, first, that Mr Jones failed properly to comply with the disclosure obligations before service of his third affidavit (on 8 May 2019, after the service of the application seeking committal) and, second, that he continues to be in breach of those disclosure obligations.

66. It is common ground that in order to prove contempt arising out of breach of an undertaking requiring the respondent to do an act, the claimant must prove to the requisite standard that: (1) the respondent failed to do the act within the time set by the order; (2) he intended to fail to do the act; and (3) he had knowledge of all the facts which made the omission to do the act a breach of the order.

67. There is no question but that Mr Jones was aware of the undertakings he gave and the terms of the order of 18 March 2019 (which contained a penal notice).

68. In the context of the disclosure undertakings, the above requirements boil down in substance to two related questions. First, whether there is information over and above that provided by Mr Jones which falls within the parameters of the undertaking and, second, whether Mr Jones was aware of that information at the time he provided either of his affidavits in purported compliance with the order, such that he must have known he had not provided information to the best of his ability. If he was, then it follows, in my judgment, that he was in deliberate breach of the disclosure obligation.

Failure to disclose in his second affidavit

69. Mr Jones accepts that the disclosure in his second affidavit was incomplete.

70. So far as the Surplus Funds are concerned, although Mr Jones disclosed that the money had been passed to EFL, he failed to disclose anything about the loans made by EFL to borrower 1 and borrower 2. Moreover, the disclosure he did make was not only incomplete, but positively misleading, in that it referred to EFL having invested the funds on "short-term liquid investments". That is in my judgment inconsistent with the use EFL had in fact made of the funds.

71. So far as the Dragonfly Facility is concerned, Mr Jones' statement that £4.9 million had been transferred to EFL, and that EFL used those funds for short-term investments to discharge EAML's outstanding obligations in respect of the Transaction was similarly both incomplete and misleading. The explanation failed to identify the use EFL made by lending to borrower 1 and borrower 2 (and was inconsistent with that use). It was incomplete in failing to identify that the funds had been used to pay £180,000 in fees to Jirehouse and in funding the retention amount. In the latter respect, the disclosure was misleading by omission, particularly in light of the reference to the retention funds in the preceding paragraph, which gave the impression (wrongly) that those were the funds held as retention monies since April 2018.

72. In determining whether the breach was deliberate, the critical question is whether Mr Jones was aware of these further matters, which he failed to disclose in his second affidavit, at the time that he swore that affidavit.

73. For the reasons which follow, I am satisfied so as to be sure (to the criminal standard of proof) that Mr Jones all along (and certainly by the time of his second affidavit) knew of the loan to EFL and the loans from EFL to borrower 1 and borrower 2, and the uses to which the funds drawn down under the Dragonfly Facility had been put.

74. First, there is compelling evidence that EAML and EFL were effectively controlled by Jirehouse. Thus, in the Jirehouse retainer letter dated 24 May 2018, EAML was described as "affiliated" to Jirehouse, and Jirehouse stated that it had "employed on your behalf as a front-facing buyer" EAML. EAML's registered office is at 7 John Street, the office address of Jirehouse. Mr Jones described EAML, in an email to Mr Hinkle of the claimant on 27 December 2018, as "effectively an internally controlled vehicle (in a loose sense) … it has Jirehouse appointed UK directors, and Jirehouse Secretaries provides banking support services."

75. Mr Jones, in a telephone call with Gibson Dunn – the claimant's then solicitors - said that there was a business relationship between Jirehouse and the "Esquiline companies" and that the people behind them are "not arm's length" from Jirehouse.

76. Mr Clark has provided a witness statement dated 22 March 2019 on behalf of EAML in response to the freezing injunction obtained against it. He explained that EAML was dormant at the time of the transaction. He said he was currently the only director. However, and importantly, the information which he gave about EAML all came from Mr Jones. He said Mr Jones had told him that EAML had no bank account of its own, and that it paid and received funds through EFL. His only knowledge of the use by EFL of the funds received on behalf of EAML for short-term investments derived from Mr Jones and his affidavit.

77. Second, the very fact that Mr Jones designed the transaction by inserting EAML as the entity to effect the purchase indicates that he was in a position to assert control over it. It was certainly not an entity within the control of the claimant.

78. Third, it is impossible to believe that Mr Jones was *unaware* that the purchase monies had been paid away by EAML. He is (as Mr Halpern accepted) synonymous with Jirehouse. It is inconceivable that he did not know that the purchase monies were no longer available. The surreptitious replacement of the retention fund by use of the Dragonfly Facility cannot have been done without his knowledge.

79. Fourth, this is in any event the obvious inference from the series of excuses given by Mr Jones between December 2018 and March 2019 for the inability to transfer the Surplus Funds. I ask rhetorically, why lie about the existence of client monies held in an account for the benefit of EAML, and why create elaborate excuses for the non-transfer of funds, unless he knew that the funds had already been removed? Given the relationship between Jirehouse and the Esquiline companies, as described above, if Mr Jones knew the money was not where it should have been, then it beggars belief that he did not know what had happened to it.

80. Fifth, when Mr Jones did provide information about EFL, and the lending to "borrower 1" and "borrower 2", although he sought to give the impression that

this was information he had only recently acquired, his failure to state in terms when, how and from whom he acquired the information leads to the clear inference – in the absence of any other explanation – that he knew all along.

81. Sixth, so far as the use of the money drawn down under the Dragonfly facility is concerned, since £180,000 was used to pay Jirehouse's own fees, it is inconceivable that Mr Jones was not aware of this at the time it happened (in February 2019). Similarly, it is impossible to see how he was unaware of the use of those monies to fund the retention amount – which in itself demonstrates that he must have known that *that* part (at least) of the monies paid in April 2018 had not been used to fund the retention amount.

82. Seventh, Mr Jones' failure to offer himself for cross-examination leads me to infer that the reason he will not do so is because he cannot honestly resist each of the inferences I draw above. It is appropriate to draw that inference in light of the following:

(1) First, there are manifest gaps in the evidence provided by Mr Jones.

(2) Second, the affidavits of Mr Jones are defective in critical respects, particularly in their failure to identify the sources of information.

(3) Third, Mr Jones has been put on notice of the inference the claimant draws as to his involvement in, and knowledge of the actions of EAML and EFL, and challenged to say whether he disputes this, but has failed to provide any response.

(4) Fourth, the formal – but important – defects in his affidavits have been pointed out to him, and he has been given the opportunity to correct them, but failed to do so.

(5) Fifth, as I have described already, Mr Jones consistently gave explanations for the delay in transfer of the Surplus Funds, between December 2018 and March 2019, which he must have known were false and has admitted, in one respect, misleading the court on 15th March 2019. This behaviour itself raises a serious question over the extent to which his evidence can be relied on, to require the gaps in it and the obvious inference as to his knowledge of EAML's and EFL's activities, which were pointed out to him, to be addressed.

83. There is one additional matter to which I need to refer. During a break in the hearing in the afternoon of the second day, I received an unsolicited email which I picked up on my mobile phone. Not immediately realising who the sender was (Henry Anderson) or associating him with the Henry Anderson that had been referred to that afternoon in the hearing (as I explain below), I read the email sufficiently to realise that it was indeed the same Henry Anderson and that he was purporting to tell me that Mr Jones was in effective control of the Esquiline companies and that it attached a document which was said to demonstrate that. I stopped reading the email at that point, and have not looked at it again, nor opened the attachment. I caused the email to be forwarded as soon as possible to the parties' counsel via my clerk.

84. At the start of the third day of the hearing, I heard submissions from the parties on the consequences of the receipt of the email. I leave aside for the moment the fact that it clearly should never have been sent to me, and the consequences which flow from that for Mr Anderson and any other party. Mr Halpern and Ms Felix both stressed to me the serious prejudicial effect which such an email could have on the court. Ms Felix submitted that the subject matter of the email went to the heart of the matter, namely the extent to which Mr Jones was aware of the actions of EAML and EFL. No application was made that I should recuse myself, but both counsel left it to me to decide whether I should nevertheless do so.

85. I am satisfied that I am able to put the email and its contents out of my mind, such that it has no impact on my findings of fact, and that it was appropriate therefore to proceed to hear and determine this application. That is particularly so in the following circumstances.

86. The email arrived at a very late stage in the hearing, after I had pre-read the evidence and the skeleton arguments of Counsel, and after I had heard all but an insignificant part of the oral submissions relating to the issue of Mr Jones' knowledge of the actions of EAML and EFL. It was immediately apparent, from my initial pre-reading alone, that this was a key issue. It was one on which I was developing provisional views as the case progressed.

87. An important factor is that Mr Jones himself (as I have indicated above) did not make any positive case that he was unaware of the relevant matters at the time he swore his second and third affidavits, but sought to paint a picture that he had only recently discovered matters by giving evidence in the (defective) form of – for example – "I now understand…". Ms Felix's submissions – which she made prior to my receipt of the email – touched only very lightly on the question of Mr Jones' knowledge. I put to her that I had not heard any real answer to the point that there was a deliberate breach of Mr Jones' disclosure undertaking prior to provision of his third affidavit. In response, she accepted that Mr Jones' evidence did not contain any statement to the effect that he did not know of the matters contained in his third affidavit at the time he swore his second affidavit. She did not feel able to respond by reference to any of the evidence adduced by the claimant going to this point, saying: "I don't think I can put it any higher than that which is contained in the documents", referring to Mr Jones' affidavits. I heard no other submissions (save for assertions about what might be in documents provided confidentially to the claimant at the end of May, to which I refer below) which engaged with the evidence adduced by the claimant on the basis of which I was asked to reach conclusions on this issue.

88. In short, before receipt of the email, I had heard nothing to dislodge the provisional views I had formed as to Mr Jones' state of knowledge at the time he provided his second and third affidavits on the basis of reading the evidence and the submissions made by Mr Levey. In those circumstances, I have no difficulty in concluding that I am able to put the email out of my mind in reaching the conclusions I have as to Mr Jones' knowledge relating to EAML and EFL.

89. I accept the submission of Ms Felix that a charge of contempt cannot be supported by the mere fact that Mr Jones has chosen not to give evidence. It is his right not to do so. In order to draw adverse inferences from his failure to give evidence

there must first be made out a sufficient case that requires an answer. In my judgment, for the reasons I have already given, the claimant has made out a very strong case to answer, in light of which I have no alternative but to draw the above adverse inferences from Mr Jones' decision not to offer himself for cross-examination.

90. Ms Felix additionally submitted that there is a public interest in ensuring that proceedings to enforce orders and undertakings are not brought unless they pass a threshold of seriousness. In other words, the court should ensure that what she refers to as the claimant's "power" to bring contempt proceedings is not being abused. She provided no authority to support that proposition, other than authorities demonstrating that the real nature of the offence of contempt is the interference with the administration of justice. I reject the contention that there is such a threshold – otherwise than in contempt proceedings based directly on interference with the due administration of justice, in which case there is an express requirement for permission to bring the proceedings. The absence of such a requirement where the contempt alleged is a breach of orders or undertakings indicates that there is no such threshold. In any event, for the reasons I have given, I regard the breach of an undertaking given in circumstances where the contemnor knew that the undertaking as offered could not be complied with, and in the undisclosed hope of obtaining funding from others, as a very serious matter.

Continuing failure to disclose following service of Mr Jones' third affidavit

91. The next question is whether Mr Jones fully cured the defects in disclosure, and thus purged his contempt, by his third affidavit.

92. I am satisfied so as to be sure that he did not.

93. In the first place, the following are obvious and glaring deficiencies:

(1) The failure to identify borrower 1 and borrower 2

(2) The failure to identify the dates of the payments to each of them

(3) The failure to identify the bank accounts to which payments were made

(4) The failure to provide any details of the terms of the loan notes by which the funds were loaned by EAML to EFL.

(5) The failure to provide any details of the dates, or terms, of the loan agreements between EFL and borrowers 1 and 2.

94. These are all matters that fall within the parameters of an explanation of how the Surplus Funds had been dealt with and what happened to the money drawn down under the Dragonfly Facility. Moreover, they are all critical items of information for a claimant seeking to police a freezing order, let alone a claimant with a proprietary claim to the missing funds.

95. For the reasons I set out above, I am satisfied so as to be sure that Mr Jones knew these further details all along. Even if not, at the very least he had the means of finding them out, given his relationship with EAML and EFL as I have found

above, such that he could not be said to have provided information "to the best of his ability". In part, Mr Jones admits as much, in that he says in his third affidavit that he has in his possession the accounting ledgers of EFL. Accordingly, I conclude that there was a continuing deliberate breach of the disclosure undertakings following service of his third affidavit.

Continuing failure to disclose

96. On 31 May 2019 Mr Jones, through Mr Henry Anderson as intermediary supplied certain documents to the claimant. I have not been shown these documents. Mr Jones referred in his fourth affidavit (dated 5 June 2019) to the fact of documents having been provided to the claimant and said that they "contained over 10 pages of Excel spreadsheets containing various detailed account ledgers that I put together in order to assist the Claimant in these proceedings."

97. He did not otherwise say what this information disclosed, nor did he exhibit the documents or purport to verify the truth of whatever it was they might show.

98. It is common ground that the documents were provided on a without prejudice basis, meaning that the claimant was not permitted to use them for any purpose, nor refer to their contents in evidence or before the court.

99. However, in paragraph 10 of his fourth affidavit, Mr Jones said that because the documents contained "client confidentiality" he did not wish to file them with court, but he had provided copies to his solicitors and instructed them to ensure that copies were available to be shown to the Court at the hearing of the contempt application.

100. In a letter dated 20 June 2019 from Jirehouse's solicitors to the claimant's solicitors, Jirehouse offered to provide the information provided via Mr Anderson, "on an open basis but subject to confidentiality restrictions." The claimant's solicitors responded on 24 June 2019, pointing out that Jirehouse was required to provide the information to the best of its abilities and that the information was not to be withheld on grounds of confidentiality. They continued: "It follows that our clients are not willing to make any proposals that would lead to any further information being provided on a confidential basis. To do so would defeat the purpose of the orders, which was to assist our clients to trace and preserve their monies."

101. On 8 July 2019 Jirehouse's solicitors repeated the offer to make the information available on an open basis, but "on the basis that it is used only for the purposes of [these proceedings] and is not disclosed to any party other than the current parties to the … proceedings. The need for confidentiality arises because the information in question contains confidential details regarding other clients of the Jirehouse Entities."

102. The claimants did not accept those restrictions and that is where the matter lay. The only additional matter is that on the third day of the hearing the Court was told that the information provided via Mr Anderson did purport to disclose the identities of borrower 1 and borrower 2.

103. During the hearing, towards the close of her submissions, Ms Felix indicated that she wished the Court to receive the documents provided on 31 May 2019 to Mr Anderson, but on the basis that they were kept confidential, in other words that no reference was made to their contents in open court and they were not placed on the Court file. After some debate as to the issues this raised (in particular the importance of the open justice principle in the context of applications for committal – see the Practice Direction to CPR Part 81), Ms Felix accepted that while her primary case was that Mr Jones had – by his third affidavit – fully complied with his disclosure obligations, if that was wrong then she would wish, in the alternative, to rely upon the materials disclosed via Mr Anderson as having purged Mr Jones' contempt. She accepted, given that the undertakings and order required not only the provision of information but that it be confirmed on affidavit, that Mr Jones would need to apply to adduce further (very late) evidence by way of affidavit to deal with this information and to vary the terms of the undertakings and order to permit him to provide information subject to restrictions on its use which went beyond those already implied by law. She maintained that the application itself would need to be heard in private. That was how matters were left at the end of the second day of the trial, after the completion of all submissions relating to the case as it stood without reference to this further material.

104. At the beginning of the third day of the trial, Ms Felix asked for further time, because the proposed evidence was not yet ready. The intention then was to make an application that I sit in private to consider whether it was appropriate to allow the materials to be provided confidentially. I had indicated that I was prepared to sit in private for the limited purpose of considering that application. I therefore adjourned until 2pm. At 2pm Ms Felix said that she was no longer proposing to adduce further evidence at this stage, and that no application would therefore be made. She did not rule out, however, making some sort of application at a later stage. As I pointed out during the hearing, if Mr Jones were to be found to be in contempt, and that contempt was continuing, then it was open to him at any time to purge his contempt by providing further information.

105. Accordingly, the present position is as follows:

(1) Mr Jones has provided, on a basis that the claimant is currently not permitted to make any use of it, the identity of borrower 1 and borrower 2, and certain other unspecified information;

(2) Although Jirehouse offered the claimant the ability to use the information, that was only on the basis that it was kept confidential and was not used save for the purposes of the existing proceedings; importantly it could not be used for the purpose of bringing any action against any person, for the purposes of enforcing the claimant's claim to the misappropriated funds, who was not already a party to these proceedings;

(3) Mr Jones has refused to verify whatever information he provided via Mr Anderson by an affidavit.

106. In my judgment, it follows that Mr Jones has not purged his contempt, which therefore continues. I have to proceed on the basis, given Mr Jones has chosen

not to disclose this further information to the court, that he has not provided information which he has, and which falls within the parameters of the undertakings (other than the fact that it discloses the names of borrowers 1 and 2, albeit in circumstances that at present means the claimant cannot make use of it) necessary to comply with his obligation to disclose what happened to the funds to the best of his ability. He is clearly in continuing breach of the obligation to verify the information on affidavit.

BREACH BY NON-PAYMENT

Preliminary point: the Debtors Act 1869

107. Mr Halpern QC, on behalf of Jirehouse, on the eve of the hearing, raised a new point, namely that no order committing Mr Jones to prison can be made for breach of the payment obligations. CPR81.4(1) provides that if a person (among other things) disobeys an order requiring him to do an act within the time fixed by the judgment, then "*subject to the Debtors Acts 1869 and 1878* … the judgment or order may be enforced by an order for committal."

108. The Debtors Act 1869, s.4, provides that "with the exceptions hereinafter-mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money." None of the exceptions could possibly apply to this case except for the third: "default by a trustee or a person acting in a fiduciary capacity and ordered to pay a court of equity any sum under his possession or under his control".

109. In light of the decision in *Prosser v Prosser* [2011] EWHC 2172 (Ch), however, Mr Halpern fairly conceded that the Debtors Act was no answer to the undertaking in relation to the Surplus Monies. The ratio of Vos J's decision in the *Prosser* case is to be found in [102] of his judgment: "where there is an order for the payment of money or the giving of security, but not the payment of an ordinary debt and not the payment of money directly to the claimant, then section 4 of the Debtors Act is not engaged."

110. He reached this conclusion in light of the Court of Appeal decision in *Bates v Bates* [1888] 14 Probate Division 17. In that case, Cotton LJ emphasised that the purpose of the Debtors Act was to prevent the imprisonment of persons for non-payment of ordinary debts. I accept that the wording of s.4 is wider than "ordinary debts" and refers to "payment of a sum of money". Nevertheless, in considering whether the Act applies to a specific case, it is important to recognise its purpose.

111. Mr Halpern maintains that the Debtors Act applies to the undertaking in respect of the monies drawn down under the Dragonfly Facility, because that was an undertaking to repay money to Dragonfly. I disagree. The first task is to construe the undertaking. As I have pointed out, it was given in circumstances where Mr Jones had assured the court that the funds drawn down under the facility were sitting in a separate account with Hambros and that those funds were available to be transferred to Dragonfly (subject only to there being any problem arising from the terms of the facility itself). In my judgment, the undertaking to "procure" that the facility was discharged is to be understood as an undertaking to procure that the funds so described would be transferred to Dragonfly. There is no question, therefore, of Mr Jones being required to "pay" a debt which he owed, nor of

paying anything from his own funds. Ms Felix made much of the point that the claimant would no doubt have been content if *any* money had been procured by Mr Jones, including from his own funds. I suspect that is correct, but there is an important difference between what the claimant would have been content with and what the undertaking, properly construed, required. The purpose of the Debtors Act is clearly not engaged in these circumstances.

112. If I had found that the Debtors Act applied, I would in any event have found that the third exception in s.4 applied. Mr Jones undertook to procure that the Surplus Funds – which are identified as being in an account with EAML for the benefit of Jirehouse – be paid into court. Mr Jones as a director of Jirehouse is clearly in a fiduciary position as regards Jirehouse. Insofar as it is sought to commit him for Jirehouse's failure to comply with the undertaking, that is precisely because he was the person able to control what Jirehouse (to whom he owes fiduciary duties) does. I would also have rejected, in that event, the submission that the Application Notice was defective because it failed to specify which of the exceptions in the Debtors Act was said to apply.

Breach of the undertaking

113. Turning to the substance of the breach, as I have already noted, there is no doubt that Mr Jones breached the payment undertakings.

114. Ms Felix, however, contends that at the time he gave the undertakings, Mr Jones believed he would be able to comply with them and that when it became apparent that he could not comply, he immediately informed the court. Thereafter, while there has never been an application to be released from the undertakings, that is a technicality given the fact that Nugee J, on being told on 18 March 2019 that it was impossible for Mr Jones to comply with the undertaking, and that Mr Jones therefore sought the court's mercy, said "yes, well I think that has to be the position" and went on to grant the very freezing order which the claimant had been seeking on the previous Friday, but which Jirehouse and Mr Jones had managed to avoid by offering the undertakings.

115. I should first say that I accept that the reality of the case is that from Monday 18 March 2019, Mr Jones' failure to comply with the Surplus Funds undertaking had been – in substance - established and his continuing failure to comply thereafter does not have any exacerbating effect. The same is true of the undertaking relating to the Dragonfly Facility undertaking, at least from 22 March. Accordingly, I deal with the breach of the payment undertakings on the basis that the vice contained in the breach was apparent on 18 March 2019, and is no worse because they were not complied with subsequently. Importantly, I do not think this can be described as a case of continuing breach, given the events on 18 March.

116. That does not, however, excuse Mr Jones altogether from the consequences of the breach.

117. Ms Felix contends that there should be no consequences, because the mental element required of a contemnor cannot be established. She relies on *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch), in which Briggs J said, at [32]-[33]

> "32. By contrast, I accept the thrust of Mr Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see A*dam Phones v. Goldschmidt* [1999] 4 All ER 486 at 492j to 494j.
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> 33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court."

118. In my judgment, however, there is an important difference between a case where it subsequently transpires that compliance was impossible and a case where an undertaking was given in circumstances where the contemnor knew compliance was impossible, or was reckless as to whether compliance was possible and nevertheless gave an unqualified undertaking.

119. Mr Levey relies in this respect on *Citadel v Thompson* [1999] 1 FLR 21. In that case, a solicitor, Mr Thompson, acting on behalf of his client, Equal Ltd, gave an undertaking to Citadel to make certain payments to it, in return for a payment from Citadel into his firm's client account. The money was paid by Citadel, but Mr Thompson failed to comply with the undertaking. Citadel applied to enforce that undertaking. At a hearing before HHJ Hordern Mr Thompson assured the court that he was in a position to make the required payment. The court ordered him to do so, but he did not comply.

120. Citadel then applied to commit Mr Thompson for contempt. At the hearing before Rougier J, Mr Thompson again assured the court that he would be able to comply with the undertaking if he were given more time to do so. Rougier J ordered that Mr Thompson be committed to prison for 6 months, but suspended the order to allow Mr Thompson the time he said he needed to make the payment. Again, Mr Thompson did not pay. When the matter came back before Wright J, he required Mr Thompson to serve the sentence that had been suspended by Rougier J.

121. On appeal, Mr Thompson contended that he had been lied to by his client as to the availability of the funds. His case was, in essence, that it was impossible for him to comply with the undertaking and that, due to his client's deception, this was unknown to him when he gave it. He contended that if HHJ Hordern or Rougier J had known that payment was never possible, they would not have made the orders that they did. The Court of Appeal rejected that argument, describing it (per Buxton LJ at p.28) as "very striking" and involving saying that "Rougier J's order should be set aside or, alternatively, not be implemented because the assurances as

to the possibility of performance the solicitor had given to Judge Hordern and to Rougier J were in fact unfounded."

122. At p.29, Buxton LJ said:

> "The undertaking in this case was based on a representation by a solicitor and repeated by him to the court that made the original order. The alleged 'impossibility' does not spring from a state of affairs or turn of events external to the solicitor, but rather is based on a contention that the solicitor now finds that he cannot perform acts which he assured the court he could perform.
>
> The alleged impossibility is thus the inability of the solicitor to do what he assured the court who made the order enforcing the undertaking that he could in fact do. I do not think that a solicitor can be heard to assert that as a reason why he should not suffer the penalty for breach of an order that was properly made on the basis of those assurances."

123. Judge LJ, in a concurring judgment, said at p.35:

> "When a solicitor has given a personal undertaking and persuades the court to make an order which he subsequently asserts is impossible to perform, he should not expect to be excused from the consequences of non-compliance if he deliberately elected to conceal that the performance of the undertaking or the orders was dependent wholly or in part on the activities of others."

124. It is true that Mr Thompson, in that case, maintained the assurance over some weeks, and on two different occasions before the court. That is a distinction between the *Citadel* case and the present which may go to the question of appropriate sanction, but it does not in my judgment go to the question of whether the failure to comply was a contempt in the first place.

125. It is necessary, therefore, to seek to determine (to the requisite standard of proof) Mr Jones' state of mind at the time he gave the undertaking on Friday 15 March.

126. Ms Felix makes a preliminary point, based on the practice direction to CPR part 81, at para 2.2, which provides that the court may decline to deal with disobedience in respect of an undertaking by contempt proceedings, unless the party giving the undertaking had made a signed statement to the effect that he understood the terms of the undertaking and the consequences of failure to comply with it. Reliance is placed on another passage in the judgment of Vos J in *Prosser v Prosser* (above) – dealing with the related question of enforcing a court order by contempt proceedings where the order did not contain a penal notice. Vos J (at [107]) framed the relevant question as being whether the contemnor understood the seriousness of breaching the order. Ms Felix accepted that this was the relevant question.

127. In this respect, she fairly accepted that Mr Jones undoubtedly understood the seriousness, and the serious consequences which flow from breach of, an undertaking to the court. He expressly said so in his email to the Court on 18 March 2019. She contends, however, that there is sufficient evidence to create a

reasonable doubt as to whether Mr Jones appreciated, until the court order of 15 March was sealed on the following Monday, that he had given any undertakings at all. She relies on two matters.

128. The first is the terms of Mr Jones' email of 18 March, where he said that in light of the serious consequences of an undertaking, it would be wrong for him to give one in circumstances where he would be in immediate breach. That suggested, Ms Felix contends, that he did not understand that he had already given such an undertaking. The second is that in the course of this hearing Mr Levey for the claimant said that there had been uncertainty whether an undertaking had in fact been given at all on Friday 15 March until they obtained a copy of the transcript of the hearing, which was sometime on the following Monday. So far as this latter point is concerned, I consider there is nothing in it. Mr Levey said in reply that what he meant was that while he had been absolutely clear that undertakings had been given, it was not until he received the transcript that he recalled that Nugee J had in terms said, on the Friday (in the context that there was to be a delay in drawing up the order), that the undertakings "had been given".

129. The transcript of the hearing on Friday 15 March demonstrates clearly, in my judgment, that undertakings were on that occasion given to the court, and that the judge expressly acknowledged that to be the case. Mr Jones has produced no evidence to the effect that he did not understand that he had given the undertakings. In his second affidavit he said (at paragraph 8) "I immediately apologised to the court by email dated 18th March 2019 … when I realised I could not fulfil paragraph (1) of the Undertaking Order." If his evidence is that he did not understand he was subject to an undertaking at all, then this would have been the obvious place to say so.

130. While the burden of course lies on the claimant to establish beyond reasonable doubt that Mr Jones was aware that he *had* given the undertaking on the Friday, I consider that the terms of the transcript provide compelling evidence that Mr Jones was so aware. That is reinforced by the fact that he was represented by experienced Leading Counsel, who one would expect would have ensured that Mr Jones understood the seriousness of giving undertakings to the court. If Mr Jones wishes to displace the obvious inference that he knew he had given the undertakings, then it is for him at the very least to give some evidence to that effect. Despite serving evidence in relation to this application, he has not done so.

131. I do not regard the one piece of evidence that Ms Felix pointed to – Mr Jones' email of 18 March – as displacing that conclusion. As Mr Levey pointed out, that was a self-serving email, clearly intended to induce the Court to be merciful. Its first line (referring to the undertakings – to be finalised over the weekend) was manifestly false, as his Leading Counsel frankly acknowledged at the hearing on 18 March. Accordingly, I am satisfied so as to be sure that Mr Jones knew full well on the Friday that he was giving an undertaking to the court, and knew of the seriousness of doing so.

132. In considering Mr Jones' state of mind as regards his ability to comply with the payment undertakings, the starting point is to construe the undertakings.

133. I have already concluded that in relation to the Dragonfly Facility, the undertaking is to be construed as requiring the transfer of the funds identified on the Friday as held in a Hambros account. In my judgment, the same is true of the Surplus Funds undertaking. That is because the undertaking was given in the context that Mr Jones – through his Counsel – told the court that those funds were held for EAML and that they could be called within 48 hours' notice to the bank. The timing for compliance being set for Tuesday 19 March is consistent with the intention clearly being that *those very funds* would be transferred under the undertaking.

134. Mr Jones' evidence (as I have mentioned) is that he hoped that the client for whom the Hambros funds were actually held would agree to them being used, or that Mr Brown would agree to fund the payments himself. Mr Jones has refused to disclose who was the other client to whom the Hambros money belonged. He has refused to say how he believed, on the Friday, that the money was available and why that was not the case by the Monday.

135. So far as Mr Brown is concerned, although Mr Brown has produced an affidavit he has not been tendered for cross-examination. Henry Carr J gave permission to Mr Jones to rely on an additional witness statement of Mr Brown but ruled that Mr Jones could not rely on that statement unless Mr Brown was tendered for cross-examination at the resumed hearing. Accordingly, I disregard this evidence.

136. Nevertheless, the claimant is prepared to accept that Mr Jones did have such a hope. Indeed, as Ms Felix pointed out, in the absence of some such hope there would have been no point in offering the undertaking, merely to withdraw it the next working day. It is common ground that Mr Jones' purpose in providing the undertaking was to avoid a freezing injunction, the inevitable consequence of which would have been the closure of his firm: no solicitors' firm can operate with its client accounts frozen.

137. Whether or not Mr Jones hoped to be able to satisfy the undertaking by persuading one or other third party to make funds available to EAML, he said nothing of this to the court. Again, he could not have done so, since it would have revealed the fact that Surplus Funds had been misappropriated.

138. In my judgment, this provides the key to understanding Mr Jones' intentions on the Friday. If he wanted to avoid a freezing order then he simply *had* to tell the court that the Surplus Funds were held in the Hambros (or some other) account *for the benefit of EAML* (something he admitted on the following Monday was not true). Had he revealed the truth (that the funds had been paid away to EFL, and loaned to borrowers 1 and 2 long ago) then his excuses for the delay in payment over the preceding months would have been revealed as lies, and there would have been no possible way of avoiding a freezing injunction.

139. The very strong inference to draw from this is that Mr Jones fully understood that he was giving an undertaking to procure that the Surplus Funds which he had told the court were held for EAML were paid into court within 48 hours. Mr Jones' refusal to offer himself for cross-examination means that there is no evidence from him to resist that inference. Accordingly, I am satisfied so as to be sure that Mr Jones did know and intend that the undertaking he gave would be understood

as one to procure that funds belonging to EAML would be paid into court. I am also satisfied so as to be sure that he knew that was not possible at the time he gave it. (In relation to Mr Jones' knowledge that the funds had been loaned, via EFL, to borrowers 1 and 2, and were thus not available, I refer to my conclusions above when considering the breaches relating to disclosure.)

140. I nevertheless accept that Mr Jones hoped that he could persuade either the other client or Mr Brown to provide the necessary funds. That, however, provides no defence to a claim to enforce the undertakings by contempt proceedings. It is recklessness of a greater amount than that of Mr Thompson in the Citadel case. Paraphrasing the words of Judge LJ, Mr Jones should not expect to be excused from the consequences of non-compliance if he deliberately elected to conceal that the performance of the undertaking or the orders was dependent on whether one or other third party would be willing to provide funding.

CONCLUSION

141. For the reasons set out above, I conclude as follows, by reference to the grounds set out in the Application Notice.

Ground A1

142. I find that Mr Jones breached the undertaking to procure that the sum of US$9.3 million (or the sterling equivalent) and any interest thereon, be paid into Court.

143. I find that he intended the undertaking to be understood as relating to the funds which he had told the Court (through Counsel) on 15 March 2019 were held for the benefit of EAML in an account at Hambros Private Bank.

144. I find that he knew that it was impossible for him to comply with the undertaking understood in that sense.

145. I further find that if and to the extent that he hoped that either another client of Jirehouse with funds at Hambros Private Bank would make those funds available to EAML, or that Mr Brown would do so, that does not excuse his non-compliance with the undertaking.

146. Accordingly, I conclude that this ground of contempt is established.

Ground A2

147. I find that Mr Jones breached the undertaking to procure repayment of the full outstanding balance under the Dragonfly Facility, including any costs and charges associated with repayment.

148. I find that he intended the undertaking to be understood as relating to the funds which he had told the Court (through Counsel) on 15 March 2019 were held in a separate account at Hambros Private Bank.

149. I find that he knew that it was impossible for him to comply with the undertaking understood in that sense.

150. I further find that if and to the extent that he hoped that either another client of Jirehouse with funds at Hambros Private Bank would make those funds available to EAML, or that Mr Brown would do so, that does not excuse his non-compliance with the undertaking.

151. Accordingly, I conclude that this ground of contempt is established.

Grounds B3 and B4

152. I find that Mr Jones failed to comply with the undertaking at Recital 6(v) of Order of 15 March 2019 and the order at paragraph 10A(1)(iv) of the Order of 18 March 2019 to provide to the best of his ability details as to what had happened to the monies drawn down under the Dragonfly Facility since the date of their drawdown no 12 February 2019.

153. I find that Mr Jones failed to comply with the undertaking at Recital 6(iii) of the Order of 15 March 2019 and the order at paragraph 10A(1)(iii) of the Order of 18 March 2019 to explain to the best of his ability how the Surplus Funds had been dealt with since 6 December 2018.

154. In relation to each of Grounds B3 and B4, I find that the breach was deliberate, in that Mr Jones was aware of further information falling within the requirements of each undertaking and order, and that such information was required to be provided under their terms, both (1) following the service of his second affidavit; and (2) following the service of his third affidavit. I further find that he is in continuing deliberate breach of both undertakings/orders for the reasons set out at paragraphs 96 to 106 above.

155. Accordingly, I conclude that these grounds of contempt are established.