Neutral Citation No. [2013] NICH 2 | *Ref:* **McCL8699**

Judgment: approved by the Court for handing down | *Delivered:* **11/01/13**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE INSOLVENCY (NI) ORDER 1989

IN THE MATTER OF DEMESNE INVESTMENTS

Between:

QUINN FINANCE

- and-

IRISH BANK RESOLUTION CORPORATION LIMITED

- and-

QUINN HOTELS PRAHA AS

Applicants;

- and-

LYNDHURST DEVELOPMENT TRADING SA

- and-

DMYTRO ZAITSEV

-and-

OLEKSANDR SERPOKRYLOV

Respondents.

JUDGMENT: CONTEMPT

McCLOSKEY J

Introduction

[1] This judgment determines the contempt motion brought by the Plaintiffs against Lyndhurst Development Trading SA ("*Lyndhurst*"), Dmytro Zaitsev ("*the second Respondent/Mr Z*") and Oleksandr Serpokrylov ("*the third*

Respondent/Mr S"). I shall describe the Plaintiffs as "*the moving parties*" throughout this judgment.

The Substantive Proceedings

[2] The subject matter of the moving parties' claims is two impugned assignments and two related "supplementary loan agreements" (described hereinafter as "*the impugned instruments*"). The moving parties made the case that these were unlawful and sought relief accordingly, under Article 367 of the Insolvency (Northern Ireland) Order 1989 and otherwise. Lyndhurst, the first-named Respondent hereto, is one of three Defendants in the main proceedings. The other two Defendants are Innishmore Consultancy Limited ("*Innishmore*") and Public Joint Stock Company Univermag Ukraina ("*Univermag*"). Mr Z and Mr S, the second and third Respondents to the contempt application, are not parties to the main proceedings. They are alleged to have been acting as Lyndhurst's agents at the material time. This is not in dispute and, in any event, is clearly established by the evidence.

The Mareva Injunction

[3] The impetus for the contempt motion is an order of this court, in the form of a Mareva injunction, made by me on 23rd December 2011. I shall describe this as "*the Mareva injunction*". It was made *ex parte* on the application of the moving parties and was directed to Lyndhurst only, in the following terms:

> "… The first Defendant including its directors and officers and servants or agents or any of them …".

For convenience, I shall describe "*directors and officers and servants or agents*" as "*Lyndhurst's agents*".

By the terms of the injunction, Lyndhurst and its agents were restrained from:

(a) Taking any steps to assign, sell or otherwise transfer or deal in any way whatsoever with any of the impugned instruments and/or any judgment of any court arising therefrom.

(b) Without prejudice to (a), assigning the legal or beneficial interest in any of the impugned instruments or, alternatively, charging, encumbering or otherwise dealing with or devaluing or taking any steps calculated or intended to prevent or obstruct the moving parties from applying to the court in order to set them aside.

(c) Seeking to rely upon, demand payment or otherwise enforce any of the impugned instruments, to include seeking to enforce the said impugned instruments against Univermag or otherwise from receiving payment of any monies pursuant to their terms.

(d) Discharging, using, paying out or otherwise dealing with any monies remitted to the first Defendant on foot of any of the impugned instruments.

The Mareva injunction further mandated that Lyndhurst and its agents retain and hold any monies remitted or paid to Lyndhurst or its agents on foot of any of the impugned instruments. The latter are described and particularised in an appendix to the injunction. In the usual way, the injunction further provided that Lyndhurst could apply to this court at any time to vary or discharge its terms, upon giving 48 hours minimum advance notice to the moving parties' solicitors. Finally, the injunction specified that the case would be reviewed by the court on 30th December 2011 and again on 5th January 2012.

[4] Under the umbrella "The Effect of this Order", the Mareva injunction further provided:

> "…[2] A defendant who is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any other way …
>
> [4] The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court:
>
> (a) The first Defendant including its directors and officers and servants or agents or agent appointed by power of attorney".

The injunction also recited the affidavits which the court had considered prior to making the order, identifying each deponent and the date of each affidavit. It further recorded the following undertaking given to the court by the moving parties:

> "If the court later finds that this order has caused loss to the first Defendant and decides that the first Defendant should be compensated for that loss, the Plaintiffs will comply with any order the court may make."

Under the rubric "Service of this Order and of the documents", the Mareva injunction provided:

> "The court grants leave to serve this order outside the jurisdiction of Northern Ireland by electronic communication for any legitimate and bona fide purpose".

The first substantive paragraph in the injunction was entitled "Notice to the First Defendant" and stated:

> "(1) This order prohibits you from doing the acts set out in this order. You should read it all carefully. You are advised to consult a solicitor as soon as possible. You have a right to ask the court to vary or to discharge this order.
>
> (2) **If you disobey this order you may be found guilty of contempt of court and may be sent to prison or fined or your assets may be seized**."

[My emphasis].

The next succeeding paragraph is couched in the following terms:

> "An application was made on 22nd December 2011 by counsel for the Plaintiff to the judge. The judge heard the application and read the affidavits referred to in Schedule 1 and accepted the undertaking in Schedule 2 at the end of this Order".

The form and appearance of the injunction accord with the customary formality and solemnity of orders of this kind. Furthermore, the first page of the injunction bears the formal stamp of the Court of Judicature of Northern Ireland; records that the matter was heard in the High Court of Justice in Northern Ireland, Chancery Division; recites the Insolvency (NI) Order 1989; identifies the presiding judge; and bears the date of the hearing (23rd December 2011).

Some Background

[5] I shall, firstly, provide a resume of the affidavit evidence considered by the court *ex parte* when making the injunction. This evidence included, in particular, an affidavit sworn by Robert Dix, who describes himself as a director and the chairman of Quinn Finance, an unlimited company incorporated in Ireland. He is also a director of other companies belonging to

the Quinn International Property Group ("*the Group*"). One of these companies is Demesne Investments Limited ("*Demesne*"), while another is Quinn International Property Management Limited ("*QIPM"*). He explains that until 14th April 2011 the Group was under control of members of the Quinn family, financed by borrowings from Irish Bank Resolution Corporation Limited ("*IBRC*") or its predecessor. As part of the financing arrangements, IBRC held securities over certain assets of the Group, together with certain share charges. Quinn Finance operated as a treasury vehicle for other members of the Group, arranging loans and finance for them as and when necessary. Demesne is registered in Northern Ireland and is a wholly owned subsidiary of Quinn Finance. Members of the Group have properties in various foreign jurisdictions, including the Ukraine. As part of a comprehensive review of the assets, liabilities and financial viability of members of the Quinn Group, it was established that Demesne's principal assets and liabilities were, respectively, debts due to it by other companies in the Group and vice versa. As of 31st March 2011, one of the debts due to Demesne was in the sum of almost £29,000,000, owing by Univermag, a company registered in the Ukraine and the owner of a shopping centre in Kiev with an estimated value of USD63,000,000.

[6] Enter Innishmore: the latter is described as a company registered in Northern Ireland. Its sole director and legal owner of the entire issued share capital is Peter Quinn, a nephew of Sean Quinn. On 6th April 2011, Demesne purportedly assigned to Innishmore its rights under a series of loan agreements. As a result, Innishmore became a creditor of Univermag. This impugned assignment is not documented in the books or records of Demesne, while its consideration is unstated. The individuals who executed this impugned assignment were Sean Quinn (on behalf of Demesne) and Peter Quinn (on behalf of Innishmore). The authenticity of this impugned assignment is challenged by the moving parties. The next protagonist in the affair is **Lyndhurst**, a company registered in the British Virgin Islands. On 7th October 2011, Innishmore purportedly assigned to Lyndhurst the Univermag debts. The effective assignor was the aforementioned Peter Quinn, while Mr. Z purported to act as attorney for Lyndhurst. It is asserted that the first of these assignments, from Demesne to Innishmore, involved a depletion of assets for something considerably less than their true value, making it impossible for Demesne to repay its financial liabilities of some £51,000,000 to Quinn Finance. It is claimed that IBRC will, in consequence, suffer a significant detriment. In short, it is contended that the assets of Demesne have been severely depleted to the detriment of its creditors, including Quinn Finance. The moving parties' case is that these transactions have been executed for the purpose of placing assets beyond the reach of Demesne's creditors. The moving parties impugn two assignments of debt and two related 'supplementary loan agreements' ("*the impugned transactions*"). It is contended that no rational commercial explanation for any of the impugned transactions is evident.

The Moving Parties' Statement of Claim

[7] Based on the outline of the evidence provided above, the case made in the moving parties' Statement of Claim was, succinctly, as follows:

(a) On 6th April 2011, Demesne purportedly assigned its right to the Univermag debt of some £29,000,000 for no consideration. The parties to this assignment were Demesne, Innishmore and Univermag. This assignment cannot be traced in the books and records of Demesne.

(b) On 26th September 2011, Univermag and Innishmore purported, by a supplementary loan agreement, to vary the terms of the original loan agreement (dated 24th October 2006).

(c) By a second assignment dated 7th October 2011, Innishmore purported to assign the Univermag debt to Lyndhurst.

(d) By a further supplementary loan agreement dated 4th November 2011, the parties whereto were Innishmore, Lyndhurst and Univermag, a further variation of the original loan agreement was effected so as to entitle Lyndhurst to demand repayment of the Univermag debt before the repayment date.

(e) Mr. Z, purportedly acting as Lyndhurst's attorney, executed the second assignment and second supplementary loan agreement on their behalf.

(f) Pursuant to this series of transactions, Lyndhurst brought proceedings against Univermag in the Kiev Commercial Court, seeking judgment in the amount of an alleged debt of some $45,000,000. These proceedings, coupled with the Mareva injunction made by this court on 23rd December 2011, are described in greater detail elsewhere in this judgment.

(h) On 23rd December 2011, the Kiev Commercial Court duly granted to Lyndhurst the judgment it was seeking.

[8] The moving parties attacked the impugned transactions on the following grounds:

(i) The first assignment was illicitly backdated to 6th April 2011.

(ii) The first assignment was not validly executed on behalf of Demesne, as Sean Quinn was no longer a director of this company and lacked authority in consequence.

(iii) Further, or alternatively, Sean Quinn executed the first assignment in breach of his fiduciary duty to Demesne to safeguard its property, a breach of which Innishmore and Lyndhurst had, or should have had, knowledge.

(iv) The first assignment being void, the second assignment and supplementary loan agreements were necessarily void in consequence.

(v) Alternatively, the second assignment and second supplementary loan agreement are void as the purported execution by Peter Quinn was not on behalf of Innishmore, a matter whereof Lyndhurst had actual or constructive knowledge.

(vi) Further, or alternatively, the impugned transactions are liable to be set aside under Article 367 of the Insolvency (Northern Ireland) Order 1989 ("*the 1989 Order*").

The Substantive Relief Sought

[9] In the prayer in the Statement of Claim, the following relief was sought:

(i) An order declaring the first assignment void, on one or more of the three grounds adumbrated above.

(ii) An order declaring the second assignment void.

(iii) An order declaring the supplementary loan agreements void.

(iv) Alternatively, an order pursuant to Article 367 of the 1989 Order setting aside the impugned transactions and declaring them null, void and of no effect.

(v) An order declaring that Demesne is solely entitled to the benefit of all rights purportedly transferred by the impugned transactions.

(vi) An Order declaring that all rights purportedly held by Lyndhurst pursuant to the impugned transactions are held on trust for Demesne.

Certain other forms of consequential and ancillary relief were sought. At the hearings conducted in the spring of 2012, the adjudication of the court was confined to the moving parties' claim under Article 367 of the 1989 Order. The court adjourned the balance of the moving parties' claims for future adjudication, in the event that they are to be pursued. Furthermore, no adjudication of the moving parties ' case against Innishmore was required, as this Defendant consented to the moving parties' entitlement to relief under Articles 367 and 369 of the 1989 Order. The only other Defendant who had actively contested the claim was Lyndhurst. On the morning of trial, the court acceded to an application moved by Lyndhurst's Belfast solicitors and made an order pursuant to RCC Order 67, Rule 5 terminating their representation of Lyndhurst in this, the main, action. No comparable order was sought in respect of the representation of Mr Z and Mr S by the same solicitors. The hearing proceeded accordingly and, at this juncture, it was advancing in tandem with the contempt motion.

The Article 367 Claim – the Court's Judgment

[10] The contempt of court motion was issued on 27th January 2012. During the ensuing four months approximately it became intermingled with the substantive proceedings. The motion was heard, initially, on 25th, 26th and 30th April 2012. At this junction, it was adjourned. This adjournment coincided with a recusal application mounted by the Respondents. Three days later, the Court gave judgment in the moving parties' substantive action under Article 367 of the 1989 Order: see [2012] NICH 15 [MCCL 8486], given on 03 May 2012. On the same date, the Court gave a separate judgment dismissing the Respondents' recusal application. The Court's adjudication of the Article 367 issue was in favour of the moving parties. The Court found that all of the impugned transactions were null and void and declared accordingly. The Court further declared that Demesne is solely entitled to the benefit of all rights purportedly transferred by the impugned transactions. The court also made certain incidental and ancillary Orders.

[11] These two judgments and resulting Orders, of course, post-dated the events under scrutiny in this contempt application. The contempt motion stood adjourned. Subsequently, the moving parties intimated their intention to pursue it to a conclusion. As a result, further hearings – on 5th and 6th November and 18th, 19th and 21st December 2012 – ensued. Each of the hearings involving the reception of evidence was conducted by a live television connection with the Ukraine where Mr Z and Mr S (and certain others) were present. One unfortunate consequence of the sequence just rehearsed is that the eight days of hearing were staggered over a period of some eight months and this judgment, to the court's regret (given four working days after the last mentioned hearing date), postdates the contempt motion by almost one year.

The Alleged Contempt of the Three Respondents

[12] By the notice of motion, issued on 27 January 2012 and amended subsequently, it is alleged that Mr Z and Mr S, acting as Lyndhurst's agents, were in contempt of the Order of this Court dated 23rd December 2011, in the following respects:

(i) Each failed to comply with the Order restraining them from taking any steps to assign, sell or otherwise transfer or deal in any way whatsoever with any of the impugned instruments and/or any judgment of any Court arising therefrom .

(ii) Each was restrained from seeking to rely upon, demand payment upon or otherwise enforce any of the impugned instruments, which precluded them from seeking to enforce same against Univermag or otherwise from receiving payment of any monies pursuant thereto.

(iii) In breach of the Order of this Court, Mr Z and Mr S, on 23rd December 2011, sought and obtained in the City Commercial Court of Kiev a judgment in favour of Lyndhurst against Univermag and did so after a copy of the Order of this Court had been served on them, in circumstances where, it is alleged, "*the contents of the Order and its consequences were explained to each of them*".

Various forms of relief, including the committal of Mr Z and Mr S to prison, are sought accordingly.

The Contempt Motion: Grounding Evidence

[13] Ultimately, the evidence received by the Court was a mix of sworn affidavits, *viva voce* testimony and documentary evidence. The contempt motion is grounded by certain affidavits sworn on behalf of the moving parties. The first is an affidavit of a solicitor in the firm of Dublin solicitors instructed by the second-named Plaintiff ("*IBRC*"), containing an averment that at 3.20am on 23rd December 2011 the Mareva injunction of this court was served by fax on Lyndhurst, exhibiting the fax transmission confirmation. The urgent circumstances in which the injunction was procured *ex parte* are expounded in the affidavit of Mr. McCord, a partner in the Belfast firm of solicitors (Tughans) instructed on behalf of IBRC:

> "Part of the urgency of the Plaintiff's application for an injunction was to restrain the first Defendant from seeking to enforce the impugned instruments by using them to pursue a claim against [Univermag] in the sum of USD45,231,641.09 before the Commercial

> Court of Kyiv. This case was due to be heard by the Kyiv court on the morning of 23rd December 2011."

The next member of the *dramatis personae* to appear is one Arsen Milutin ("*Mr M*"), who has sworn two affidavits and also gave 'live' evidence. He describes himself as a Ukrainian citizen and the IBRC's attorney in that jurisdiction. He avers that he received the injunction by e-mail in the early morning of 23rd December 2011 and continues:

> "The same day I visited the Commercial Court of Kyiv intending to participate in the hearing of case No. 35/465 Lyndhurst Development Trading SA v PJSC Univermag Ukraina "on collection of the amount of US Dollars 45,231.641.09 before Judge Litvinova MF scheduled for 10.00 am Kyiv time. I also submitted the motion through the secretariat of the court asking IBRC to be engaged into the mentioned case as a third party and the proceedings to be suspended until the present case is resolved in Northern Ireland.
>
> Before the hearing started, in the hall of the court I saw Mr. Dmytro Zaitsev the representative of Lyndhurst Development Trading SA (hereinafter referred to as Lyndhurst). I approached him and asked whether his name was indeed Dmytro Zaitsev and whether he was indeed a representative of Lyndhurst. He confirmed this replying "yes". I told him that I was acting as attorney for IBRC and informed him about the Order and that according to the Order Lyndhurst including its Directors and Officers and servants and agents were restrained from collecting the amount claimed before the commercial Court of Kyiv in case No. 35/465. I also proposed him to accept the copy of the Order including translation into Ukrainian and a cover letter signed by myself. He refused to accept asking me a question, which makes me think he did not care to comply with the Order whatsoever. "where is Northern Ireland and where am I?"
>
> "After the hearing started, it appeared that Lyndhurst was represented by two attorneys: Mr. Dmytro Zaitsev and Mr. Serpokrylov O.V. After that I was asked by Judge Litvinova M.E. to explain the submitted motion. I read in a loud voice my motion with the relevant

> reference to the Order and the restraining of Lyndhurst including its Directors and Officers and servants and agents from collecting the payment of the amount claimed before the Commercial Court of Kyiv in case No. 35/465. So I asked judge to grant my motion by engaging IBRC as a third party and suspending the proceedings until the present case is resolved in Northern Ireland.
>
> After that judge Litvinova M.E. gave my motion including the copy of the Order and translation into Ukrainian to Mr. Zaitsev. Mr. Serpokrylov, as well as to the counsel for PJSC Univermag "Ukraina" (hereinafter referred to as Univermag) and proposed them to comment. They were reading the documents for around 10 minutes. After that they told [sic] that the Order was not properly certified and they saw no reason to engage IBRC to the proceedings and nothing prevented them to pursue the case No. 35/465.
>
> After that I announced to everyone that (i) the Order was issued on 23 December 2011 and it was impossible to present a certified copy: (ii) the Order may be presented certified should the court grant a proper adjournment: (iii) according to the Order it may be served by electronic means of communication: (iv) by not complying with the Order Messrs. Zaitsev and Serpokrylov may be held criminally liable before the law enforcing bodies of Northern Ireland. Having heard the last phrase. Messrs. Zaitsev and Serpokrylov laughed and Mr. Zaitsev said 'thanks for reminding'.
>
> After that the judge made a short break. In the court hall Mr. Zaitsev told me to serve the Order to the representative of Demesne Investments Limited who was also present, which I understood was an irony.
>
> After the hearing was renewed Judge Litvinova ME refused to grant my motion and proceeded to the merits of the dispute."

In his second affidavit, in which he rejoins to the Respondents' affidavits, Mr. M describes some of the events in greater detail. In this he avers that he warned the second and third-named Respondents about potential criminal liability, continuing:

> "I said so directly to them, to the judge and to everybody in the court room …
>
> I noticed [the second and third-named Respondents] both laughed (the laughter may as well correctly be described as grin) …
>
> The judge basically followed the demands of the Lyndhurst's representatives. According to the law the judge cannot pass a judgment unless Plaintiff supports his claims…
>
> Both [the second and third-named Respondents] supported the claim and asked the judge to fully satisfy it. Their position is clearly heard on the court record and there is no place for them to deny that."

[14] Exhibited to Mr. M's affidavits is a transcript made from the official court record of the hearing in Kiev City Commercial Court on 23rd December 2011. I observe that there is no challenge of substance to its authenticity or accuracy. I shall revisit this theme later. The transcript contains certain noteworthy passages. It records that, at the beginning of the Kiev Commercial Court hearing, Mr. M applied for permission on behalf of IBRC to intervene. He did so on the following basis:

> "The decision in this case may affect the rights and obligations of [IBRC] with regard to [Univermag]".

Mr. M then adverted to the Mareva injunction:

> "So, on 23rd December 2011, which is today, Justice McCloskey of the High Court of Justice in Northern Ireland initiated judicial proceedings upon the claim of [IBRC] and others –v- … [the named Defendants]… with respect to agreement dated 7th October 2011 between [Innishmore] and [Lyndhurst] … [and] … agreement dated 6th April 2011 between [Innishmore, Demesne and Univermag]. …
>
> On 23rd December 2011, that is today, based upon application of [IBRC] Justice McCloskey of the High Court of Justice in Northern Ireland issued an injunction order that, inter alia, restrained [Lyndhurst] its directors and officers and servants or agents from taking steps to collect the aforementioned amount from [Univermag] …".

Mr. M applied for orders permitting IBRC to intervene and staying the Ukrainian proceedings pending the judgment in this jurisdiction in the substantive proceedings. He continued, per the court record:

> "As an exhibit to the application a copy of the order is attached. I have received it today. The said injunctive order is with translation. A duly certified copy from Northern Ireland can be provided if the court adjourns the proceedings for the relevant period."

At this juncture, the copy of this Court's order was examined by the second-named Respondent, Mr Z. He then addressed the court, opposing the application. He submitted, *inter alia*, that the only available version of the order was in electronic form and it was not certified by IBRC's representative. He further pointed out that the application for the judgment debt preceded the injunction. Mr S, the third-named Respondent then addressed the court, submitting that "*… a simple copy sent by e-mail cannot be adequate evidence of the fact that this order was made as such …*". He expressed his support for the submissions already made. Interestingly, the attorney representing Univermag also opposed the IBRC application to intervene, in trenchant terms. He adverted to the Code of Commercial Procedure of the Ukraine, suggesting that thereby a third party may become involved only "*… if the judgment may affect its rights and obligations …*" and submitting that this test was not satisfied. Mr Z then highlighted a clause in the impugned assignments to the effect that disputes between the parties thereto would be resolved according to Ukrainian law.

[15] According to the transcript, Mr. M, rejoining, stressed the clause in the injunction authorising electronic service and he continued:

> "… in accordance with the order, if this order is not complied with by the representatives, authorised persons or directors of Lyndhurst … these persons may be subject to criminal prosecution by the law enforcements bodies in Northern Ireland."

Mr Z then made a lengthier submission to the court, reiterating his opposition to the intervention application and formally requesting judgment in the amount of $45,231,641. The third-named Respondent, Mr S, supporting, continued:

> "I fully support the statements contained in the law suit …

> Based on this, we ask the court to grant the claims of the Claimant against the Respondent in the amount specified in the Statement of Claim."

The outcome of the hearing in the Commercial Court of Kiev on 23rd December 2011 is documented in the written judgment of the court dated 27th December 2011. In short, as appears from the following excerpts, Lyndhurst's application for judgment against Univermag was granted:

> "As it is established by the court and as the circumstances of the case show, the Respondent did not timely [sic] return the claimant the loan amount of USD43,000,000 and did not pay in full the interest for using the loan in the amount of USD2,231,641.09 …
>
> Taking into account the above, the court considers that the stated claims on recovery of debt from the Respondent under the loan in the amount of USD43,000,000 and the charged interest in the amount of USD2,231,641.09 are reasonable and shall be satisfied in full."

The judgment further recorded that it would not take effect until expiry of the time limit for appealing.

Response to the Contempt Motion

[16] In resisting the application to commit him for contempt, Mr Z, the second-named Respondent, has sworn two affidavits. He describes himself as "*a representative and attorney*" for Lyndhurst, pursuant to the aforementioned Power of Attorney dated 11th July 2011. In his second affidavit (but not his first) he describes himself as an economist and not a lawyer. In the course of the two affidavits, he makes the following claims and assertions:

(a) The proceedings in Kiev Commercial Court were initiated on 7th December 2011, based on a failure by Univermag to satisfy a demand issued to them just two days previously.

(b) (By implication) he attended a preliminary hearing in court on 12th December 2011.

(c) The next hearing date was 21st December 2011, when the court considered three intervention applications, including one on behalf of IBRC. The hearing was adjourned to 23rd December 2011.

(d) On 23rd December 2011, the deponent, accompanied by the third-named Respondent, whom he describes as "*a lawyer representing Lyndhurst*", attended court.

(e) Before the hearing began, an unidentified male alerted him to something which was not clear to him. At the hearing, Mr. M applied for intervention on behalf of IBRC, unsuccessfully. Judgment was awarded to Lyndhurst.

(f) When the deponent left the court on 23rd December 2011, he had neither read nor received a copy of the injunction. A Lyndhurst representative e-mailed it to him on 28th December 2011. He is adamant that neither he nor the third-named Respondent read the order on 23rd December 2011.

(g) He was aware of the injunction, in general terms only, by virtue of what Mr. M said to him and represented to the court on 23rd December 2011.

(h) He has never been Univermag's attorney: while his name "*appears*" in a draft Power of Attorney to this effect, this was a clerical error.

In his second affidavit, Mr Z acknowledges that he *did* read the injunction at the court hearing on 23rd December 2011, suggesting that he had only three minutes to do so and that this was insufficient. I observe at this juncture that this acknowledgment (in paragraph 16) flatly contradicts the averments in his first affidavit (paragraph 14 especially).

[17] Mr S, the third-named Respondent has sworn one affidavit. In this he describes himself as "*a lawyer practising in Ukraine as a sole practitioner*", one of whose clients is Lyndhurst. His affidavit contains the following claims and assertions:

(a) He attended the Kiev Commercial Court hearing on 23rd December 2011 "*to provide assistance to* [the second-named Respondent]".

(b) He was "*acting for Lyndhurst Development Trading SA … pursuant to the Power of Attorney which* [the second-named Respondent] *issued to me, though I realised a few weeks later that it had not been certified by a notary and was therefore not valid*".

(c) (In terms) in the course a recess during the Kiev Commercial Court hearing, he was neither shown nor did he read the injunction.

(d) He submitted to the Kiev Court that, to his knowledge, there had been no breach of the rights of IBRC or the other Plaintiffs.

(e) He did not understand everything that Mr. M said in court.

(f) He suggested to the judge that, in the absence of an (unspecified) "*certificate*" there was an irregularity in Mr. M's application.

(g) "*I could not understand how the order could have been made in Northern Ireland the same day which was two hours behind Ukraine time*".

(h) Mr. M did state in court that non-compliance with the injunction by the second and third-named Respondents could expose them to criminal liability.

[18] I shall analyse in some detail and comment further on the affidavits sworn by Mr Z and Mr S *infra*: see paragraphs [26] – [28] and [32].

The Hearing of the Contempt Motion

[19] The three Respondents to the contempt motion have been represented by solicitor and counsel (both senior and junior) throughout the greater part of these proceedings. At the stage when the affidavit evidence of all parties was complete, Mr. Lockhart QC (appearing with Ms Simpson, of counsel), representing all Respondents, informed the court that the second and third-named Respondents would not be attending the hearing in this court as they were fearful of the possible sanction of imprisonment. The court made two interlocutory orders. The first was an order that the second and third-named Respondents, together with Mr. M (on behalf of IBRC), be cross-examined on their affidavits. The second was an order authorising a live television link with the Ukraine, to give effect to the first-mentioned order. The court also approved the engagement of interpreters and stenographers. As a result, the hearing before this court had the following distinctive elements:

(i) The aforementioned live television link with the Ukraine.

(ii) The engagement of an interpreter (jointly appointed by the moving parties and the Respondents).

(iii) The engagement of a stenographer in this court (also at the moving parties' expense)

(iv) The attendance at the hearing, via the live television link facility, at a location in the Ukraine of a cast consisting of the second and third-named Respondents; a London solicitor apparently representing their interests; an interpreter engaged on their behalf; and representatives of IBRC.

As the hearing progressed, transcripts of the proceedings were prepared overnight by the very efficient stenographers [engaged by IBRC] and these proved to be of great assistance to the court.

[20] Evidence was given by Mr Z and Mr S by live television link from the Ukraine. Evidence was also given by Mr M in this court. All witnesses were cross-examined. Inevitably, the sworn testimony of all three witnesses focused mainly and in some detail on the events surrounding the hearing in the Kiev City Commercial Court on 23rd December 2011. Their evidence related to events both inside and outside the courtroom. While there was some agreement in substance amongst the three witnesses about certain aspects, others were controversial.

The Transcript

[**21**] At this juncture, it is appropriate to highlight certain features of the English translation of the relevant section of the transcript of the hearing in the Kiev Court on 23rd December 2011. These are the following:

(a) The first matter transacted by the Court was the IBRC intervention application, which was duly presented by Mr M, who made explicit reference to the Order of this Court, made some hours earlier. Mr M stated unequivocally that the effect of this Order was to restrain Lyndhurst and its representatives from taking steps to collect the alleged debt due by Univermag.

(b) The application by IBRC was clearly expressed in two fold terms: to permit intervention as a third party **and** to stay the substantive proceedings (Lyndhurst – v – Univermag) pending this Court's adjudication of the substantive claim (IBRC and Others – v – Lyndhurst and Others).

(c) A copy of the Order of this Court, with accompanying translation, was attached to the IBRC application.

(d) A duly certified copy of the Order of this Court was promised "*if the Court adjourns the proceedings for the relevant period*".

(e) During a period of three minutes and six seconds, Mr Z examined the Order of this Court, in open Court.

(f) Mr Z then addressed the Court. His submissions suggested strongly that he had some background knowledge of IBRC. He highlighted that the Order of this Court was in electronic copy form only and was not satisfied. Secondly, he highlighted that the claim filed in the Kiev Court by his client pre-dated the Order of this Court.

(g) Mr S then addressed the Court, supporting the submissions of Mr Z and adding that the proceedings would not affect the rights of IBRC in any way.

(h) Next there was a submission to the Court from the Univermag attorney to the effect that the substantive decision to be made in the proceedings would not affect the rights and obligations of IBRC.

(i) Rejoining, Mr M highlighted (correctly) that the Order of this Court expressly incorporated permission for service outside Northern Ireland "*by electronic communication for any legitimate and bona fides purpose*". He further pointed out that there had been insufficient time for service of the Order in original or duly certified form.

(j) Mr Z then formulated a submission to the effect that the Order of this Court lacked jurisdiction, as the impugned assignment agreements were governed exclusively by the laws of the Ukraine.

(k) Mr M then drew attention to the provision in the Order of this Court:

> "If you disobey this Order you may be found guilty of contempt of Court and may be sent to prison or fined or your assets may be seized."

(l) Mr Z and Mr S then addressed the Court on the substance and merits of Lyndhurst's claim against Univermag. They asked the Court to grant judgment in favour of their client in the amount of around 45 million US dollars.

There was virtually no challenge by Mr Z or Mr S to the accuracy of this transcript. The only contentious point of substance which they

raised concerned Mr M's claim that, at one stage of the hearing, their reaction, or demeanour, was one of laughter. I find that, with this exception, the transcript is an accurate and reliable record of the proceedings in Kiev City Commercial Court on 23rd December 2011. The exception noted will have no bearing on this court's findings or its determination of this application.

[**22**] Based on all the evidence, including in particular the documentary evidence, the proceedings in Kiev City Commercial Court fall to be analysed in the following way:

(a) The substantive element of the proceedings entailed a claim by Lyndhurst – v – Univermag for a money judgment in the amount of some $45 million.

(b) This claim was formally admitted by the Court on 12th December 2011, at which stage a hearing date of 21st December 2011 was scheduled.

(c) On 20th December 2011, Lyndhurst filed in Court "*the substantiation of calculation of claims on collection of the debt*" (quoting from the later judgment).

(d) On 21st December 2011, IBRC filed an intervention motion. This was based on a contention that the main proceedings "*may affect the rights and obligations of [*IBRC*] as mortgagee of the immovable property owned by [Univermag] since should the claim be satisfied, the bankruptcy proceedings against [Univermag] would be most probably initiated*".

(e) On 21st December 2011, the Court conducted a hearing, at which Univermag "*admitted the claims in full*".

(f) On the same date, the Court refused the IBRC intervention motion which, as the judgment records, was based on a contention that the adjudication of the substantive proceedings could affect the rights and obligations of IBRC as mortgagee of immovable property owned by Univermag, since the initiation of bankruptcy proceedings against Univermag as a consequence of Lyndhurst's claim for judgment for $45 million could be readily foreseen. The gravamen of the Court's reasoning is expressed in the following passage:

> "*In the Court's opinion, the judgment in the case number 35/465 does not change existing relations between [IBRC and Univermag] as to the mortgage …*

The bank's claims, secured by the mortgage, shall be satisfied on a first priority basis."

The IBRC intervention application was refused accordingly.

(g) The Court also rejected an intervention motion brought by Quinn Holdings Sweden AB.

(h) The substantive hearing was adjourned to 23rd December 2011.

(i) On 23rd December 2011, IBRC's attorneys resubmitted their client's intervention motion. The impetus for this was, plainly, the Mareva Order made by this Court some hours earlier. Both English and Ukrainian versions of this Order were available to the Court. It is clear from the ensuing written judgment of the Court, promulgated just 4 days later, that the presiding Judge's understanding of the Order of this Court was impeccable. The intervention motion was again refused by the Court, on the ground that, having regard to Article 27 of the Ukrainian Code of Commercial Procedure, there was no possibility of the substantive judgment of the Court altering the property relations between IBRC and any party to the proceedings.

(j) In its judgment, the Court also entered two *caveats* about the Order of this Court dated 23rd December 2011. The first was non-compliance with a 1961 Convention concerned with the execution of official foreign public documents. The second was the absence of any proof "*that the Order on security for claim was duly recognised and brought for enforcement in Ukraine*".

(k) Having dismissed a total of **3** intervention motions on 23rd December 2011, the Kiev City Commercial Court then proceeded to determine the merits of Lyndhurst's claim for judgment against Univermag in the amount of some $45 million. The essence of the judgment which followed was that Univermag had failed in its contractual obligation to repay this loan plus accrued interest to Lyndhurst, thereby entitling Lyndhurst to the Order sought.

[**23**] It is particularly clear that the application made to the Kiev City Commercial Court by IBRC's attorney (Mr M) on 23rd December 2011 had two elements. Firstly, he sought the Court's permission for IBRC to intervene in the main proceedings. Secondly, he sought an Order staying the main proceedings pending the judgment of this Court in the substantive proceedings in this jurisdiction. I add the observation that the latter

proceedings were then at a relatively embryonic stage and, during the four months which followed, progressed through certain procedural phases and culminated in the substantive judgment of this Court on 3rd May 2012: see [2012] NICH 15 and, further, paragraph [10] above. The proceedings in this Court and those in Kiev City Commercial Court were both conducted on the same date, 23rd December 2011 and were separated, in real time, by a period of approximately 10 hours. It is clear – and undisputed – that at the time of Mr M's arrival at the Kiev Court that morning, he was the only person there who had any knowledge of the proceedings in this Court and the resulting Mareva injunction. The outcome of the December 2011 proceedings in the Kiev City Commercial Court was a judgment in favour of Lyndhurst against Univermag in the amount of some $45 million.

[24] The next material development was a letter dated 28th December 2011 from Mr Z to the Chancery Office of the High Court. In this letter, the author refers to the injunction and highlights in particular the provision therein for forthcoming review hearings on 30th December 2011 and 5th January 2012. This letter requests an adjournment for a minimum period of four weeks. It contains the following passage:

> "We note that restrains [sic] imposed by the order as well as appointed dates for latter consideration <u>were not</u> any how communicated to the company earlier that [sic] 24th December 2011. Accordingly, presently neither the company nor its officers, agents of [sic] legal advisors have had a chance to review the case materials, yet aware of legal facts of the matter or make any other reasonable preparations for the court hearing …".

Appended to this letter were copies of (a) the injunction of this court and (b) a document entitled "General Power of Attorney", purportedly signed by a director of Lyndhurst, Mr. Spyrides and purporting to appoint Mr Z as the company's attorney, in demonstrably broad terms. The suggestion that the injunction was not served on Lyndhurst until 24th December 2011 is contradicted by an affidavit to the effect that personal service was affected at Lyndhurst's registered office in the British Virgin Islands at 11.47am on 23rd December 2011. To this letter is exhibited a signed written confirmation of service of the injunction on Lyndhurst. There is not the slightest suggestion in this letter that the Order of this Court lacked formal or substantive legitimacy in any respect. Furthermore, this letter manifestly fails to engage with the events in Kiev City Commercial Court five days previously. I find that this letter confounds the essence of the case made by both Mr Z and Mr S to this Court, which was that, when first presented with the Order of this Court, they reasonably doubted its authenticity. Viewing all the evidence in the round and taking into account the various factors already highlighted – see

particularly paragraph [22] above – I find that neither Mr Z nor Mr S had any genuine grounds for doubting the formal or substantive authenticity of the Order of this Court when first presented to them. I reject their protestations to the contrary as self-serving, unworthy of belief and confounded by the transcript of the Kiev Court hearing, Mr M's evidence [which I prefer – *infra*] and Mr Z's subsequent letter.

The Evidence of Mr Z and Mr S

[25] As recorded above, both Mr Z and Mr S gave evidence under oath to this Court through the mechanism of live television link. Duly analysed, the main twofold focus of their evidence concerned the events at the Kiev City Commercial Court on 23rd December 2011 **and** their respective states of mind throughout. I have already recorded, in paragraph [22] above, my basic findings concerning the first of these issues. As regards the second issue, the central recurring themes of the evidence of these two Respondents may be fairly described, in brief compass, as scepticism, disbelief and some degree of unfamiliarity or inexperience. Their evidence to this Court was transcribed in full (*supra*) and I decline any attempt to reproduce it *in extenso*. In substance, if not in detail, there was no major distinction between the evidence of these two parties. Each of them addressed with particular emphasis their respective states of mind. They testified, in substance, that they were sceptical about and disbelieving of the Order of this Court having regard to factors such as different jurisdictions, time zones, timing and lack of certification. This is reflected in the submissions of Mr Lockhart QC and Ms Simpson (of counsel) which highlight the professional inexperience of Mr Z and Mr S, coupled with their assertions in evidence that they had never encountered an order of any court made in the early hours of the morning; they were unfamiliar with "unstamped" court orders; they believed the Order of this Court to have no validity; they were suspicious about the Order of this Court; its validity was not properly explained to them by Mr M; and they had limited time for absorption.

[26] When Mr Z and Mr S initially swore affidavits, they purported to put forward their versions of the events surrounding the proceedings in the Kiev Court on 23rd December 2011. In his affidavit, Mr Z acknowledged that there had been some direct interaction with the IRBC lawyer, Mr M, outside the courtroom in advance of the hearing, followed by relevant exchanges at the hearing itself. He averred that he at no stage read any part of the Order of this Court. He asserted that he had received no opportunity to read it. He claimed to have first read it five days later, on 28th December 2011. He described a recess in the Court proceedings during which he had further direct contact with Mr M. He claimed that during the initial interaction, Mr M spoke unintelligibly. He sought to lay a significant measure of responsibility on the shoulders of the presiding Judge. In his second affidavit, Mr Z, rejoining to a second affidavit sworn by Mr M, acknowledged that

during the initial interaction outside the courtroom Mr M "*mentioned something about NI Court Order of 23 December 2011*" and "*offered me some documents, which may have included the Order* [which] *I refused to accept …. from a person who did not give me confirmation about his power*". The first affidavit of Mr Z contains no comparable averments. Rather, it's clear thrust is that Mr M did not offer or divulge any documents to Mr Z or Mr S at any stage [see in particular paragraphs 8 – 9 and 16.1 – 16.2]. This may be linked to repeated averments that Mr Z first read the Order of this Court on 28th December 2011 [see paragraphs 14 – 15 and 17]. Furthermore, Mr Z's second affidavit contains no repetition of the suggestion in his first affidavit that Mr M's speech outside the courtroom was unintelligible. On the contrary, the import of Mr Z's second affidavit is that Mr M spoke both intelligibly and comprehensively.

[27] The sole affidavit sworn by Mr S may be described as perfunctory, being confined to a statement of general concurrence with the first affidavit of Mr Z and a specific confirmation that neither deponent read the Order of this Court in the context of the Kiev Court hearing. Mr S also averred that he did not understand everything said by Mr M **in the courtroom** (contrast with Mr Z's claims in his first affidavit, but not his second) and included an averment that the normal kind of certificates were absent from the documents provided to both deponents by the Judge during the hearing.

[**28**] The two affidavits sworn by Mr Z invite the following analysis:

(a) In his first affidavit, he was adamant that he had neither read nor been given the opportunity to read the Order of this Court at any time on 23rd December 2011.

(b) In his second affidavit, there is an averment that something **was** said about an Order of a Northern Ireland Court and he **was** given some opportunity to read documents which may have included this Order, an opportunity which he consciously declined.

(c) In his second affidavit, there is a later averment that he **was** given a copy of the Order of this Court and **did** read it during a period of some minutes.

These averments are replete with contradictions. Furthermore, when swearing his second affidavit, Mr Z did not address at all the transcript of the Kiev Court hearing exhibited to the second affidavit of Mr M. While, notably, he did not challenge its accuracy or completeness in any way, he conspicuously avoided engaging with it. The further averments in his second affidavit which I have highlighted were, realistically, unavoidable, given that the transcript confounded various claims and protestations in his first

affidavit. Furthermore, according to the transcript, Mr Z, having perused the Order of this Court (which was in translated form), then made repeated references to it in his representations to the Judge. Based on the transcript, there are approximately a dozen references to "*this Order*", "*that Order*" and "*the Order*" in the submissions advanced to the court by Mr Z and Mr S. Moreover, the transcript confirms that Mr Z did not merely have the opportunity to examine the terms of this Court's Order and avail thereof: he also specifically requested to see the Order again. As regards Mr S, he did not swear any further affidavit following service of Mr M's second affidavit exhibiting the aforementioned transcript. The conclusion that the affidavits of these Respondents were deeply unsatisfactory follows inexorably. This analysis casts a significant shadow over the veracity and reliability of the totality of the evidence given by Mr Z and Mr S.

[**29**] Turning to the sworn evidence of Mr Z and Mr S to this Court, having reviewed the transcripts I propose to highlight certain aspects only. Mr Z acknowledged the encounter and discussion with Mr M outside the Kiev courtroom prior to the hearing; he admitted to previous knowledge of the Anglo Irish Bank; he refused to accept documents from Mr M; he was aware that the relevant document emanated from Northern Ireland; he denied any understanding of a link with his client, Lyndhurst; he understood the contents of his affidavits; he distanced himself from the Northern Ireland connections explicitly spelled out in the Demesne/Innishmore/Univermag Supplementary Loan Agreement dated 6th April 2011; his previous "due diligence" exercise in relation to Anglo Irish Bank emerged only when probed in cross examination and he volunteered no details whatever thereof; he admitted that he had enquired into the "collectability" of the debt of circa $45 million ; his researches had uncovered the bank's mortgage over the assets of Univermag; he admitted that, following his initial exchange with Mr M, he was able to inform Mr S about "*the representative of the bank*" and "*the decision ….. which had been made by a Northern Irish Court*"; he was able to figure out **which** bank was involved; he did not ask Mr M for any clarification or elaboration; he believed that "*the Northern Ireland Court Order had nothing to do with us*"; he claimed that Mr M spoke "*very fast and quite incoherently*" in the courtroom; he did not protest any lack of comprehension at the time; he admitted, with a degree of qualification, that having listened to the transcript subsequently he understood what Mr M was saying to the Court; he acknowledged that Mr M made explicit reference to the Northern Ireland Court Injunctive Order in the courtroom; he claimed not to remember whether Mr M was the bank's sole representative at the hearing; he claimed not to recall the essence of the requests made by Mr M to the Court; as regards this Court's Order, he was clearly aware of its timing, the translation, the official stamp and the absence of signatures; he suggested that there was "*confusion*" during the Kiev Court hearing on the earlier date of 21st December 2011; he persistently maintained that there was some consideration for the assigned loan other than or additional to the $43 million specified in the

Supplementary Loan Agreement, without providing any particulars; he accepted that all or part of the consideration post dated the Agreement; he claimed that he first properly understood the Order of this Court on 28th December 2011; he agreed that Mr M had, in terms, warned of the consequences of breaching the Order of this Court; he declined to provide any details of his experience in Court proceedings; he attempted to explain the belated engagement of Mr S following the preliminary hearing on 21st December 2011, which involved an uncertified and incorrectly dated power of attorney prepared by him, Mr Z; he was aware of these defects both when providing this to Mr S and at the time of the subsequent hearing, on 23rd December 2011; he instructed Mr S to attend the subsequent hearings in the Kiev City Appeal Court on 23rd January, 1st February and 2nd February 2012; and all services provided by Mr Z to Lyndhurst were on the instructions of Mr Orlov. Finally, Mr Z testified that his motivation for participating (from the Ukraine) in these contempt proceedings was -

> "….. because I wanted to clear my name from all the accusation that I actually tried to make a fraudulent signature of Peter Quinn."

[30] In his sworn evidence to this Court, Mr S confirmed that he is a lawyer who was representing the interests of Lyndhurst at the material time; he was barely privy to the communications between Mr M and Mr Z on 23rd December 2011; he did not have a full understanding of what was happening; Mr M addressed Mr Z, not this witness; he heard some mention of Northern Ireland, but not a Court Order; he declined to provide a simple, direct answer to a question about his knowledge of Univermag; Mr Z conveyed to Mr S the essence of what he (Mr Z) had been told by Mr M; his recollection of events was diminished; in particular, he could not recall precise words; Mr Z did not inform him clearly and exactly about any Northern Irish Court Order; he considered it unnecessary for him to mention his conversation with Mr Z in his affidavit; he took issue with that part of the transcript of the Kiev Court hearing which attributed the words "*thank you*" to him: his reason for doing so was that this implied a clear understanding of the Northern Ireland Court Order; he agreed, in terms, that he understood Mr M's presentation to the Kiev Court about said Order; next, he claimed that he "*did not know exactly about*" the authenticity of the Order; there was no proof of its authenticity; he saw the Order of this Court during the course of the Kiev Court hearing – at around the beginning of a hearing which lasted some 2 hours; he read the document and then returned it; he noted in particular the date of the Order and its provenance; the stamp on the Order did not persuade him of its authenticity; he could not believe that an Order of this Court had been prepared, translated and then transmitted to Kiev with such speed; he suspected the bank's Ukrainian lawyers of having fabricated this document; while acknowledging the warning expressed by Mr M in the courtroom, he was insistent that this was not addressed to him personally; he first believed

in the authenticity of the Order when these contempt proceedings were initiated; he knew nothing about Mr Z's letter of 28th December 2011 to this Court; he did not consider it appropriate to write to this Court once satisfied of the authenticity of its Order; he claimed he was unable to recall whether he had voiced any concern about the authenticity of the Order to the Ukrainian Court; the Russian translation of the Order of this Court was not "*legally confirmed*"; the Order was presented during the hearing in both English and Russian; he had not previously had any dealings with foreign Courts; he was equivocal as to whether his client was Mr Z or Lyndhurst; he had not previously had any dealings with Mr Z; the Power of Attorney exercisable by Mr S was given to him by Mr Z immediately prior to the hearing in the Kiev Court; he could not recall whether during two previous meetings with Mr Z this issue had been raised; when the Power of Attorney was produced during the hearing, he accepted that it was invalid as it lacked the official stamp of a notary; he acknowledged that this was obvious to him; he then suggested that he was unaware of this requirement; the stamp/seal of Lyndhurst on this document was legally ineffectual; he first realised the invalidity when it was raised (in some unspecified way) during the Appeal Court hearing in Kiev about a month later; he was equivocal regarding his function at this hearing.

[**31**] I have reviewed the affidavit evidence and sworn evidence of Mr Z and Mr S at some length. In doing so, I have had the benefit of the transcripts of their sworn testimony. I have made due allowance for the twin factors of the interpreter and evidence by videolink. It is a fact that, sporadically, certain words, questions and answers had to be repeated and, occasionally, individual words or phrases had to be reformulated. When these steps proved necessary, they were accomplished to my satisfaction. I have no doubt that, ultimately, both of these Respondents understood all questions put to them and replied accordingly. They were given ample opportunity to put their case and they duly availed thereof. On some occasions, they gave prolix replies, more akin to speeches. On others, they did not hesitate to request the repetition or clarification of a given question. As the transcripts confirm, on those occasions when I found it necessary to question these Respondents in order to clarify, amplify or properly understand their evidence, I formulated my questions in succinct and readily comprehensible terms and, where appropriate, I repeated them. By virtue of the two aforementioned factors, I did not enjoy the usual opportunity to assess a witness at close quarters and through the medium of the English language in direct form. However, the video and audio connections were at all material times of reasonable quality and the immediate translation was self-evidently of a high standard, questioned by no-one. One adds to this the overnight transcripts. In summary, my ability to assess these two Respondents suffered no impediment of substance and was satisfactory.

[32] As the above résumé of the affidavit evidence and sworn evidence of these two Respondents amply demonstrates and as I have already observed,

the affidavits of both were highly unsatisfactory. Mr Z demonstrably failed to provide a full and truthful account of events in his first affidavit. The impetus for much of his second affidavit was, plainly, the emergence of evidence contrary to his case and interests in the form of Mr M's further affidavit and the exhibited transcript of the Kiev Court hearing. Mr Z chose to swear his affidavits reactively and selectively. His second affidavit was reactive to unfavourable evidence and served to highlight the inadequate and incomplete nature of his first affidavit. The single "affidavit" sworn by Mr S is scarcely deserving of this appellation. It was a woeful attempt to provide a full and candid account of the events under scrutiny. The failures of both deponents are exacerbated by the consideration that, when swearing their affidavits, they were doing so in the grave and solemn context of responding to proceedings in which they were accused of having treated this court with contempt by their actions on 23rd December 2011. Mr S expressly acknowledged his awareness of this critical factor of context [see page 66 of the transcript of hearing, 25th April 2012].

[33] In their sworn evidence, I found both of these Respondents highly unconvincing. They were hesitant, reluctant, evasive and unspontaneous. As the extensive résumé above demonstrates, the evidence of both suffered from many inconsistencies, viewed from various perspectives – internally, vis-à-vis their affidavits and *inter se*. Various parts of the affidavits and sworn evidence of these Respondents are also inconsistent with the transcript, which I have already found to constitute a true and reliable record of the Kiev Court hearing. I reject the centrepiece of their case, which was that they doubted the authenticity of this court's order, as intrinsically lacking in veracity and devoid of objective confirmation. On any showing, the Mareva injunction, which was in both English and Ukrainian, bore an unmistakable stamp and hue of authenticity and legitimacy. Furthermore, I found the evidence of Mr M, also received in both forms, to be generally convincing and credible and, where there were conflicts, manifestly preferable to that of these two Respondents. Finally, the letter written by Mr Z on 28th December 2011 clearly undermines the claims repeatedly made by both Mr S and Mr Z as it contains nothing even obliquely questioning either the authenticity or the formal legitimacy of the Order of this Court. I consider this letter to be the work of an author beginning to doubt the wisdom of his belligerence and scepticism five days earlier, clearly exhibiting some growing regret and actuated by self-interest and self-preservation.

The Parties' submissions

[**34**] The submissions of the parties' respective counsel, to which I pay tribute, reflected, necessarily, the abundant evidence considered by the court during the successive hearings of this contempt motion, outlined above. I shall confine myself to a focussed summary. On behalf of the moving parties, the submissions of Mr Moss QC and Mr Dunlop (of counsel) included

contentions that in contempt proceedings there is no requirement for a formal appearance by a Respondent; Mr Z and Mr S have submitted to the jurisdiction of this Court throughout; there was at no time any conflict of order or judgment between the jurisdictions of Northern Ireland and the Ukraine; and Mr Z and Mr S were at all material times acting as agents of Lyndhurst. It was submitted that the evidence of Mr Z and Mr S to this Court was riddled with untruthful and implausible claims and assertions. It was further submitted that the conduct of both men on the occasion in question was, incontestably, in contravention of the Order of this Court and was knowing and deliberate in nature. It was an act of blatant disobedience. The recorded actions and representations of Mr Z and Mr S during the hearing in the Kiev Court consisted of purely technical objections and confounded their later evidence to this Court that they doubted the authenticity of the Order in question. It was submitted that, as a minimum, they should have been prepared to adjourn the claim of their client (Lyndhurst) for judgment against Univermag and had failed to provide any plausible explanation for not doing so.

[**35**] The defence of Mr Z and Mr S was both skilful and spirited. In their submissions, Mr Lockhart QC and Ms Simpson (of counsel) emphasised, firstly, the limited scope of the pleaded particulars of contempt. They questioned the purpose of pursuing the Respondents at this stage, given the judgment and consequential Orders of this Court in favour of the moving parties in the substantive proceedings. They highlighted that, in its original form, the contempt motion was directed to Lyndhurst only. While acknowledging that this Court is empowered to penalise the Respondents for such contempt as may be found, it was submitted that the exercise of this jurisdiction would be inappropriate, given that any penalty imposed would, in reality, be unenforceable. They pointed out that one of the clear purposes of the original motion, which was to debar Lyndhurst from defending the substantive action pending the purging of its contempt, is now moot. They emphasised the brevity of the time available to their clients in the Kiev Court hearing, the sequence of events, the conflicting time zones, the differing legal systems, the role of the Ukrainian judge, the Respondents' lack of experience, their willing co-operation with this Court since late December 2011 and their non-participation in any further aspect of the Ukrainian Court proceedings.

Conclusions

[36] It is beyond plausible dispute that that Mr Z and Mr S have submitted to the jurisdiction of this court and I so find. There is no question concerning this Court's jurisdiction in respect of Lyndhurst and, as I have already highlighted, it is abundantly clear that Mr Z and Mr S were acting as Lyndhurst's agents when they engaged in the conduct alleged to constitute contempt of court. Furthermore, there was no challenge to this Court's jurisdiction to make the Mareva Order against Lyndhurst on 23rd December

2011. At that stage, Lyndhurst was one of the Defendants in the substantive proceedings. Nor was there any suggestion that full obedience to the Mareva Order was not, for whatever reason, required of the three Respondents. Thus there are four starting points:

(a) This Court's jurisdiction over Lyndhurst on 23rd December 2011 is not disputed.

(b) There is no challenge to the validity of the Mareva Order.

(c) The Mareva Order had to be obeyed by Lyndhurst and its servants and agents, who included Mr Z and Mr S.

(d) All three Respondents are within the embrace of the contempt jurisdiction being exercised by this Court in this discrete phase of the proceedings.

[**37**] The parties were agreed that the alleged contempt of all three Respondents is civil in nature and, further, to be determined within the framework formulated in the judgment of Christopher Clarke J in ***Masri – v – Consolidated Contractors International*** [2011] EWHC 2579 (Comm), paragraph [150]:

> "In order to establish that someone is in contempt it is necessary to show that (i) he knew of the terms of the Order; (ii) he acted (or failed to act) in a manner which involved a breach of the Order; and (iii) he knew of the facts which made his conduct a breach."

I shall proceed accordingly. In the same judgment, his Lordship rejected the argument that it is also necessary to establish, to the criminal standard, that the alleged contemnor acted **in the belief** that what he did was in breach of the Order of the Court: see paragraph [155]. In ***Heatons Transport – v – TGWU*** [1973] AC15, Lord Wilberforce spoke of disobedience of a court order which is "*more than casual or accidental and unintentional*". This phrase has resurfaced with some frequency in later decisions, in the context of occasional debate concerning the necessary state of mind on the part of the alleged contemnor in civil contempt proceedings. In essence, the issue which has arisen periodically is whether it is necessary to demonstrate that the alleged contemnor intentionally and knowingly flouted the Court Order in question. The decision of the House of Lords in ***Re Supply of Ready Mixed Concrete (Number 2)*** [1995] 1 AC 456 makes clear that liability for contempt does not require any direct intention on the part of the alleged contemnor. Per Lord Nolan (with whom the other members of the House agreed), page 481:

> "Given that liability for contempt does not require any direct intention on the part of the employer to disobey the Order, there is nothing to prevent an employing company from being found to have disobeyed an Order by its servant as a result of a deliberate act by the servant on its behalf."

Lord Wilberforce's formulation of conduct not "*merely casual or accidental and unintentional*" was affirmed. I consider that "*unintentional*", in this context, denotes conduct which cannot be described as deliberate. One example might be purely careless or otherwise inadvertent conduct. Another might be conduct under duress. Neither of these hypothetical instances arises in the present context. I refer also to the consideration of this topic in Arlidge, Eady and Smith on Contempt (4th Edition), paragraph 12 – 83 and following. In short, it is not necessary to establish an intention to wilfully flout the court order concerned.

[**38**] Thus, it may be said that in cases of alleged civil contempt of court, there is a somewhat greater accent on conduct than accompanying state of mind. The latter is relevant, but only to demonstrate knowledge by the contemnor of (a) the Order concerned and (b) the facts rendering the contemnor's conduct in breach thereof. No further or other intention or knowledge or state of mind is required. This is reflected in the proposition that contempt of this species may be committed in the absence of wilful disobedience on the part of the contemnor: see Halsburys Laws of England (4th Edition Re-Issue), Vol 9(1), paragraph 459.

[**39**] While the issue of the alleged contemnor's state of mind is, self-evidently, an important one, I have devoted particular attention to it because it features so prominently in the defence advanced by Mr Z and Mr S, as highlighted above. I consider that, in cases of this kind, the court must be alert to draw a line. Belonging to one side of the line are issues regarding state of mind which properly sound on the two types of knowledge required of the alleged contemnor, as set out above. On the other side of the line are issues concerning the contemnor's state of mind which have no bearing on legal liability and which can only, at most, sound on mitigation and punishment [see Arlidge et al, op cit]. Liability for contempt is concerned with the former and not the latter.

[**40**] This analysis is consonant with the rationale underpinning the inherent jurisdiction exercised by the Court in matters of contempt. It is expressed with particular clarity by Lord Oliver in ***Attorney General – v – Times Newspapers*** [1991] 2 All ER 398, page 413:

> "My Lords, the inherent jurisdiction of the superior Courts of record to ensure the effective administration of justice by punishing Contempt of Court has been developed by the common law over centuries. It is as essential as it is ancient, for unless litigants can be assured that the rights which it is the duty of the Courts to protect can be fairly determined and effectively protected and enforced, the system of justice necessarily ceases to command confidence and an essential foundation of the structure of civilised society is undermined."

This passage serves as a reminder that in all contempt of court proceedings the elephant in the room is nothing less than the rule of law itself. Stated succinctly, contempt of court is, fundamentally, antithetical to the rule of law which is the foundation of society. Disrespect for and disobedience of the Orders of properly constituted courts is, self-evidently, a mischief of the gravest proportions. It is appropriate to add, as emphasised in the opinions of their Lordships in the ***Times Newspapers*** case, that contempt of court has nothing to do with the dignity, righteousness or *amour propre* of the offended Judge. Its rationale is to ensure that the rule of law prevails.

[41] I return to the particulars of contempt alleged against Mr Z and Mr S, which are rehearsed in paragraph [12] above. I accept, as argued by Mr Lockhart QC, that this places the spotlight very firmly on a limited span of time in the Kiev City Commercial Court on the date of 23rd December 2011. The essence of the contempt alleged against both men is that they proceeded with the hearing of their clients' claim for judgment against Univermag in the amount of some $45 million. There is not a shadow of doubt that this conduct was in breach of the Order of this Court. Thus, the first of the three requirements set out in paragraph [36] above is clearly satisfied. The next question is whether Mr Z and Mr S knew of the terms of the Order of this Court. I readily find that they did: the evidence, rehearsed above, is overwhelming in this respect. I find that they acquired this knowledge in the course of the events in Kiev City Commercial Court on 23rd December 2011. The gained this knowledge from a combination of reading and listening. This finding follows readily upon my findings above.

[42] The third requirement is that Mr Z and Mr S "*knew of the facts which made [*their] *conduct a breach"* (*supra*). I consider that the two main "*facts*" in play were the terms of the Order of this Court and the conduct of the Respondents throughout the hearing in the Kiev Court, culminating in their action in applying for judgment in favour of their client, Lyndhurst, against Univermag in the amount of some $45 million. I have already found that each of these Respondents knew of the terms of this Court's Order. This is

reinforced by my further finding that Mr M, in the solemn setting of the Kiev courtroom, warned them of possible criminal liability. Furthermore, it cannot be sensibly suggested that they did not know of their own conduct or its effect. In short, their conduct obstructed the moving parties' attempt to secure an adjournment of the substantive proceedings in the Kiev Court; opposed the application of IBRC to become involved in those proceedings as an interested party; raised objections, mainly technical, to the Order of this Court; called into question in an unfocussed way this Court's Order; and entailed proceeding with their client's claim for judgment against Univermag. While it is correct that this latter aspect of their conduct constituted the essence of their alleged contempt, it cannot sensibly be divorced from its context, to which all of the aforementioned elements of their conduct belong. The finding that Mr Z and Mr S had full knowledge of all of the facts rendering their conduct a breach of the Order of this Court follows inexorably. Realistically, no other finding is possible. I am satisfied beyond reasonable doubt that, within the compass of the particulars alleged, the ingredients of the misdemeanour of civil contempt have been established by the moving parties, on whom the onus rests. I find that the particulars of the contempt alleged against all three Respondents have been established.

[43] Accordingly, a finding that the Respondents acted in contempt of the Order of this Court should, in principle, follow. However, I must first deal with Mr Lockhart's submission which, in substance, was that such a finding would be inappropriate since there is no clear mechanism whereby any consequential penalty imposed by this Court could be successfully enforced. This submission was mainly founded on the following passage in ***Masri:***

> "[261] In my judgment, the Court should, in relation to applications in a case such as the present, adopt a flexible approach in determining, as a matter of discretion, what action, if any, to take – just as it does in relation to the question whether to make an Order in the first place. That will involve taking into account all the circumstances, including the nature of the Order made by the English and the foreign Court, the circumstances in which the relevant Orders were obtained, the consequences of breach of the foreign Order and any other relevant considerations."

I consider that, evaluated in its full context, this passage is primarily directed to the question of what action, if any, should be taken by the Court consequential upon a finding of contempt. Furthermore, in this part of the judgment, the argument examined – and ultimately rejected – by Christopher Clarke J was, in essence, that the Court had no contempt jurisdiction over Mr Mazri because his "*primary allegiance*" was to a Court in the Lebanon, rather than the English Court which had made the original Order, which was a

substantial money judgment, followed by a series of receivership and freezing Orders. The refusal of the judgment debtors to satisfy the original judgment was found to be a "*determined and deliberate contempt*": paragraph [7]. Ultimately, having found that the judgment debtors were guilty of several acts of civil contempt, the Judge declined to impose any penal sanction for the main reason that the judgment debt had been satisfied: see paragraph [28]. He made a declaration only. His comments were plainly concerned with remedy, not liability.

[44] I have also considered the decision in ***Lakah Group – v – Al Jazeera*** [2002] EWHC 2500 (QB), on which Mr Lockhart placed reliance. By the application in question, the Claimants, an Egyptian company and an Egyptian national, both operating abroad, sought an Order of sequestration of the assets of a Qatari company and committal of an Egyptian national residing and working in Qatar. Neither of the Defendants was present in or had submitted to the jurisdiction of the English Court and neither had assets within the jurisdiction. The underlying Order was one made *ex parte* restraining the further broadcasting of an interview. The Defendants reacted by applying to have the Order set aside. While this application resulted in an Order discharging the injunction with immediate effect, the proceedings remained live as the Court found itself unable to determine with finality a jurisdictional issue and gave certain directions accordingly. Eady J, while accepting that the offending programme had remained accessible on the internet during a period of some weeks prior to the discharge order, readily accepted the Defendants' explanation that this had occurred due to regrettable oversight. Accordingly, he could not be satisfied beyond reasonable doubt that there had been any deliberate or contumacious breach of the original Order. Having considered further submissions that the original Order was invalid and that the offending conduct was not in contempt thereof in any event, Eady J stated that were it necessary to do so he would make findings accordingly. Having begun his judgment with the observation that the contempt motion was brought "*in very remarkable circumstances*", he concluded that it would be "*wholly inappropriate to have resort to the contempt jurisdiction of the English Court in respect of these parties who are outside its jurisdiction*". En route to this conclusion, he highlighted that neither Defendant was subject to or had submitted to the jurisdiction of the English Court, unlike the present case.

[45] In ***Al Jazeera,*** Eady J also stated in paragraph [27]:

> "The Court's jurisdiction in contempt is a valuable one but its essential purpose must always be borne in mind. Litigants, and indeed for that matter the Court itself, should always be mindful that resort should be had to its salutary but Draconian powers only where necessary; that is to say, only where there is no other

> effective means of achieving the desired objective. The underlying rationale of the jurisdiction is to uphold the rule of law by protecting or enforcing the authority of the Court. It is most emphatically never appropriate to use it as a tool of oppression or even as a tactical weapon …"

The learned judge also recorded arguments to the effect that orders of committal and sequestration would be illusory and would, in the particular circumstances, bring the law into disrepute. He further recognised the need for the court to act proportionately. As this résumé demonstrates, the disposal in the ***Al Jazeera*** case, which was an Order dismissing the contempt applications, is unsurprising. I consider that the decision is properly to be viewed as one applying well established principles to its particular, unique factual matrix. The only true parallel which it can claim to have with the matrix of the present case is the absence of the three Respondents from the jurisdiction of Northern Ireland and the apparent absence of company assets in this jurisdiction. There the analogy stops. I consider that the rationale of the contempt jurisdiction of the High Court, as expounded earlier in this judgment and by Eady J, is clearly engaged. Properly analysed, the aim of this contempt motion is to protect and enforce the authority of this Court and, ultimately, to uphold the rule of law. I am satisfied that there is no element of oppression or suspect tactics. I elaborate on this in the following paragraph.

[46] In my estimation, it is difficult to conceive of a case in which Mr Lockhart's argument would result in the Court declining to make a finding of contempt - to be contrasted with a consequential penal/remedial order. As emphasised by Christopher Clarke J, the original Order of the Court in ***Masri*** was made *intra vires* and it must be obeyed: see paragraph [257]. While this is as elementary as it is unassailable, it is appropriate to highlight that it is the starting point in every case of this kind. The correct course for a discomfited, embarrassed, uncertain or defiant recipient of an injunctive court order is to apply to the Court concerned for its variation or discharge. In the present case, the most that was required of Mr Z and Mr S was to concede a very brief adjournment of the Kiev court proceedings, either to pursue such a course or to enable production of a properly certified version of this Court's order, or both. But their stance was one of intransigent and implacable opposition, based on every technical objection they could muster. For reasons which have not been divulged to this court, both were grimly determined to procure judgment for $45 million for their client, Lyndhurst, against Univermag on the date of 23 December 2011 in proceedings which were of less than three weeks' vintage. While making some allowance for cultural differences between different jurisdictions, this striking non-disclosure failure warrants an inference adverse to all three Respondents. Furthermore, this Court is bound to take into account the undeniable gravity of the conduct breaching its Order and the effect thereof, which was to

frustrate and jeopardise the central purpose of both the Order and the litigation itself, namely, to preserve a highly valuable asset in a foreign jurisdiction pending the final judgment of this Court. The defiance by Mr Z and Mr S of this court's order is correctly described, dispassionately and without hyperbole or literary flourish, as flagrant. In the context in which it occurred, their disobedience of this court's order could scarcely have been more blatant. Finally, I observe that, at this stage, the argument which the court has received on the enforceability of any penal sanction which might ultimately be imposed is incomplete. Even if it were demonstrated that there is little or no realistic prospect of such sanction being enforced, I make clear that this would not dissuade me from a finding of contempt against the Respondents. To decline to make such a finding would devalue and denude the principles in play; would broadcast an entirely inappropriate message to the Respondents and others; could stimulate the unlawful disappearance or dissipation of other valuable assets around the world in the wider landscape to which this litigation belongs; would encourage similar future breaches of Court Orders; would undermine the authority of all courts; and, ultimately, would be inimical to the rule of law itself.

[47] This discrete conclusion is reinforced by a passage in the judgment of Rix LJ in the recent decision of the English Court of Appeal in ***JSCBTA Bank – v – Ablyazov*** [2012] EWCA Civ 1411, paragraph [188]:

> "The authorities demonstrate that it is vital for the Court, in the interests of justice, to have effective powers and effective sanctions. Without these, it would be possible for a Defendant (or, in a different situation, a Claimant) to flout the orders of the Court, which are the Court's considered means by which to keep the scales of justice for the parties even. If once it became known that the Court was unable or unwilling to maintain the effectiveness of its Orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice."

The power in play here is the court's jurisdiction to make a finding of contempt, following due inquiry and adjudication. In some cases, of course, the consequential sanction available to the Court for proven contempt might not be as efficacious as in others. The paradigm case is that of a contemnor who may be able to evade the sanction of imprisonment or monetary penalty, at least initially, because it is unenforceable against him on account of jurisdictional factors. I recognise that the present case may, potentially, be of this kind. However, in the exercise of what is plainly a judicial discretion, I reiterate that to decline to make a finding of contempt against the Respondents for this reason would be plainly inappropriate for the reasons elaborated above.

[48] I have rejected the central thrust of the Respondents' defence for the reasons explained. I would add that even if I had accepted their case at its zenith (bearing in mind that they have no burden of proof) which, stripped of its detail and adornment, was that they wondered whether the paper order of this court was some kind of hoax or fabrication, my finding of contempt would have been unaltered. A finding that they did indeed have some doubt about the validity of this Court's Order would not have warranted a conclusion that they did not know of its terms and of the facts rendering their conduct a breach thereof: see paragraph [37] above. Something altogether stronger and considerably more persuasive would have been required to defeat this conclusion.

Omnibus Conclusion

[49] The three Respondents to the contempt motion are Lyndhurst, Mr Z and Mr S both of whom were, plainly, acting as Lyndhurst's agents at the material time. I am satisfied beyond reasonable doubt that all three Respondents are guilty of the contempt alleged. All parties will have an opportunity to address the Court on the repercussions of this finding. At this juncture, I confine myself to noting two matters. The first is that the relief sought against the Respondents consists of declarations; a sequestration order; a fine; and committal to prison. The second is that, with effect from 17th December 2012, Lyndhurst has been in receivership by order of the Supreme Court of the British Virgin Islands.

[50] The question of punishment will be decided at a future hearing, which will be conducted during the next 21 days. I shall also deal with costs on the occasion of the next listing.

A Footnote

[**51**] During the course of these proceedings, I raised with the parties the question of whether any possible objection based on the rule against apparent bias arose in a context where this court, being the author of the Order which was subsequently disobeyed, was adjudicating on a claim that the Respondents had acted in contempt thereof. While neither party canvassed any objection, I draw attention to this issue as it may foreseeably arise in future contempt applications.