CA on appeal from Chancery Div (Warren J) before The Chancellor of the High Court, Arden LJ; Longmore LJ. 20th December 2006

Lady Justice Arden :

1. For the second time in this action, this court has had to consider the exercise by the court of its discretion under powers conferred by the freezing order. On the first occasion, now reported as *Dadourian Group International Inc v Simms* [2006] 3 All ER 48, this court gave guidelines for the exercise by the court of its discretion to permit a worldwide freezing order to be enforced abroad. In this case, the court has to consider the exercise by the court of its discretion to release a party who has obtained a freezing order from his undertaking not to use information obtained from the party against whom the freezing order is made in contempt proceedings against that party.

2. The undertakings in this case were an expanded form of the relevant undertaking in the specimen form of freezing injunction set out in the annex to Practice Direction 25 of the Civil Procedure Rules 1998. The specimen form of freezing injunction sets out the basic undertaking routinely required when a freezing order requires a party to divulge information about the assets subject to the order. That undertaking states: *"The applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim."*

3. In this case, the undertaking also prevented the claimants from using the information without the court's permission. The undertaking made express reference to use in committal proceedings, for which permission of the court was also required. There were exceptions for other proceedings which had already been commenced against the defendants, or some of them. However nothing turns on this appeal on these particular differences. Nor does anything turn on the fact that the order containing the undertaking with which this appeal is particularly concerned was an order which so far as material required the provision of information subsequent to the original freezing order.

4. The history of freezing injunctions was summarised by Lord Bingham in his speech in ***Commissioners of Customs and Excise v Barclays Bank plc*** [2006] 3 WLR 1 at [9]. He explained (so far as material to this case) as follows:

   "FREEZING INJUNCTIONS

   [9] *The jurisdiction to grant Mareva injunctions, to give freezing injunctions their original and better-known name, was developed by judicial decision from the late 1970s onwards. It was recognised in s 37(3) of the Supreme Court Act 1981, and is now governed by CPR 25.1(f) as an order which may be made—*

   '(i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not . . .'

   A standard form of injunction (which may be modified to meet the needs of the particular case) is annexed to the practice direction on interim injunctions (CPR 25 PD). The prescribed standard form contains a penal notice:

   'If you [ ] disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

   Any other person who knows of this order and does anything which helps or permits the respondent to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.'

   The first of these warnings is addressed to the subject of the order, the second to any party (such as a bank) who knows of it…."

Order under appeal

5. Warren J made the order which is the subject of the appeal in this case on 20 March 2006 in the early stages of the trial of this substantial action. In this action, Dadourian Group International Inc ("DGI") and others claimed damages for inter alia conspiracy and misrepresentation against Mr and Mrs Dadourian and other defendants. (For convenience I will refer to DGI in this judgment as if it were the only claimant). So far as material, the application before the judge was an application by DGI to release it from undertakings given to the court to enable it (DGI) to use at the trial, and on any subsequent contempt application, both affidavits and transcripts of the cross-examination on those affidavits of the third and fourth defendants, Mr and Mrs Dadourian.

6. Those affidavits and transcripts had come into existence in the following manner. On 3 February 2004 Lindsay J made a freezing order against Mr and Mrs Dadourian, as well as a number of other defendants, which in the usual way required them to disclose their assets by affidavit. The order was extended by Lewison J on 13 February 2004. The affidavits which Mr and Mrs Dadourian provided were unsatisfactory, and the claimants therefore sought and obtained an order for further and better information. This order was made by Peter Smith J on 14 October 2005 on the basis that DGI gave an undertaking to the court that it would not, without the leave of the court, use that evidence "for the purpose of (a) any criminal proceedings whatsoever (b) any committal proceedings, and (c) the trial of this action". By an order dated 22 November 2005, Sir Donald Rattee, sitting as an additional judge of the Chancery Division, extended the time for Mr and Mrs Dadourian to file evidence in accordance with the order of Peter Smith J.

7. The order made by Peter Smith J also provided for the deponents to attend the court for cross-examination as to (inter alia) the assets and what had become of them. The assets as defined in the order included personal assets of Mr and Mrs Dadourian and assets which they claimed were held by the thirteenth defendant, Brinton

Establishment. DGI's case is that Peter Smith J ordered cross-examination in order to assist in the policing of the freezing order. The cross examination took place on 30 and 31 January 2006.

8. The judge acceded to DGI's application to be released from its undertakings pursuant to the order of 14 October 2005 and ordered that release on terms, but the terms related only to the use of the affidavit and transcripts in the course of the trial. No objection is made to the judge's order of 20 March 2006 in so far as it authorised the use of affidavits and transcripts of cross-examination at the trial, and so I need not set out the terms that the judge imposed on the use of the affidavits and transcripts at the trial.

9. The trial of this action took twenty-nine days, and on 24 November 2006 the judge handed down a judgment of 762 paragraphs. DGI succeeded in one of its claims against Mr and Mrs Dadourian, being a claim in deceit added by amendment dated 27 April 2005. All other claims were dismissed. We are not concerned with the grounds on which the judge accepted or rejected the claims in the action. The immediate impact of the judgment is that damages will have to be assessed against Mr and Mrs Dadourian. Moreover, Warren J has also yet to make an order for costs arising out of the trial of the action. The freezing orders already obtained will prevent the dissipation of assets below the amount of the damages assessed and ordered to be paid by Mr and Mrs Dadourian, and in addition, any costs which they are ordered to pay. We have not been told whether any application has been made for permission to appeal.

10. The gist of the appellants' case on this appeal is that the judge's order of 20 March 2006 was in error in so far as it gave permission to the claimants to use the affidavits and transcripts in later committal proceedings. When Mr and Mrs Dadourian gave their evidence, no such permission had been given. Now, however, the judge's order unconditionally releases DGI from its earlier undertaking to the court in relation to contempt proceedings. It is that undertaking that forms the springboard for a challenge to the exercise by the judge of his discretion in this case. It is said that a judge ought to release a party from his undertaking not to use information obtained from a defendant under a freezing order only in exceptional circumstances. Mr and Mrs Dadourian further contend that, if a claimant is released too readily from this undertaking, a person cross-examined is likely to claim the privilege against incrimination where he might not otherwise have done so, and that would inhibit the proper enforcement of freezing orders. They further say that they had a reasonable expectation that the information they provided would not be used in subsequent committal proceedings save in exceptional circumstances. Accordingly, they contend that it is unjust that DGI was released from its undertakings in this case. The judge failed properly to balance the interests of DGI and those of Mr and Mrs Dadourian. Mr and Mrs Dadourian further contend that the evidence was obtained under compulsion and that the purpose of any contempt proceedings would be to punish Mr and Mrs Dadourian.

11. It is common ground that it is open to a defendant who is alleged to have committed a breach of a court order to claim to rely on the privilege against self-incrimination. However, Mr and Mrs Dadourian did not in general claim the privilege when they were cross-examined. They were fully advised at the time, and as explained below it is too late for them to claim the privilege now.

Undertaking not to use information obtained in proceedings for collateral purpose

12. To clear one point out of the way at the start, the use by DGI of these transcripts of cross-examination would not involve any departure from the undertaking which every litigant gives not to use documents obtained in one set of proceedings for the purposes of some other proceedings or otherwise for a collateral purpose. In ***Crest Homes PLC v Marks*** [1987] AC 829, the House of Lords confirmed that the proper policing and enforcement of observance of orders made in an action is an integral part of the action, just like any other step taken by the claimant in the proper prosecution of his claim. Accordingly proceedings for contempt of court are not collateral to the action in which they were launched. It follows that DGI did not need a release from its undertaking not to use documents obtained in the action for a collateral purpose. A release from this undertaking may require special circumstances: see per Lord Oliver in *Crest Homes plc v Marks* at page 860. The reason why DGI needed the permission of the court was that, as a term of the court's orders for cross-examination of Mr and Mrs Dadourian, DGI gave an undertaking to the court that it would not use the transcripts of evidence in any way without the permission of the court.

The protection provided by the privilege against self-incrimination and article 6 of the European Convention on Human Rights for a person who provides information under a freezing order

13. It will be appreciated that the conduct of any part of any civil proceedings to enforce a civil right or obligation gives rise to rights under article 6 of the European Convention on Human Rights. One aspect of those rights is to "a fair and public hearing". The concept of a fair hearing in article 6 is a Convention concept. In order to assess whether there has been a fair hearing, the court may need to look at the proceedings as a whole to decide whether the process adopted in the particular case meets the Convention requirements of a fair trial. In contempt proceedings, one of the ways in which a fair trial is achieved is by conferring the privilege against self-incrimination. English law provides a person against whom contempt proceedings may be brought with the privilege against self-incrimination, and this right can be qualified or removed only by statute. The European Court of Human Rights has described the right to remain silent, and the right not to incriminate oneself, as reflecting "generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6 of the Convention." (*Serves v France* [1997] ECHR 20225/92). If the disclosure of information pursuant to a freezing order would expose a person to the risk of proceedings for contempt, that person can rely on the privilege against self-incrimination. Indeed, the specimen form of freezing order in the Civil Procedure

Rules provides that if any information which a party is required to give under the order is likely to incriminate the party, that party may be entitled to refuse to provide it, but the order recommends the party to take legal advice before refusing to provide the information. The specimen form goes on to say: "Wrongful refusal to provide the information is contempt of court and may render the respondent liable to be imprisoned, fined or to have his assets seized". The original freezing order in this case is not before us but is likely to have followed the specimen form in this respect.

Privilege against self-incrimination - position of Mr and Mrs Dadourian

14. Article 6 has played little part in this appeal, because Mr and Mrs Dadourian were advised of their rights to claim the privilege against self-incrimination both by the terms of the order (as set out above) and in the course of the cross-examination. Accordingly there was no compulsion to answer the questions in this case. They declined to answer certain questions but answered others without claiming any privilege. Mr Ashe QC, for Mr and Mrs Dadourian, submitted that the privilege against self-incrimination arose anew in the contempt proceedings and that merely because Mr and Mrs Dadourian did not take the point in the cross-examination it does not follow that they cannot claim the privilege in respect of the contempt proceedings. However, no authority was adduced in support of this proposition. Given the safeguards with which Mr and Mrs Dadourian were provided before they answered questions, I do not see how this submission can be correct. In those circumstances, this appeal is not in my judgment concerned with the question whether the grant of permission would be unfair on the grounds that it would amount to Mr and Mrs Dadourian giving evidence against themselves in later contempt proceedings.

The exercise by the court of its discretion to grant permission to permit a party to a freezing order to use information obtained from another party pursuant to an order in subsequent contempt proceedings

15. As Lord Bingham further explained in his speech in ***Commissioners for Customs and Excise v Barclays Bank plc*** at [11],

> *"**[11]** The court will punish a party who breaches one of its orders if the breach is sufficiently serious and the required standard of knowledge and intention is sufficiently proved. This rule applies to freezing injunctions, as the prescribed form and the notices given to the bank in this case make clear."*

16. However, a party who proposes to bring contempt proceedings may wish to bring contempt proceedings not simply to persuade the court to punish the alleged contemnor, but also in order to induce the subject of the order to produce more information about assets falling within the scope of the order than he has so far done, notwithstanding that he has been ordered to provide that information by the terms of the freezing order (or an order made in consequence of the freezing order). If this information is produced, the party who obtained the freezing injunction will be able to identify the assets within scope of the order and this will facilitate the enforcement of any judgment obtained at trial against the subject of the order. In the meantime he will also be able to ensure that the terms of the freezing injunction are observed. In fact DGI has not yet started any contempt proceedings against Mr and Mrs Dadourian but this may well be because of the pendency of this appeal.

17. The first question is: what is the right approach for the court to take to an application for permission to use material obtained under a freezing injunction in these circumstances? In my judgment the court should provide significant protections for the subject of a freezing injunction who was cross-examined or provided information under a freezing order. Nonetheless, subject to those protections, the court should in my judgment lend its weight to an application to use information obtained from such a person for the purpose of enforcing or policing the freezing order. A freezing order is an important tool in the court's armoury for the purpose of doing justice between the parties, or more precisely for the purpose of preventing or policing the disposition of assets which would inhibit the enforcement of an order. In the normal situation, failures to provide information about assets subject to a freezing order can be enforced by orders for further information. Litigants who are the subject of an order to produce further information will generally produce it to the best of their ability. But that is not always the case, and the court will in particular be astute to identify those defendants who are deliberately concealing assets. In some situations, a party who obtains a freezing order will have little option but to bring contempt proceedings to ensure that the order is properly observed. As already explained, litigants who do not properly comply with orders made by the court to provide affidavits or information will be aware that the court may punish them for contempt because of the penal notice attached to the order.

18. In my judgment, the threat of contempt proceedings is more likely to motivate a person to give information frankly if the court is willing to give permission for the use of information obtained under a freezing order in any appropriate case than if the court is prepared only to give permission to use that information in contempt proceedings in exceptional circumstances, as the appellants submitted should be the case. When an omission is pointed out to a person who was ordered to produce information or to be cross-examined, he may be willing to give the necessary information in order to avoid the issue of contempt proceedings.

19. The court should, in my judgment, not shrink from enabling a party who has obtained a freezing order to use the information obtained under the freezing order for contempt proceedings if that is necessary to protect that party's position. As I have explained, the court is not, in my judgment, required to find that exceptional circumstances exist before it gives permission. This is because, as Lawton LJ pointed out in ***CBS United Kingdom v Lambert and another*** [1983] Ch.37 at 42G: *"A jurisdiction to grant [freezing] injunctions, however, is not likely to be of any use to a [claimant] who believes that he is suing a defendant who intends to deal with his assets in such a way as to deprive him of the fruits of any judgment he may obtain unless there is some means of making the defendant disclose what his assets and whereabouts they are to be found."*

20. In my judgment, the principle applying to the grant of permission to use information provided by the party under a freezing order in contempt proceedings against that person in a case such as this is that it should be just and convenient for that information to be so used for the purpose of enforcing or policing the freezing order. In deciding whether the grant of permission to use the information would be just and convenient, the court will need to consider all the circumstances of the case before it. The application for permission should be on notice to the other party affected, and it should be supported by witness statements which put in evidence all the relevant information which the court needs in order to consider whether to exercise its discretion to grant permission to use information obtained under the freezing order.

21. Naturally the matters that the court needs to consider will depend on the facts of the particular case and the weight to be accorded to such matters will vary accordingly. However, in general the court will need to examine the basis on which it is said that the party has failed to comply with an order of the court, and to consider whether in all the circumstances it would be reasonable for such committal proceedings to be brought. This involves considering the seriousness of the alleged non- compliance. The court should consider the purpose that the party seeking to use information obtained under the freezing order has in seeking to bring contempt proceedings. We are here concerned with the situation where a party contends that there have been deficiencies in the information provided by the subject of the freezing order and that its main purpose in bringing contempt proceedings is to seek as best it can to cure those deficiencies. The approach of the court may be different where the party who obtained the freezing order simply wants to bring contempt proceedings in order to persuade the court to impose a sanction on the subject of the freezing order for his non-compliance. Moreover,. if a party, having informed the court as to his motive for bringing contempt proceedings, obtains an order permitting it to use information obtained under the freezing order in contempt proceedings later changes his mind as to the motive for the contempt proceedings, he may need to bring the matter back before the court which gave him permission to use the information.

22. The court will no doubt want to consider whether, if time permits this course, some other, less draconian, application for the production of the information necessary to protect the rights of the party who obtained the freezing order would be likely to be sufficiently efficacious, such as an application for further information. Obviously, the court should refuse permission to use information obtained under the freezing order if it can see at that stage that the committal proceedings would be bound to fail, or if the information in respect of which the release from the undertaking is sought would not be material in the committal proceedings. The court should clearly consider the objections or defences of the person against whom committal proceedings may be brought before deciding to grant permission for this information to be used.

23. The court will in general also need to consider whether use of any part of the examination in contempt proceedings could be said to be unfair. If, for example, the party who obtained the freezing order used the cross-examination to extract admissions from the person cross-examined on the motive for concealment rather than the location of assets, then the court may consider that it would be unfair to the party cross-examined to allow evidence of the cross-examination, or at least the relevant part of the cross-examination, to be used in the contempt proceedings.

24. The fact that the person giving evidence, though aware that he could claim the privilege against self-incrimination, decided not to make that claim, does not automatically make the grant of permission unfair. In those circumstances, the witness has in general voluntarily made an informed decision to give information. If he was in fact unable to claim the privilege against self-incrimination, he has nothing to fear from committal proceedings. If he had the ability to claim the privilege but decides for his own reasons not to do so, he cannot in general complain if evidence which goes no further than proper cross-examination on his affidavit is sought to be used in committal proceedings. The position must be considered on its facts.

25. The court should bear in mind, when it gives its decision on the application, that it is able to give permission on terms, or to give permission to use some only of the evidence to which the application relates. Although the court has to consider all the circumstances, it should be careful to avoid the application becoming in itself complex satellite litigation. Dependent on the facts, the court should also bear in mind that it may be necessary for the contempt proceedings to take place as soon as possible if assets are to be successfully identified and located. In any event, the court should give consideration to the timing of the proposed contempt proceedings if the application for permission to refer to information supplied under the freezing order is made at the start of the trial. This may affect the fairness of the application for any order granting permission. If the action has been set down for trial, it may, in the interests of fairness to the defendant in the action, be appropriate to direct that a judge other than the judge hearing the trial should deal with the contempt proceedings. It may also be appropriate, in the interests of fairness to the defendant, to direct that the contempt proceedings should not take place until after judgment in the action unless the court otherwise orders.

The approach of the judge in this case

26. Applying the foregoing, for the reasons given below, I am satisfied that the judge was not in error in this case in giving permission for the evidence produced by Mr and Mrs Dadourian in compliance with the freezing order including transcripts of their cross-examination on their affidavits to be used in subsequent committal proceedings. I need only deal with that part of his judgment relating to that part of the application before him.

27. The judge noted that the privilege against self-incrimination had not been claimed. Having inspected material *de bene esse*, he noted that there had been discrepancies in the disclosure of accounts by Mrs Dadourian. The judge

also noted that Mr Freedman QC (for DGI) submitted that the purpose of the contempt application would be to obtain full disclosure, rather than to punish a breach. The judge thought that Mr and Mrs Dadourian might take a different view of DGI's motives given the hostility between the parties. Mr Freedman further submitted that, if full disclosure were made, that would weigh heavily in the mind of a judge when deciding whether to punish the defendant or not. The judge accepted Mr Freedman's submission as to the attitude of the court.

28. So far as Mr and Mrs Dadourian's evidence was concerned, the judge noted that Mr Ashe invited him to preserve the privilege against self-incrimination by refusing to allow the use of the evidence. The judge noted that there was a tension between the difficulty for DGI in proving contempt as opposed to the prejudice to be suffered by Mr and Mrs Dadourian in relation to something for which they could have invoked the privilege in self-incrimination. The judge held that his function was to strike a proper balance between competing tensions.

29. In my judgment the judge's overall conclusion is unimpeachable. He was in my judgment right to reject the submission that there needed to be exceptional circumstances before he could release DGI from its undertaking and permit use of material obtained from Mr and Mrs Dadourian in contempt proceedings against them. He took into account the difficulty for DGI if it could not refer to the material. As I see matters, it is in the interests of the administration of justice and the rule of law as well as the private interests of a party that permission to use information obtained under compulsion of a freezing order in contempt proceedings should be given in an appropriate case. There has been a very long history in this litigation of attempts to obtain information about assets from Mr and Mrs Dadourian. The matters set out in para 59 of my earlier judgment ([2006] 3 All ER 48) are a testament to this. No realistic alternative to contempt proceedings has been suggested to us or to the judge. I accept that, in the light of paras 35 and 36 of the judge's final judgment, there may be an issue, if a contempt application is made, as to the fitness of Mr and Mrs Dadourian to give evidence but that is a matter which can be dealt with at that stage with up to date medical information.

30. There was no basis suggested to the judge for saying that the course the cross-examination had taken had been unfair, or that Mr and Mrs Dadourian had been in some way misled or gulled into not claiming the privilege against self-incrimination. All that is said before us is that they had an expectation that the undertaking would not be released save in exceptional circumstances, but there was no authority to support this proposition, nor indeed any indication of how they came to have this expectation. Accordingly I would dismiss this appeal.

Postscript

31. There is a final point I would add. Judges should not in general hear applications for permission to use information obtained under compulsion of a freezing order in subsequent contempt proceedings at the start of a trial in which they may have to form a view about the credibility of the witness against whom the contempt proceedings would be brought. In the present case, the judge was placed in difficulty because the application was for permission to use the evidence of Mr and Mrs Dadourian both in the trial and in subsequent contempt proceedings. It was difficult for the judge to separate the two parts of the application. However, without in any way criticising the judge in this case, it seems to me that judges must be careful if applications concerning possible contempt proceedings are made at the start of trial for the reason which I have given. It may be better to defer the whole application, where possible, or to separate the application so as to adjourn that part of it which relates to subsequent contempt proceedings, in case it should be thought that discussion of possible contempt proceedings might colour the judge's view at trial of the witness or his ultimate conclusion in the case.

Disposition

32. For the reasons set out above, I would dismiss this appeal.

Lord Justice Longmore :

33. As my Lady has explained, Peter Smith J on the application of the claimants, made an order on 14th October 2005 requiring Mr and Mrs Dadourian to file further affidavits to the affidavits originally filed in response to freezing orders made by Lindsay J and Lewison J in February 2004. Peter Smith J also ordered them to attend for cross-examination on their affidavits (and that cross-examination took place on 30th and 31st January 2006). As part of the order of 14th October 2005, the claimants undertook not to use the evidence obtained pursuant to the order for the purpose, inter alia, of any committal proceedings or the trial of the action without the leave of the court.

34. The claimant then applied to be released from this undertaking before the trial of the action began. On 20th March 2006 Warren J (before whom the trial had started) acceded to that application, on terms so far as the release was to be for the purposes of the trial but generally so far as the release was for the purposes of committal proceedings.

35. Mr Michael Ashe QC submitted on behalf of Mr and Mrs Dadourian that a claimant, who has undertaken not to use evidence obtained after an order for such evidence has been made in pursuance of a freezing injunction, should only be released from that undertaking in exceptional circumstances. Mr Freedman QC for the claimant submitted no such principle existed and release should normally be ordered if it was consistent with justice to do so.

36. I agree with my Lady's conclusion that there is no principle that exceptional circumstances must exist before a claimant can be released from any undertaking given in the form it was in the present case and also with her conclusion on the facts of this case (where there is a reasonable suspicion that Mr and Mrs Dadourian may not have been completely frank about the amount and whereabouts of their assets) that the claimant is entitled to be

released from its undertaking. As my Lady says in paragraph 18 of her judgment the threat of contempt proceedings is more likely to promote the frank disclosure of information if the court is willing to allow evidence obtained to be used in appropriate cases than if the court only gives its permission in exceptional circumstances.

37. For my part I would wish to emphasise (as my Lady has also done) that contempt proceedings following a freezing injunction can be made for two separate (but sometimes combined) purposes.

38. More often than not a court exercises its powers in contempt proceedings for the purpose of punishing a party for disobedience to or non-compliance with a court order. In the particular case of freezing injunctions, however, it is common to bring contempt proceedings in order to "improve" a defendant's compliance with the original order. Under the pressure of a committal application, a defendant may feel obliged to reveal the whereabouts of assets the existence or amount of which he has hitherto concealed or the ownership of which he has hitherto misrepresented.

39. This second purpose will not usually be stated overtly on the face of the application. As the judge noted Mr Freedman for the claimant has submitted that this is the purpose in this case. Mr and Mrs Dadourian have doubted that and the court can hardly decide which of them is right. It seems to me, therefore, that the formal position should be that permission to use, in contempt proceedings, information obtained pursuant to a freezing order should be granted where it is convenient for that information to be used for the purpose of "establishing the contempt" rather than for the purpose "of enforcing or policing the freezing order" as such. This latter purpose may not be the purpose of launching contempt proceedings and, as I say, is unlikely to be stated openly on the court documents even if that is its true purpose. It is noteworthy that, in the present case, the claimant's application for release from its undertaking dated 28th February 2006 is that the claimant be permitted to use specified documents *"for the purpose of committal of the 4th Defendant"*.

40. The question should primarily be, therefore, whether it is appropriate for the claimant to be permitted to use the documents for the purpose of establishing the alleged contempt on which the committal application is founded. In my opinion it was and I agree, therefore, that the appeal should be dismissed.

The Chancellor :

41. This action was commenced by Dadourian Group International Inc ("DGI") on 3rd February 2004 against, amongst others, the third and fourth defendants Mr Jack Dadourian and his wife Mrs Helga Dadourian seeking damages for conspiracy and fraud. On the same day a world-wide freezing order, with corresponding disclosure orders, was made against Mr and Mrs Dadourian by Lindsay J. Disclosure affidavits pursuant to that order were made by Mrs Dadourian on 29th June and 18th November 2004 and 12th October 2005.

42. On 14th October 2005 Peter Smith J made an order against, amongst others, Mr and Mrs Dadourian requiring them to make further disclosure in respect of the matters specified in that order and to attend for cross-examination in relation to the same on a date in December 2005 and at a place to be subsequently notified to them. The order was indorsed with the normal penal notice and specifically drew their attention to their privilege against self-incrimination. In addition DGI undertook *"not without the permission of the court to use any information obtained as a result of this order for the purpose of (a) any criminal proceedings whatsoever, (b) any committal proceedings, and (c) the trial of this action."*

43. Disclosure affidavits, as required by the order of Peter Smith J were made by Mr and Mrs Dadourian on 18th November 2005. On 6th January 2006 Mann J ordered that the cross-examination of Mr and Mrs Dadourian should take place before him by video-link, Mr and Mrs Dadourian attending a studio in San Diego, California, USA for the purpose. Such cross-examination duly took place on 30th and 31st January 2006.

44. The trial of the action was due to commence on 7th March 2006 when, on 28th February 2006, DGI applied for permission to use at the trial and/or for the purpose of committal of Mrs Dadourian, amongst other documents, the affidavits sworn by Mr and Mrs Dadourian on 18th November 2005 and the transcripts of their cross-examination on 30th and 31st January 2006. The trial of the action began before Warren J on 7th March and in due course the application was made to him.

45. Judgment on the application was given by Warren J on 20th March 2006. Most of it related to the use of this and other material at the trial of the action. In relation to its use for the purposes of committal of Mrs Dadourian Warren J stated:

> *"72. So far as the third and fourth defendants' own evidence is concerned the position is more difficult precisely because of the privilege against self-incrimination, the protection of which is no longer strictly available but which [counsel for the Dadourians] invites me to preserve by refusing to allow the use of it.*
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> *73. There is here another stark tension. If the material is not admitted, the claimants may have difficulty persuading the court that there has been a breach and, more importantly, that there is a real case for saying that disclosure has not been given fully. If it is admitted, the defendants may suffer a prejudice in having disclosed something in relation to which they could have invoked a privilege against self-incrimination.*
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> *74. In my judgment attempting, as I perceive my function, to strike a proper balance between the competing tensions, the evidence of the 3rd and 4th defendants should be available for use on any contempt application in the same way as the evidence of other deponents but subject to the same caveats which I have already mentioned."*

The caveats to which the judge referred were those noted in paragraph 71 of his judgment, namely how such evidence might be properly adduced in evidence on a contempt application and the weight to be attached to it. The judge gave permission to appeal, not because he considered that there was a real prospect of success but because he considered that the point was a novel one.

46. By their appellants' notice Mr and Mrs Dadourian sought to have the whole of the order of Warren J set aside in relation to any evidence obtained under the order of Peter Smith J made on 14th October 2005 to be used in connection with any application to commit either Mr or Mrs Dadourian. In opening his case on behalf of Mr and Mrs Dadourian their counsel confirmed that now their objection is limited to the transcripts of their cross-examination by video link before Mann J on 30th and 31st January 2006.

47. We have been supplied with those transcripts. They show that present in the studio in San Diego with Mr and Mrs Dadourian was DGI's solicitor, Mr Serota, and present in court before Mann J was counsel instructed on their behalf, Mr Cakebread. The cross-examination of Mr Dadourian was extremely brief. Accordingly the substance of this appeal is whether DGI should be permitted to rely on the cross-examination of Mrs Dadourian on an application to commit her for contempt of court. The transcript of the evidence of Mrs Dadourian records a detailed cross-examination in respect of her assets and the disclosures previously made by her.

48. Before considering the submissions made on behalf of Mr and Mrs Dadourian on the hearing of this appeal I should record that the hearing of the action by Warren J took some 29 days. Warren J handed down a lengthy judgment on 24th November 2006. In the result DGI obtained judgment against Mr and Mrs Dadourian for deceit whereby DGI was induced to enter into an option agreement with Charlton Ltd which led to a dispute and an arbitration costing millions of dollars. The question of damages and issues as to costs are to be determined at a further hearing on 20th December 2006.

49. Counsel for Mr and Mrs Dadourian submits that in releasing DGI from its undertaking to Peter Smith J Warren J applied the wrong test. He submits that instead of seeking "to strike a proper balance between the competing tensions" the judge should have directed himself that a party should only be released from such an undertaking "in exceptional circumstances". He cited no authority in support of that proposition. He seeks to justify this submission with the further proposition that the proceedings had given rise to a reasonable expectation in the Dadourians that their evidence would only be used in subsequent committal proceedings in such circumstances. He suggests that if the test is any lower than that it will discourage frankness in those complying with disclosure orders made by the court.

50. I do not accept any of these propositions. There is no evidence to support the submission of the creation of a reasonable expectation in the Dadourians. There is nothing in the order of Peter Smith J to suggest that the permission of the court would be given or withheld by reference to any test of exceptional circumstances. Indeed the penal notice indorsed on the order and the express reference to the privilege against self-incrimination suggests the opposite. So far as the suggestion that any lower test than exceptional circumstances will discourage frankness is concerned I draw the opposite conclusion to that submitted by counsel for the Dadourians. No doubt it is important to encourage frankness in those to whom disclosure orders are directed but a proposition that only in exceptional circumstances may such evidence be used in an application for committal for contempt in falsely or inadequately complying with such an order would hardly induce frankness in those who need an inducement.

51. Mr and Mrs Dadourian have been represented throughout this action by counsel and solicitors. Their counsel was present at the London end of the video-link throughout their cross-examination. At no stage did either Mr or Mrs Dadourian seek to rely on the privilege against self-incrimination. At all times Mann J was astute to ensure that the cross-examination was properly and fairly conducted. There can be no suggestion of improper compulsion to answer questions so as to engage Article 6 of the European Convention on Human Rights.

52. In my view the judgment of Warren J discloses no error entitling this court to interfere with the exercise of his discretion. Such an exercise must depend on what is just in all the circumstances of the case; no more, but no less. For these reasons I agree with Arden and Longmore LJJ that this appeal should be dismissed.

Michael Ashe QC & Stuart Cakebread (instructed by David Wyld & Co.) for the Appellants
Clive Freedman QC & Charles Samek (instructed by Wallace & Ptnrs) for the Respondents