Neutral Citation Number: [2015] EWHC 769 (Comm)

Case No: 2012 FOLIO 1333

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2015

**Before**:

**THE HONOURABLE MR JUSTICE FLAUX**

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**Between:**

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| **ABDOURAHMAN MOHAMED MAHMOUD BOREH** | **Applicant/First Defendant** |
| **- and -** | |
| **(1) REPUBLIC OF DJIBOUTI**<br>**(2) AUTORITE DES PORTS ET DES ZONES FRANCHES DE DJIBOUTI**<br>**(3) PORT AUTONOME INTERNATIONAL DE DJIBOUTI**<br>**(4) GIBSON, DUNN & CRUTCHER LLP** | **Respondents/ Claimants**<br><br>**Additional Respondent** |

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**Dominic Kendrick QC, James Willan and Keir Howie** (instructed by **Byrne & Partners LLP**) for the **Applicant**
**Lord Falconer of Thoroton, Deepak Nambisan, Jennifer Haywood and Daniel Edmonds** (instructed by **Gibson, Dunn & Crutcher LLP**) for the **First to Third Respondents**
**Timothy Dutton QC** (on 2-5 March 2015) **and Philip Ahlquist** (on 9 March 2015) for **Gibson, Dunn & Crutcher LLP**
**Mark Simpson QC, Nico Leslie and James Hart** for **Peter Gray**

Hearing dates: 2-5 March and 9 March 2015

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# Approved Judgment

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

THE HONOURABLE MR JUSTICE FLAUX

## The Honourable Mr Justice Flaux:

Introduction

1. By Application Notice dated 9 January 2015 the applicant, who is the defendant to the proceedings and to whom I will refer as "Mr Boreh", applies to set aside the freezing injunction and proprietary injunction and other relief which I granted in favour of the respondents who are the claimants in the proceedings (to whom I will refer compendiously as "Djibouti" save where the context requires otherwise) on 11 September 2013. The basis for the application is that Djibouti and its legal representatives deliberately and/or recklessly misled the court in the application for the Freezing Order and subsequently. Although the Application Notice is framed in those wide terms, at the hearing of this application, Mr Dominic Kendrick QC who appears for Mr Boreh has made it very clear that, so far as the legal representatives are concerned, the allegation of deliberate misleading of the court is made only against Mr Peter Gray, the partner at Djibouti's solicitors, Gibson, Dunn & Crutcher LLP ("Gibson Dunn") who had the conduct of the case on their behalf.

2. In particular, Mr Kendrick QC made it clear that, whilst his client's rights were reserved, no allegation of professional misconduct or impropriety was being made against any other solicitor or lawyer at Gibson Dunn or against leading or junior counsel who acted for Djibouti at the hearing of the application for the freezing injunction and subsequently, Mr Khawar Qureshi QC and Miss Jennifer Haywood.

3. By a judgment dated 13 November 2014, I have already determined that I was misled at the time of the application for the freezing injunction. The issues for determination at the hearing which took place over five days on 2 to 5 March and 9 March 2015 were thus (i) whether Mr Gray had deliberately and/or recklessly misled the court and (ii) whether the freezing injunction, proprietary injunction and other relief granted on 11 September 2013 should be set aside or some other order made by the court.

4. Given the seriousness of the allegations made against Mr Gray and the implications for him of a finding that he had deliberately misled the court, the hearing was conducted on a fully robed basis. In that context, it is important at the outset of this judgment to set out the legal test which the court has to apply in determining whether a solicitor has deliberately misled the court and thus been guilty not just of professional misconduct but of dishonesty. As Mr Timothy Dutton QC submitted in his helpful and measured oral submissions on behalf of Gibson Dunn, the test has been clarified in the context of hearings before the Solicitors Disciplinary Tribunal where there are allegations of dishonesty by the Divisional Court (Richards LJ and Aikens J) in *Bryant v Law Society* [2007] EWHC 3043 (Admin); [2009] 1 WLR 163. Having reviewed the earlier authorities, including the decision of the Court of Appeal in *Law Society v Bultitude* [2004] EWCA Civ 1853, the Divisional Court said at [153] and [155]:

> "153. In our judgment, the decision of the Court of Appeal in *Bultitude* stands as binding authority that the test to be applied in the context of solicitors' disciplinary proceedings is the *Twinsectra* test as it was widely understood before *Barlow Clowes*, that is a test that includes the separate subjective element. The fact that the Privy Council in *Barlow Clowes* has

> subsequently placed a different interpretation on *Twinsectra* for the purposes of the accessory liability principle does not alter the substance of the test accepted in *Bultitude* and does not call for any departure from that test.
>
> ….
>
> 155. Accordingly, the tribunal in the present case should, in our judgment, have asked itself two questions when deciding the issue of dishonesty: first, whether Mr Bryant acted dishonestly by the ordinary standards of reasonable and honest people; and, secondly, whether he was aware that by those standards he was acting dishonestly."

5. It seems to me that in a case involving allegations that Mr Gray deliberately misled the court, that is an allegation of dishonesty and that, although the allegation is being made and determined in civil proceedings, given the gravity of the allegation, the appropriate test for the court to apply is the two stage test set out by the Divisional Court and Mr Kendrick QC has not sought to argue otherwise.

6. Two other aspects of the approach which should be adopted by the court in cases of this seriousness were highlighted by Mr Dutton QC in his submissions. First, that in considering whether Mr Gray deliberately misled the court, it is important to judge his conduct by reference to the circumstances as they were at the time of the conduct in question and not with the application of hindsight. As Laddie J said in *Re Living Images Limited* [1996] BCC 112 at 116H:

> "I should add that the Court should be alert to the dangers of hindsight……
>
> The court must be careful not to fall into the trap of being too wise after the event."

7. Second, since the proceedings are civil proceedings, the standard of proof remains the civil standard of the balance of probabilities, but where an allegation is made of deliberate misconduct or dishonesty, the court will only conclude that the allegation is made out if there is cogent evidence to that effect: see the well-known passage in the speech of Lord Nicholls of Birkenhead in *In re H (Minors)* [1996] AC 563 at 586:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception. By family proceedings I mean proceedings so described in the Act of 1989, sections 105 and 8(3). Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings.

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"

8. Mr Peter Gray is now 39 years old. He was called to the Bar in 1999 and requalified as a solicitor in 2002. He has worked in Dubai for a number of years and was a partner in Dewey & LeBoeuf before joining Gibson Dunn as a partner in 2012. He remained based in Dubai and had the conduct of this litigation on behalf of Djibouti.

9. He has sworn no fewer than seven affidavits in this matter and gave evidence before me, being cross-examined by Mr Kendrick QC for the best part of two days and then recalled for further cross-examination on the fourth day of the hearing, when further disclosure was made by Djibouti and Gibson Dunn. In his evidence at the hearing he accepted, as he had done in his sixth affidavit, that he had been guilty of serious errors of judgment, but he maintained throughout his evidence that he had not intended to mislead the court and had certainly not done so deliberately.

10. I have had that denial well in mind throughout my assessment of his evidence and the other materials before the court and throughout the writing of this judgment. In assessing his credibility I have adopted the approach which Lord Goff of Chieveley said in *Grace Shipping v Sharp* [1987] 1 Lloyd's Rep 207 at 215-6 that he adopted in cases of fraud:

> "I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities."

11. Before considering the background to the proceedings and setting out my detailed findings about the events with which this application is primarily concerned, I should just say something about the materials before the court. Following the order which I made at the hearing on 13 November 2014 and the subsequent directions hearing on 22 January 2015, Djibouti has waived privilege, solely for the purpose of the proper determination of this application, in a substantial number of documents passing between it and its legal advisers and in internal communications between those legal advisers. Inevitably there has not been a complete waiver of privilege and there are some documents in relation to which Djibouti was not prepared to waive privilege. That is their legal entitlement and prerogative and the court must be careful not to draw adverse inferences merely from the fact that privilege has been claimed and not waived.

12. It is also important to have in mind that one consequence of the waiver of privilege which has taken place is that the court has seen many of the internal discussions between the members of the legal team which no-one would have thought would ever be disclosed to the court or to the defendant. I have in mind in considering those communications, particularly where intemperate or ill-advised language is used, that it would be wrong to be over-critical of what was said when it was never intended that it would be disclosed.

The proceedings

13. Mr Boreh is a wealthy businessman who is a Djibouti national and also a citizen of France. In the mid-1990s he based himself in Dubai, from where he expanded his empire internationally. Between 2003 and 2008 he was the president or chairman of the board of directors of the second respondent, the Djibouti Ports and Free Zone Authority. During that period of time, substantial resources were invested in developing the port and the free zone. In 2008, Mr Boreh left Djibouti, having had a dispute with the first claimant over tax claims levied against him and his companies.

14. In the present Commercial Court proceedings issued in October 2012, the respondents as claimants allege that whilst he was president, he improperly profited from his position in numerous ways, including (1) receiving commissions from a Chinese company in respect of a contract for cranes for use at a new container terminal; (2) causing contracts to be concluded for the benefit of one of his companies, Soprim Construction SARL; (3) procuring large payments to himself regarding an alleged finders' fee and for purported expenses in respect of the dry port; (4) obtaining a 30 per cent interest in the share capital of a Bahamian company, Horizon Djibouti Holdings Limited ("HDHL"); and (5) procuring contracts for the provision of security-related services by a company, Nomad, in which he had an interest, for the third respondent and Port Secure FZCO, a company partly owned by the second respondent.

15. The allegations made by Djibouti are denied by Mr Boreh, but following the dismissal by Field J in a judgment dated 7 June 2013 of an application by Mr Boreh for summary judgment against the respondents and my judgment of 11 September 2013, concluding that Djibouti satisfied the test as to a good arguable case in the context of freezing injunctions set out by Mustill J in *The Neidersachsen* [1983] 2 Lloyd's Rep 600, the court is not concerned on the present application with the merits of the underlying claim, which is due for trial in October this year.

The conviction of Mr Boreh in Djibouti

16. After Mr Boreh left Djibouti in 2008, he was convicted in his absence by the Court of Appeals in Djibouti on 23 June 2010 of terrorism and sentenced to fifteen years imprisonment. Prosecution counsel at the hearing before the court was the attorney general, Mr Djama Souleiman Ali. The basis for the conviction was that he had instigated a grenade attack on the Nougaprix supermarket in Djibouti which occurred at 7.30 pm on the evening of 4 March 2009. As is clear from the judgment of the Court of Appeals the conviction was based upon two matters.

17. First it was based upon intercepted telephone calls said to have taken place on 5 March 2009 (the day after the Nougaprix attack) between Mr Boreh in Dubai and two brothers, Mohamed Abdillahi and Mahdi Abdillahi. The judgment makes a number of references to the calls having been intercepted on 5 March 2009, for example (in translation from the French): *"on 05/03/09 the investigators… intercepted an initial call… reporting on the criminal grenade tossing operation they had perpetrated the day before in the proximity of the 1st District"*. It is quite clear from the Reasons for the Decision that the calls on 5 March 2009 were regarded by the Court as highly incriminating of Mr Boreh and the principal reason for the conviction: *"in view of the fact that the recordings of mobile telephone calls indicated that [Mohamed Abdillahi] reported to [Mr Boreh] concerning the terrorist act perpetrated on 04/03/09 on the Nougaprix supermarket, while emphasising the implementation of a similar act on the evening of 05/04/09"*, those transcripts being said to "*… establish [Mr Boreh's] involvement as instigator of the terrorist acts perpetrated on 04/03/09 against the Nougaprix supermarket and on 08/03/09 against the Sheikh Moussa national gendarmerie barracks without question"*.

18. The second basis for the conviction was a purported confession of Mohammed Abdillahi. He was questioned by the national gendarmerie on 24 March 2009 about his alleged involvement in the grenade attack on the Nougaprix supermarket on the evening of 4 March 2009. It is clear from a transcript of his interview that the telephone calls he and his brother had with Mr Boreh were played to him and he was questioned about them on the basis that they had taken place on 5 March 2009 after the attack. He maintained, throughout those parts of the interview which he signed, that they were talking about the distribution of leaflets on behalf of Arche, an anti-government organisation. It was put to him by the police that he was lying as the distribution of the leaflets had occurred on the morning of 4 March 2009 whereas he was telling Mr Boreh that it had taken place at night but he denied lying.

19. There is then a further section of interview timed between midnight and 3 in the morning on 25 March 2009, in which in answer to a question asserting that in the phone conversation "*… you clearly tell [Mr Boreh] about the grenade attack at NOUGAPRIX saying that you performed the mission yesterday evening…"*, Mr

Abdillahi purportedly confessed as follows: *"I withdraw my previous depositions and I admit that during the telephone conversation with [Mr Boreh] the subject of the recording you sent me, I did in fact report on the grenade attack we carried out on NOUGAPRIX camouflaging it through the 1st district…This was a first warning."* Mr Abdillahi refused to sign this section of the interview.

20. In the judgment the Court of Appeals refers to the fact that Mr Abdillahi ended up admitting having had a phone conversation with Mr Boreh which related to the attack on the Nougaprix supermarket. In its Reasons for the Decision, the Court gives, as one of its reasons, that Mr Abdillahi had made that admission.

21. As set out in more detail below, Mr Gray became aware prior to the hearing before me on 10 and 11 September 2013 (which he attended) that in fact the transcripts of the telephone calls between the Abdillahi brothers and Mr Boreh were not made in the afternoon of 5 March 2009 but in the afternoon of 4 March 2009, the day before the Nougaprix attack. Accordingly the Court of Appeals had proceeded on a false basis. It is difficult to see how either the conviction in Djibouti of Mr Boreh or the alleged confession of Mr Abdillahi could stand in those circumstances. It is the fact that the misdating of the transcripts was not drawn to the attention of this court at the hearing in September 2013 (or indeed at any time prior to the further hearing on 13 November 2014) which led me to conclude in the judgment at that further hearing that the court had been misled.

Events leading up to the 10 and 11 September 2013 hearing

22. Djibouti issued an application for freezing order relief on 22 April 2013. On 23 April 2013, the parties appeared before Hamblen J. On the basis of undertakings by Mr Boreh not to dispose of or deal with or diminish the value of three assets, a property in Eaton Square, a French property known as Chateau Soraya and the shareholding in HDHL which was by now held by a company called Net Support Holdings Ltd, Hamblen J adjourned the freezing order application and listed it for hearing on 5 to 7 June 2013.

23. As I held in my subsequent judgment of 11 September 2013 at [11]:

> "…the way in which the matter was presented in terms of the undertaking the defendant has given to the Commercial Court, at least before Hamblen J at the hearing on 23 April 2013 was not entirely satisfactory. It is true that Hamblen J appears to have been told, and to have appreciated, that Mr Boreh was not accepting that he had any beneficial interest in the chateau in France or in the flat in Eaton Square, but it is the case that he was not told that in fact what had happened was that the defendant had divested himself of the interest that he had in Net Support, which in turn owned a substantial part of HDHL. I have considerable doubts as to whether if Hamblen J had been told what the true position was about the shareholding he would have regarded the undertaking being proffered as adequate."

24. Following the hearing before Hamblen J, Mr Boreh served evidence in the form of the First Affidavit of Ms Nicola Boulton of Byrne & Partners dated 21 May 2013, in

opposition to the freezing order application, in which it was alleged that the proceedings against him were politically motivated, because he was seen as a rival to President Guelleh. He said he had left Djibouti in 2008 for his own personal safety and managers of his companies were pressurised to leave. The government had targeted not only his companies but also him and his family.

25. In particular Ms Boulton drew attention to the fact that Mr Boreh had been convicted by the Court in Djibouti in his absence of offences of embezzlement and terrorism. She pointed out that Mr Gray's first affidavit dated 22 April 2013 in support of the freezing order application did not mention the conviction and she said: "*one would expect such a conviction [for terrorism] to be relied upon as evidence of dishonesty and likely dissipation of assets, but no such conclusion can be drawn here, because the proceedings were such an obvious travesty of justice."* In a footnote to that sentence Ms Boulton said this: *"Including, for example, the mystifying observation that a given telephone conversation: 'removed any shadow of a doubt' about Mr Boreh and others being involved in a terrorist attack 'because they discussed the purchase of scrap metal (meaning grenades).'"* That was a direct reference to one of the two telephone calls about the date of which the court was subsequently misled.

26. Ms Boulton went on to refer to the fact that, in June 2011 the Spanish High Court had dismissed the request of Djibouti for the extradition of Mr Boreh, who was arrested and imprisoned in Tenerife as a result of Djibouti having had him put on the Interpol Red Flag or Red Notice list pending that extradition application. The Spanish Court found: *"there is more than reasonable doubt regarding the absence of political or ideological motivations in the request."*

27. In an Appendix to her Affidavit dealing with alleged failure by Djibouti to make full and frank disclosure on its freezing order application, Ms Boulton relied upon the failure of Djibouti to refer in Mr Gray's first affidavit to the terrorism conviction as a material omission stating: *"…even if the Claimants do not wish to rely upon the convictions, they know that Mr Boreh challenges them as being obviously deficient on their face, and that he relies upon them as important evidence of a politically motivated campaign against him."*

28. Mr Gray answered that affidavit in his second affidavit dated 28 May 2013. He explained that he considered the terrorism incident of no relevance to Mr Boreh's wrongdoing (in other words to the matters the subject of the claim in the Commercial Court proceedings) and had not wanted to take up court time by implicitly inviting Mr Boreh to seek to re-litigate or re-open a decision of the Djibouti court. In an appendix to that affidavit, he set out details of matters concerning the terrorism conviction, stating that Mr Boreh had been convicted in June 2010 for actions to incite the bombing of a supermarket (clearly a reference to the grenade attack on the Nougaprix supermarket in Djibouti on the evening of 4 March 2009). He stated that: *"On the strength of the evidence, including recorded phone conversations, Mr Boreh was found guilty in absentia and given a prison term".* He then said this: *"…although the Spanish Court refused to extradite Mr Boreh, that does not mean that his conviction is unsound. Indeed, given that Mr Boreh has admitted to supporting at least one Somali warlord, one Mohammed Deylaf and has therefore supported violent acts in Somalia, it cannot be said to be inconceivable that he would not do the same in Djibouti, particularly given his stated animosity towards the Government there."*

29. In the event, the hearing before Field J in June 2013 was occupied with Mr Boreh's largely unsuccessful summary judgment application and there was insufficient time to deal with the freezing order application. Field J adjourned the application to September upon Mr Boreh undertaking to have sealed by the court and file with the court an affidavit disclosing his assets worldwide and further undertaking not to dispose of or diminish the value of the assets set out in that affidavit. The reason why the affidavit was to be sealed and so not open to inspection by Djibouti was apparently a concern that Djibouti might misuse information about his assets.

30. In August 2013, Mr Gray and Mr Qureshi QC were both involved in the drafting of an extradition request to the UAE authorities in Dubai for the extradition of Mr Boreh to Djibouti. Mr Boreh had been arrested and required to surrender his passport in Dubai at the behest of Djibouti. Although at one point in cross-examination, Mr Gray sought to suggest that the decision as to what went into the extradition request was ultimately a matter for the local Dubai lawyers, Al Tamimi, and that he merely had a role in drafting, having considered all the materials before the court, I consider Mr Gray's role in deciding what went into the extradition request was far more active than he was perhaps prepared to admit. Mr Qureshi QC was apparently involved because he had some previous experience of drafting such requests.

31. On 20 August 2013, Mr Gray sent Ms Ibtissam Lassoued of Al Tamimi and a number of other lawyers at Al Tamimi and Gibson Dunn a copy of a draft of the extradition request drafted by Mr Qureshi QC under cover of an email stating that: *"...it contains a number of notes and comments. We will of course work on reviewing issues such as date/time inconsistencies."* The first paragraph of that draft makes it clear that extradition was being sought for Mr Boreh to serve the sentence of imprisonment for the terrorism offences of which he had been convicted. At page 6, the draft refers to the two terrorist attacks in relation to which he had been convicted, the grenade attack on the Nougaprix supermarket on the evening of 4 March 2009 and the grenade attack on the gendarmerie barracks on the evening of 8 March 2009. Paragraph 15 of the draft then states that, by reason of suspicious activities that had come to the attention of the authorities, an investigating judge had authorised surveillance of telephone conversations.

32. Paragraph 16 then refers to a call intercepted on 5 March 2009 at 1 pm between Mr Abdillahi and Mr Boreh. A note on the draft, evidently from Mr Qureshi QC, asks what was the time of the call, which is also said to have been at 2.23 pm. That was a query about the time of the call and not the date. Extracts from the call are then quoted. The draft then says that, a few minutes later, Mr Mahdi Abdillahi and Mr Boreh spoke on the phone and quotes extracts from that call. Paragraph 20 then says that the indictment of Mr Boreh as the chief instigator of the terrorist acts resulted from those intercepted conversations on 5 March 2009. Paragraph 26 then referred to the admission made by Mr Mohamed Abdillahi in interview that the report he had provided over the telephone to Mr Boreh was of the attack on the Nougaprix supermarket. On any sensible reading of that draft, heavy reliance was being placed on the calls which were said to have taken place on 5 March 2009.

33. It was proposed that transcripts of the calls and of the interview in the original French[1] and in English translation would be exhibited to the extradition request. In

[1] In fact the telephone calls were in Somali and the transcripts were translated into French then into English.

response to Mr Qureshi QC's query about the time of the call, Ms Sana Merchant, an associate in the Dubai office[2] instituted a check by various staff including Ms Deborah Ngo Yogo II, one of the associates in Gibson Dunn's Paris office, as to the time of the call. Ms Deborah Ngo Yogo II said that the transcript gave the time as 1.30 pm and Ms Merchant then asked if a copy of the call log had been obtained to verify whether that information was correct.

34. Ms Deborah Ngo Yogo II then obtained the call log for these phone calls and noticed that the call log showed the two calls as having taken place at 2.23 pm and 2.35 pm on 4 March 2009, not 5 March 2009. She immediately emailed Ms Aurelie Kahn, also an associate in the Paris office[3] and Ms Merchant saying: *"the problem is that the call log shows that the conversations took place on* ***March 4, 2009 at 2:23pm and 2:35pm*** *i.e. before the grenades attacks took place"* (her emphasis in the original email). She described it as: *"a critical discrepancy that must be cleared"*.

35. Ms Merchant forwarded the email to Mr Gray the same day saying: "*it appears that the conversations (between the brothers and Boreh) took place before the grenade attacks. Unless I am missing something, this would be a very large discrepancy"*. Mr Gray immediately appreciated the significance of this, as he forwarded the email chain to Mr Hassan Sultan, the State Inspector-General of Djibouti, from whom Gibson Dunn received instructions. Mr Sultan sent the email chain on to Mr Djama Ali, the attorney general (who had prosecuted Mr Boreh at the trial) who said he would call the people in SDS (evidently state security) to get things clear.

36. Mr Gray then sent an email to Ms Deborah Ngo Yogo II on Sunday 25 August 2013, congratulating her on having spotted the dates and saying: *"Many people would not have checked and disaster would most certainly have followed."* In cross-examination he said the disaster would have been that they would have submitted a fundamentally incorrect document which would have put everything on the wrong factual basis. He admitted that they would have misled the courts, this court and the court in Dubai, albeit by mistake because no-one would have spotted it, a telling admission given the subsequent attempt by his counsel Mr Mark Simpson QC to maintain that Mr Gray had not appreciated prior to the hearing on 13 November 2014, that this court had been misled. He also accepted in cross-examination that, now that the discrepancy in dates had been spotted, there was a big issue as to what to do about it. He went on to accept that the conviction was obviously unsafe because it was based on the wrong date and that the confession of Mohamed Abdillahi was unreliable, although he said there was also a confession from the other brother [who had in fact died in hospital whilst in police custody] on the basis of the correct date.

37. Mr Kendrick QC put to Mr Gray that, in those circumstances, a solicitor who was under a duty not to mislead the court should have been saying that it was no longer possible to rely upon the conviction or seek extradition, but rather start all over again, because, if the English or Dubai court or Interpol was shown an unsafe conviction, the Rubicon was crossed between integrity and deception. Mr Gray answered that they had not relied upon the conviction but had pursued extradition on the basis of seeking a retrial rather than Mr Boreh serving the prison sentence, because the initial

[2] Who was four years qualified at the time having qualified in New York in 2009.
[3] Who was two years qualified at the time, having qualified as a New York attorney in March 2011 and in Paris in July 2012, although counting as the class of 2010 for the purposes of employment.

conviction in absentia did not count for much. When he gave that evidence, it struck me that it was indicative of an approach of telling some of the literal truth whilst not giving the full picture, the overall effect of which can be to give a misleading impression. Unfortunately, I consider that that was very much the approach which Mr Gray adopted from the moment that the dating problem, which he knew was a big issue (or as he described it to Ms Kahn later in the sequence of events in September 2014: "It was a massive issue"), was discovered.

38. Monday 26 August 2013 was the August bank holiday in the United Kingdom. Mr Qureshi QC was at home in the country apparently without any papers. Mr Gray spoke to him from Dubai on the telephone for just under half an hour. Mr Gray's evidence in his sixth affidavit was that he discussed the problem of the date in the transcripts being wrong, that they discussed the fact that Mr Boreh would seek to deploy this point to challenge extradition, but that the date issue was not fatal to the extradition request, because the underlying evidence still showed an arguable case that Mr Boreh had been involved in terrorist activities. His recollection was that Mr Qureshi QC advised that the extradition request had to be consistent with the revised date. His evidence was that he had the extradition request open on his computer throughout this conversation.

39. No attendance note was prepared by Mr Gray of this conversation. Mr Qureshi QC has written a number of letters to the court and produced a helpful note dated 20 February 2015 in response to a letter from Byrne & Partners, setting out, inter alia, his recollection of this conversation, which is that what Mr Gray apparently explained to him on 26 August 2013 was that there was a typographical/date error in one document referred to in the extradition request which was not material. On 26 February 2015, the Thursday before the hearing began, I convened a case management hearing because of concerns Mr Qureshi QC had expressed as to whether his integrity was being impugned. Mr Kendrick QC made it quite clear that no allegations of professional misconduct or impropriety were being made against Mr Qureshi QC at the hearing and on that basis I considered it was not necessary for Mr Qureshi QC to attend the hearing or be represented. In the event, having looked at some of the materials overnight, I considered that, in fairness, Mr Qureshi QC should attend the hearing or be represented in case any issue which might involve him came up. He attended throughout the hearing.

40. It is striking that, in the light of subsequent submissions made by Mr Mark Simpson QC on behalf of Mr Gray (to which I will refer later in this judgment) no application was made on behalf of Mr Gray at the hearing on 26 February 2015 for Mr Qureshi QC to be called to give evidence or to be cross-examined. Mr Gray's position, both in his sixth affidavit and his oral evidence and Mr Simpson QC's submissions before me, was that there was an honest difference of recollection between himself and Mr Qureshi QC about this conversation (and others to which I will come later in the judgment). In oral submissions made at the very end of the hearing Mr Simpson QC was at pains to emphasise that Mr Gray was not alleging that there had been any professional misconduct by Qureshi QC. In the light of that very clear stated position and the emails after the conversation to which I refer below, I do not consider that Mr Gray can possibly have explained to Mr Qureshi QC the full extent of the problem with the dates of the transcript or that it rendered the conviction and confession unsafe.

41. A meeting had been arranged to take place at Al Tamimi's offices between Gibson Dunn, Al Tamimi and Djibouti for 4 pm on Tuesday 27 August 2013 and, on the evening of 26 August 2013, Ms Lassoued sent out an agenda and version 2 of the extradition request to all those who were due to attend and others (including Mr Qureshi QC) who were not due to attend. Version 2 contained a number of changes from Mr Qureshi QC's 20 August draft, evidently made by Al Tamimi. For present purposes, it is only necessary to note that extradition was still sought for Mr Boreh to serve his sentence, that in the narrative in relation to the telephone interception evidence the two calls were still wrongly stated to have been on 5 March 2009, (although in a section on the sources of the evidence, the correct date of 4 March 2009 was given) and that the purported confession by Mohamed Abdillahi was still relied upon.

42. Two hours later at 20.11 hours Dubai time on 26 August 2013, Mr Gray sent an email to Ms Kahn, Ms Merchant and Ms Ngo Yogo II (but not Mr Qureshi QC) stating: *"I've spoken with Khawar* [Qureshi] *and we agree that having reviewed the evidence, we can get away with the date error. It is only in the judgment, which is awful anyway, and not in the evidence."* On the basis that Mr Qureshi QC was at home on that Bank holiday Monday without all the papers, it is a little difficult to see how he could have reviewed the evidence. Mr Kendrick QC put to Mr Gray in cross-examination that this email did not show the mindset of someone with integrity, acting for a state prosecuting authority seeking extradition. Mr Gray sought to justify the email by saying that they were not relying on the judgment but on the evidence and that, on the evidence, including the transcripts of the telephone calls bearing the correct date of 4 March 2009, he concluded Mr Boreh had a case to answer and therefore it was appropriate to proceed.

43. That suggestion that, even when the telephone calls were given their correct date there was still a case to answer, became something of a mantra in Mr Gray's evidence. I find that explanation of the approach Mr Gray adopted hard to accept. It seems to me that any competent and reputable solicitor faced with the "big issue" and potential "disaster" of the misdating of the transcripts would have been anxious to scrutinise the transcripts carefully and critically to see if, when they bore the correct date, they supported a case that Mr Boreh had instigated terrorist attacks. That critical analysis would surely have revealed that, unless there was some evidence of a grenade attack in a public place in the first district on the evening of 3 March 2009, the references in the first call to *"last night the act was completed in the first district"* and *"the people heard it and it had a deep resonance"* and in the second call to *"last night we bought the scrap metal and near Harbi Square and the first district the matter was concluded and it went well. Tonight we are counting on concluding the same act"* and *"yes the act was heard by the westerners and even had resonance"*, cannot have been a reference to a grenade attack the previous evening, 3 March 2009 and, therefore, by definition, *"the same act"* that night cannot have been a reference to carrying out a grenade attack on the Nougaprix supermarket.

44. Furthermore, it is quite clear that Mr Sultan and Mr Ali of Djibouti appreciated the importance of being able to produce some evidence of a grenade or bomb attack on the evening of 3 March 2009 to which the Abdillahi brothers and Mr Boreh could have been referring, as did Mr Gray. Hence his reference later in this email to his team: *"Aurelie, Debbie, we also need one of you to work with the security guy-we*

*need a statement about the people's palace attack. I think it is the Presidential Palace."* As Mr Gray accepted in answer to me, this was a reference to information he had been given by his clients Djibouti that there had been a grenade attack on 3 March 2009 and to the confession of Mahdi Abdillahi.

45. Furthermore, a statement was produced by Djibouti on 27 August 2013 from a police officer purporting to give evidence about a grenade found within the walls of the People's Palace, a public building where functions were held, including photographs of the grenade. However, by the following day, 28 August 2013, Gibson Dunn had ascertained from the metadata of the photographs that they had been taken on 12 April 2009, more than a month later. Mr Kendrick QC relied upon this as evidence of the concoction of evidence by Djibouti, a matter to which I return in more detail below. For the present it is only necessary to record that, however hopeful Mr Gray may have been that some evidence would emerge of a grenade attack on 3 March 2009, at the time of the email to his team on the evening of 26 August 2013, there was no such evidence. The material produced by Djibouti the following day was a pretty desperate attempt to produce some such evidence, any credibility of which must have been exploded the following day, when it emerged from the metadata that the photographs were dated 12 April 2009. It follows that, by 28 August 2013, Mr Gray must have known that there was no evidence of a grenade attack on 3 March 2009.

46. However, just continuing the focus on the events of 26 and 27 August 2013, soon after the email to his team at 20.11 on 26 August 2013, Mr Gray sent an email to Mr Qureshi QC in which he said: *"It turned out we didn't really need to say much. The extradition request did not labour the point, so changing the date by one date was all I had to do."* As Mr Kendrick QC put to Mr Gray, that is a strong indication that Mr Qureshi QC did not have the papers before him and that it was Mr Gray rather than Mr Qureshi QC or the two of them together, who went through the extradition request seeing what references were made to the telephone transcript. The email was also encouraging in its tone, suggesting that whatever the problem was it had been easily solved.

47. Mr Gray enclosed with that email the latest version of the extradition request as amended by him. It is immediately striking from this draft that, although in his evidence Mr Gray sought to maintain that no reliance was being placed on the judgment of the Djibouti court and, indeed admitted that the conviction was unsafe, the extradition was still being sought for Mr Boreh to serve his sentence, not for a retrial, as he had suggested in evidence. The dates of the phone calls in the section headed Telephone Interception Evidence had been changed from 5 to 4 March 2009, although reliance was still placed on the alleged confession of Mohamed Abdillahi in relation to the phone conversation, which was still said to be on 5 March 2009. As Mr Kendrick QC put to Mr Gray, it was left to the diligent reader to glean the inconsistency on the facts between the actual dates of the calls and the date ascribed to them in relation to the alleged confession. There is no indication anywhere in the draft that the conviction is unsafe. On the contrary, there is an assertion that the conviction is final and an express confirmation that the judgment is enforceable, unchanged from previous drafts.

48. Mr Kendrick QC put to Mr Gray that this draft, which left the reader to work out the inconsistency of the dates between the calls and the confession, was not the work of someone acting with integrity, to which Mr Gray's answer was that it was never

intended to be a final document. In my judgment that is not an answer to the criticism Mr Kendrick QC was levelling against him. I consider that any competent and reputable solicitor faced with the misdating issue and an appreciation that the conviction and the confession were unsafe would not have been embarking on an exercise of trying to tinker with the dates in the extradition request or, as he put it at a meeting the following day, 27 August 2013: *"fudge the error of the date"*, but would have advised his client that the only appropriate course was to give the full information about the dating error to the Dubai court and to inform that court that the extradition request could only be justified on the basis that there would be a retrial, because both the conviction and the confession were unsafe.

49. Since that is undoubtedly the course which would have been adopted by a solicitor of integrity from the very moment he was aware of the "big issue" and potential "disaster" of the dating issue, the obvious question is why Mr Gray did not adopt that course. It seems to me that the answer is to be found in something that was recorded as the priority at the meeting at Kroll's offices on 27 August 2013 to which I refer in more detail below: *"Avoid at all costs for Boreh to be released and passport given back"*. His desire to ensure that the terrorism allegation stuck against Mr Boreh, irrespective of whether the original conviction was a safe one, seems to have outweighed all other considerations and coloured his conduct at that time and thereafter. I will return to this point in more detail below, but in my judgment Mr Gray was determined that the terrorism case against Mr Boreh should prevail, which is the explanation why Mr Gray did not correct the misapprehension as to the date of the telephone calls under which I as the judge and both leading counsel were clearly labouring at the hearing on 10 and 11 September 2013, as Mr Gray must have known.

50. Furthermore, the fact that Mr Gray considered that tinkering with the dates or fudging the date issue in the extradition request was the appropriate course rather than making a clean breast of the misdating issue with the Dubai court is, regrettably, indicative of a lack of moral compass on his part, which also manifested itself in other ways in his dealings both with Byrne & Partners and the court, the most obvious example of which was his reference to being "acceptably evasive" in his response to Byrne & Partners' letter of 4 September 2014 raising with Gibson Dunn the fact that the court had been misled as to the date of the telephone calls at the hearing in September 2013. I return to this issue of "acceptable evasion" later in the judgment.

51. Mr Qureshi QC's response to Mr Gray's email of the evening of 26 August 2013, sent that same evening was a further indication that he, Mr Qureshi QC, did not appreciate the significance of the date issue and in particular that it made the conviction unsafe: *"On the assumption that all the documents are consistent then the change of date hopefully will not stir matters up too much-however this is highly likely."* That was clearly a reference to the fact that extradition requests have to be very precise and accurate as to dates. I simply do not see how Mr Qureshi QC could have written this if he had appreciated the significance of the dating issue and, in particular, that it rendered the conviction unsafe.

52. Mr Qureshi QC's reply went on to discuss the fact that this latest draft relegated the "Spanish information" (in other words the fact that the Spanish court had refused to extradite Mr Boreh) to a later section of the request rather than putting it up front as Mr Qureshi QC's original draft had. He considered this looked very defensive and could "kill" the Interpol warrant. It was being relied upon by Mr Boreh and would be

highly influential unless negated. Mr Gray's response to this email is an interesting insight into his intentions: *"Why don't we make this the first thing we say in the Interpol letter? That's the real audience."* Mr Qureshi QC responded that they should look at it [i.e. the "Spanish information"]; *"from Boreh's perspective-it is his ace card-why is it in an annex for us? When we deploy the translation in the High Court it will look rather strange to the English Judge-whatever the UAE Judges are like, I doubt that including the text in the format I had originally will radically alter their approach or confuse them-hiding it in an annex looks defensive."*

53. Although Mr Gray was not inclined to accept this in cross-examination, it is clear that what was going on here is that Mr Gray was aiming at producing in the extradition request a comprehensive document that could be shown not only to the court in Dubai but to Interpol and to this court on the freezing injunction application. That is confirmed by what Mr Gray said at the meeting at Kroll the following day about wanting: *"the extradition submitted before the English High Court hearing"*.

54. On 27 August 2013 a meeting took place at the offices in Dubai of Kroll security consultants and private investigators instructed by Djibouti. It was attended, apart from the Kroll representatives, by Mr Gray, Ms Merchant and Mr Tiernan Fitzgibbon (a newly qualified solicitor who had been working in the Dubai office for only two months at the time) from Gibson Dunn, by Mr Hassan Sultan (State Inspector General) and Mr Djama Ali (Attorney General and the prosecutor at Mr Boreh's trial) from Djibouti together with the Djiboutian ambassador to the UAE and a Djibouti lawyer. The aim of the meeting, as recorded in Mr Gray's opening statement, was to finalise the extradition request. He stated that they wanted the extradition request submitted before the English High Court hearing (i.e. the hearing of the freezing order application). This is a clear indication that they wanted to use the extradition request as part of the evidence before this court in support of the freezing order application (as indeed it was used, as exhibit PMJG 7 to Mr Gray's third affidavit sworn on 4 September 2013).

55. Mr Gray is then recorded as saying: *"Going to fudge the error of the date, it doesn't affect the underlying evidence"*. As I have already found above, fudging the error of the date was not the conduct of a solicitor of integrity, given that he knew that the original conviction and alleged confession on the basis of the wrong date were unsafe. Although Mr Gray would not accept this in cross-examination, the concept of "fudging" is of concealment so that no-one would spot the error. Furthermore, as I have also found, any solicitor who read the telephone transcripts carefully to ensure that, when they bore the correct date they did support an allegation of terrorism against Mr Boreh would have appreciated that, unless there was evidence of a grenade attack on 3 March 2009, they did not because, absent such evidence, whatever *"the act completed in the first district last night"* and *"the same act"* tonight were referring to, it cannot have been grenade attacks.

56. At the time of the meeting on 27 August 2013, Mr Gray may have been hopeful that Djibouti could produce evidence of an attack at the People's Palace on the evening of 3 March 2009. Indeed later in the meeting, Mr Sultan is recorded as saying that he had spoken to Mr Gray about grenades and Mr Gray asks for a report explaining everything about the grenades, how they were found and why they weren't talked about and says Ms Kahn was to arrange for the statement to be made and finalised that day, evidently a reference to the statement from the police officer who purported

to recall a grenade attack at the People's Palace on 3 March 2009. However, any hope that this was viable evidence was shattered the very next day when it emerged from the metadata that the photographs supposedly of the grenade taken on 3 March 2009 were in fact taken on 12 April 2009. Neither the statement from the police officer purporting to give evidence about an attack on 3 March 2009 nor the photographs were deployed thereafter.

57. Mr Gray in his evidence (as exemplified by paragraph 12 of his fifth affidavit sworn on 29 December 2014) sought to maintain that, even without any evidence of a grenade attack on 3 March 2009, he thought the phone transcripts with the correct dates ascribed to them still gave rise to a case for Mr Boreh to answer because of the "suspicious coded language". I find it difficult to accept that he can genuinely have thought that in the light of the analysis which it seems to me any competent solicitor would have engaged in, as set out in the previous paragraph. However, even giving him the benefit of the doubt about this, it can be no excuse for sitting through the hearing where both counsel and I were proceeding on the basis of the transcripts being dated 5 March 2009 without correcting the misapprehension.

58. Returning to the note of the meeting at Kroll, after his comment about fudging the error of the date, there was a discussion with Mr Ali about service of the Djibouti judgment and the fact that if the judgment had to be served before it became final, as in the case of civil judgments, then: *"if that is the case, then we would need to resubmit it and ask for a retrial and that would be a long winded process. Avoid at all costs for Boreh to be released and passport given back. PG has been discussing the backups with QC i.e. tax case and potential retrial as a back up in the event that the first request goes wrong".* Despite Mr Gray's denial in cross-examination, it seems clear from this whole passage that the imperative was getting the extradition request dealt with before the freezing order hearing and fudging the error about the date in the request, as well as ensuring that Mr Boreh was not able to leave Dubai.

59. Furthermore, as that passage shows, at least in the first instance, what was being proposed was an extradition request based upon the existing judgment and conviction. Retrial, which the meeting went on to discuss, was very much the back-up option if the request failed. Following a discussion involving Mr Ali about the need for a new criminal trial because Mr Boreh had not been present at the first trial, Mr Gray is recorded as saying this: *"What we can do is amend our extradition request to say that the judgment is good but that we are seeking his return for a retrial. That will then get rid of any issues with fairness over the trial."* It seemed to me that Mr Gray had some difficulty in explaining this in cross-examination, since, as he accepted, he knew that the judgment was not good, in other words that the conviction was unsafe.

60. The discussion then turned to the possibility of bringing in a French judge to Djibouti to try Mr Boreh at any retrial, which apparently was not possible under the constitution, but a foreign judge could be brought in as an observer. Mr Gray was then asked what his concerns were which he said were *"that it has been based on one phone call, no representation etc. If he [retried] the only defence is that he won't get a fair trial".* He then goes on to discuss the bad image Djibouti has in the media. As Mr Gray eventually accepted in cross-examination, what he did not say in answer to the questions about his concerns was that the reason why they should bring in a foreign judge was that this particular judgment and conviction was unsafe.

61. Following that meeting, the further meeting at Al Tamimi's offices in Dubai for which the agenda had been sent out the previous evening, took place in the afternoon of 27 August 2013. Apart from Ms Lassoued and other Al Tamimi lawyers, also in attendance were Mr Gray, Mr Fitzgibbon and Ms Merchant, together with representatives of Kroll and Mr Djama Ali. Mr Gray begins by referring to the meeting at Kroll which had been to deal with the outstanding factual issues about the extradition request. He then says that the most important of these is that *"we need to change it to a retrial rather than enforcement of the sentence"*. There is then some discussion about how this would be better from an international point of view, because Mr Boreh could be represented by whoever he wanted, including possibly a French lawyer. Ms Lassoued is then recorded as saying [that they must be] *"careful to avoid implying that the first judgment was incorrect"*, to which Mr Gray responded that anyone who returns to Djibouti is offered a retrial, which was what was going to be offered. The reason for the first trial was that he was tried with the Abdillahis and they did not want to delay the trial. In my judgment, the reasons why they were anxious not to imply that the judgment was incorrect were (i) that this might have an adverse effect on whether extradition was successfully achieved; (ii) disclosure of any problem with the judgment would provide Mr Boreh with ammunition for his case that all the actions against him were politically motivated and (iii) anything which suggested the conviction was unsafe would be likely to lead to his being able to leave Dubai.

62. As Mr Kendrick QC put to Mr Gray, it was the need to avoid implying that the Djibouti judgment was incorrect that led to Mr Gray not informing the English court or Interpol that the judgment was incorrect. As Mr Gray said later in the meeting: *"PG notes that we want to refer to the same documents in the UK case. We are going to put the extradition request in the English proceedings."* What is clear is that the intention was to use the extradition request, not only in Dubai but before this court on the freezing order application and with Interpol, and that was why the request was fuller than such a request would normally be in the UAE. That was confirmed by an email from Ms Lassoued of 29 August 2013. Although again Mr Gray would not accept this in cross-examination, it seems to me Mr Kendrick QC was right that if the extradition request did not provide the full picture about the conviction, so that there was misleading in the extradition proceedings, then the English court was going to be misled as well.

63. It seems to me that what emerges from the notes of the meetings at Kroll and Al Tamimi is in effect a strategy of not disclosing to any court (in the first instance in Dubai for extradition purposes then in England for the Freezing Order Application) that the conviction in Djibouti was unsafe and the evidence on which it was based was unreliable. Those meetings were attended by Mr Sultan (at Kroll) and Mr Djama Ali (at both meetings). Neither spoke out to say that the conviction should be quashed as unsafe and the extradition request reformulated on the basis that Mr Boreh should stand a fresh trial. Neither of them dealt with these meetings in his affidavit or came to be cross-examined about his knowledge and intentions. The court is entitled to infer that they agreed with this strategy. That may be part of the explanation as to why Mr Gray embarked on the evasive course of conduct which he did, that he thought that what he was doing was, if not on specific instructions of his client, at least in its best interests.

64. At the meeting, Mr Gray also referred to the misdating error in the transcripts and to the fact that evidence was being obtained of grenades left by the People's Palace but never set off on 3 March 2009 and that they were trying to get to the bottom of that issue. The third version of the extradition request which was enclosed with Ms Lassoued's email of 29 August 2013 now referred to offences committed on 3, 4 and 8 March 2009. As Mr Kendrick QC put to Mr Gray, the statement produced from the police officer in relation to the alleged attack on 3 March 2009 asserted that the pin from the grenade found at Nougaprix came from the same batch as the grenade found at the People's Palace. He also said that the attack on 3 March 2009 had not been publicised and treated with the utmost confidentiality in order to assist in the apprehension of the terrorists. Photographs were included with the statement.

65. Mr Gray accepted that he asked his French associates to look at this material and that, by 28 August 2013, they had ascertained from the metadata that the photographs were dated 12 April 2009 so could not be from an attack on 3 March 2009. Whilst he would not accept in cross-examination that by 28 August 2009 he knew the evidence Djibouti had put forward was false, he accepted that it was unreliable. When Ms Merchant sent him the next version of the extradition request on 30 August 2013, the reference to an offence on 3 March 2009 had been deleted and the request merely referred to offences on 4 and 8 March 2009. When Mr Kendrick QC put to Mr Gray that this was because they had no reliable evidence that anything had occurred on 3 March 2009, Mr Gray said the only pointer was Mahdi Abdillahi's confession, in which he admitted informing Mr Boreh in the telephone conversation he had with Mr Boreh on 4 March 2009: *"that a grenade had exploded in the 1st arondissement and that the country was starting to move"*.

66. The problem with the statements and photographs which Djibouti had come up with is that, even if they had been evidence of something happening on 3 March 2009 (which they were not because of the metadata of the photographs) there was no evidence of any explosion or detonation. Mr Gray accepted that if the phone conversation on 4 March 2009 was talking about grenades, then there has to have been an incident where something went bang on 3 March 2009. The position at this stage was that Gibson Dunn had looked and they and their clients, Djibouti, had come up with nothing either in contemporaneous reports or in the police files. He said that was why he had asked Djibouti to keep looking.

67. In this context it is worth noting (although it was not suggested Mr Gray appreciated this) that Djibouti never had any evidence of any incident involving grenades on 3 March 2009 (whether exploding or otherwise) let alone one implicating Mr Boreh. That emerges from a wikileaks cable dated 10 June 2009 referring to a meeting which the chiefs of police and national security in Djibouti requested with the U.S. embassy in which they were seeking U.S. Government assistance in identifying the origins of two grenades which exploded in the capital on 3 June 2009. It was said in the embassy cable reporting on the meeting that this was the fourth grenade incident in Djibouti since March 2009. The other three were then identified as (i) the grenade attack on the Nougaprix supermarket on the evening of 4 March 2009; (ii) the grenade attack on the gendarmerie barracks at Cheik Moussa on the night of 8 March 2009 and (iii) the unexploded grenade found in a tree behind the People's Palace at 2 pm on 12 April 2009. The cable then reported that according to the Chief of Police, Col.

Abdi, the perpetrators of these acts were not Djiboutian but he strongly asserted that these were direct acts from the Government of Eritrea to destabilise Djibouti.

68. Furthermore it is striking that the judicial enquiry referred to in the telephone calls was an enquiry not into grenade attacks, but the distribution of anti-government leaflets, and that it was pursuant to that judicial enquiry that the order for tapping the phones of the Abdillahi brothers was made. In the circumstances, Djibouti must have known there had not been any attack on 3 March 2009 and that the statement from the police officer purporting to report on a grenade found on 3 March 2009 was false. No-one from Djibouti (whether Mr Sultan or Mr Ali who produced affidavits or anyone else) has been called to explain how there can have been any proper ground for concluding, after the misdating error was discovered, that Mr Boreh still had a case to answer, based on the telephone calls, of being implicated in terrorism.

69. On 4 September 2013, Mr Gray then swore his third affidavit in support of the freezing order application and in answer to Ms Boulton's affidavits and affidavits that Mr Boreh had sworn. In a section headed "The extradition proceedings in Dubai" Mr Gray refers to the fact that he has been informed by Mr Ali about the detention of Mr Boreh in Dubai and the extradition request that he be returned to Djibouti for re-trial. He does not disclose that he had been involved in drafting the extradition request himself. He goes on to deal with the fact that Mr Boreh was making much of the decision of the Spanish court not to extradite him, but says that the arguments made there by the lawyer for Mr Boreh were based on a number of wrong or misleading submissions, which he then enumerates.

70. One of these, at [163.4] was that Mr Boreh had misrepresented to the Spanish court: *"the severity of his crimes"* because he had said the terrorism offences would lead to a sentence of 6 months to 2 years, possibly suspended and were based on mere suspicions that he had instigated the terrorist acts. Mr Gray stated that this was: *"wrong, in Djibouti acts of terrorism are punishable by way of imprisonment. Mr Boreh was convicted on 23 June 2010 and sentenced to 15 years imprisonment."* No mention is made there of the fact that Mr Gray was aware, because of the misdating of the transcripts that the conviction was unsafe. Far from it, as at the outset of this third affidavit, he incorporates by reference his first and second affidavits and attests to their accuracy. Mr Kendrick QC put to him that the appendix to the second affidavit (referred to in [28] above) set out details of matters concerning the terrorism conviction, stating that Mr Boreh had been convicted in June 2010 for actions to incite the bombing of a supermarket and that: *"although the Spanish Court refused to extradite Mr Boreh, that does not mean that his conviction is unsound."* Mr Kendrick QC put that all of that cried out for correction, which Mr Gray accepted, saying that he regretted that he did not notice this when finalising his third affidavit.

71. Mr Kendrick QC then put another of the matters which he had said in his third affidavit, at [163.6] were misleading submissions put before the Spanish court by Mr Boreh, that the request for extradition was politically motivated. Mr Gray said in the affidavit that this was unsustainable: *"not least in the face of the evidence which led to Mr Boreh's conviction in Djibouti".* Mr Kendrick QC put to Mr Gray that this was misleading, on the basis that the evidence on which he had been convicted was the incorrectly dated telephone transcripts. He would not accept that it was misleading, although he accepted it was a mistake not to think about this when he finalised the affidavit. As he accepted in answer to questions from me, he did not say in the

affidavit that the evidence on which Mr Boreh had been convicted was unreliable, because the date of 5 March on the transcripts relied upon was wrong nor did he say that the conviction was unreliable. He accepted that it was a mistake not to do so. In my judgment, the failure to inform the court about the unreliability of the conviction and the evidence on which it was obtained is quite remarkable. There would have been no reason for a judge reading the affidavit to know that there was any problem with the conviction or the evidence.

72. This misleading impression was compounded by the next paragraph [164] of the affidavit which stated: *"Mindful of the serious nature of these matters, I have provided an English language version of the extradition request submitted by the Djibouti Authorities to the UAE* [which he then exhibits]. *This evidence in support is at the very least reflective of a case to be answered by Mr Boreh.*" Mr Kendrick QC put that *"reflective"* was deliberately equivocal, which Mr Gray would not accept, seeking to justify what he had said in the affidavit on the basis that he believed Mr Boreh had a case to answer. However, I agree with Mr Kendrick QC that, where the evidence on which Mr Boreh was convicted was unsafe, the conviction itself was unsafe, the confession of Mohamed Abdillahi was unsafe and Mr Gray knew that Djibouti had not produced any reliable evidence of an attack or incident on 3 March 2009, the suggestion which he made that what he had said in the affidavit could be justified, on the basis that he thought there was a case to answer, was insupportable. Paragraphs 163.4, 163.6 and 164 of this affidavit involved equivocation, the use of ambiguity to hide the truth, a technique which regrettably Mr Gray continued to use in his misleading fourth affidavit and in correspondence with Byrne & Partners when they raised the issue of the misdating of the transcripts with Gibson Dunn in September 2014.

73. The extradition request exhibited to the third affidavit was in the form which asked the court in Dubai to extradite Mr Boreh to Djibouti where he had been convicted in absentia for terrorism offences and where he would be entitled to a retrial. It referred only to offences on 4 and 8 March 2009. It referred in the section headed "Telephone Interception Evidence" to extracts from the telephone calls with the Abdillahi brothers with the correct date of 4 March 2009 and then stated that: *"It is Djibouti's case that these conversations refer to the successful attack on 4 March 2009".* The reference to Mohamed Abdillahi's confession stated that he had admitted during the telephone conversation that he: *"was reporting on the grenade attack at Nougaprix supermarket"*. It is difficult to see how that statement could be justified, given that the attack had yet to occur at the time the call took place. Nowhere in the extradition request was any mention made of the fact that the evidence on which the original conviction had been obtained was unreliable and the conviction therefore unsafe. This was in line with Al Tamimi's reference at the meeting on 27 August 2013 to being careful to avoid implying that the judgment of the Djibouti court was incorrect.

74. Exhibit PMJG 7 included not only the extradition request which had been submitted at this stage through diplomatic channels, but the exhibits to that request. These included the transcripts of the two telephone conversations, but both the French "originals" and the English translations exhibited were the wrongly dated transcripts, with the first on 5 March 2009 at about 13.30 (exhibit 12) and the second "the same day a few minutes later" so also 5 March 2009 (exhibit 13). Since Mr Gray appears to have been travelling at the time the exhibit to his affidavit was put together, I accept

that the inclusion of the wrongly dated transcripts was a mistake probably made by those at Gibson Dunn who put the exhibit together, rather than being deliberate.

75. A detailed skeleton argument was produced by counsel (Mr Qureshi QC, Miss Haywood and Mr Goodkin) in support of Djibouti's application for the freezing order relief which came on for hearing on an *inter partes* basis[4] before me on 10 September 2013. It is fair to say that that skeleton did not rely upon the conviction of Mr Boreh in Dubai or the telephone transcripts as evidence of the risk of dissipation. The conviction was referred to in the section of the skeleton dealing with Mr Boreh's allegation of political oppression.

76. Paragraph 125 stated: *"The charges against [Mr Boreh] are not trumped up. [Mr Boreh] was convicted in absentia because he refused to attend court. The attempt to extradite [Mr Boreh] was not misconceived and [Mr Boreh's] Spanish lawyers seriously misled the court, as explained in paras 163 of Peter Gray's Third Affidavit. [Mr Boreh] has been arrested in Dubai and the Djibouti authorities have applied for his extradition. Such a request does not require supporting evidence. Exceptionally, because of the serious allegations that have been made against Djibouti the Djibouti authorities have submitted supporting evidence".* There is no hint there that the conviction was unsafe or the evidence on which it was based unreliable: quite the contrary. Clearly Mr Qureshi QC could not and would not have put his name to that skeleton argument if he had appreciated the full implications of the dating error and, in particular, that it rendered the conviction unsafe and created a serious dent in any argument that the telephone transcripts were referring to grenade attacks.

77. The skeleton argument filed on behalf of Mr Boreh for the hearing was drafted by Mr Christopher Butcher QC and Mr Keir Howie. In a section headed "The succession of legal proceedings against Mr Boreh", the skeleton was highly critical of the convictions of Mr Boreh in Djibouti for embezzlement, fraud and terrorism. It said there were many reasons to regard the convictions as unreliable and that the terrorism conviction above all was an obvious injustice. The court was invited to look at the judgment of the Djibouti court in the terrorism trial and form its own view of the integrity or otherwise of the process recorded in it. The skeleton alighted particularly for present purposes on the observation that scrap metal meant grenades.

78. These were strong submissions, but they were made in circumstances where Mr Boreh's counsel were completely unaware of the dating error or that the evidence was unreliable and the conviction unsafe, let alone that all those matters were known to Mr Gray. It is really beyond doubt that, if Mr Butcher QC had known the true position, he would have submitted that Mr Boreh's case that the terrorism conviction was trumped up and that his case that there was serious political oppression by Djibouti of Mr Boreh was amply borne out by the continued reliance on an unsafe conviction in seeking his extradition. Whether that would have led to my refusing the entire application for freezing relief is a different question, but that the revelation of the true position and the opportunity for Mr Butcher QC to make submissions about it would have been relevant and material to the exercise of my discretion cannot be doubted.

[4] Although Mr Butcher QC on behalf of Mr Boreh sought to persuade me that, because of the volume of materials served by Djibouti only days before the hearing (Mr Gray's third affidavit plus voluminous exhibits) the hearing should be treated as *ex parte* on notice, I ruled against him on that point at the hearing.

The hearing on 10 and 11 September 2013

79. Mr Gray attended the hearing on 10 and 11 September 2013, as, according to Mr Gray, did Ms Merchant and Ms Kahn. Lord Falconer told me, on instructions, that Ms Merchant was not at the hearing for the whole time. Mr Sultan, the Inspector General, was also at the hearing on behalf of Djibouti. Mr Mark Handley, one of the London associates at Gibson Dunn was present for at least some of the time, although he was new on the case that day. Furthermore, as Mr Gray accepted in evidence, he had not informed any of the London staff about the dating error, so that neither Mr Handley nor any of the London partners was aware that there was an issue about the dating of the telephone transcripts or that the misdating meant that evidence was unreliable and the conviction unsafe, let alone that Mr Gray knew all this. Accordingly, there was no reason for Mr Handley to conclude that there was anything untoward in the submissions being made to the court or in the exchange between the court and counsel. This is in marked contrast to the position of Mr Gray.

80. In his oral submissions in support of the freezing order application, Mr Qureshi QC first referred to the extradition proceedings in Spain at pp 31-33 of the transcript of 10 September 2013, after I had raised the issue that it was being alleged on behalf of Mr Boreh that the terrorism conviction was trumped up. Mr Qureshi QC made submissions as to why Mr Boreh's points about the refusal of the Spanish court to accede to the extradition request was not as forceful in his favour as he wanted them to be, including submitting that his Spanish lawyer's submissions had been misleading. I doubt very much whether Mr Qureshi QC would have made those submissions or, at least, would have made them in such an unqualified manner if he had known that [163.4], [163.6] and [164] of Mr Gray's third affidavit were at best equivocal.

81. Mr Qureshi QC then went on to refer the court to the transcripts of the two telephone conversations with the Abdillahi brothers exhibited at PMJG7 (which were of course incorrectly dated 5 March 2009). At pp 36-38 of the transcript, these submissions and exchange with the court took place:

> "MR QURESHI But what we have is Mohamed Abdillahi saying, and Mohammed is the cousin of Mr Boreh: "Boss, last night the act was completed in the first district. In the upcoming days similar acts will be intensified and other acts will be performed." "Was the act heard by the people or have you done nothing concrete?" "Of course people heard it and there was a deep resonance. I assure up the same act will occur tonight, God willing." A few minutes later the phone rings again. "Hello? Mr Boreh, yes, it's Abdourahman." Now when we asked whether Mr Boreh would accept that he was the conversant, Ms Boulton said it wasn't for him to confirm or deny anything, but anyway.
>
> MR JUSTICE FLAUX: This is the other brother now is it?
>
> MR QURESHI: Yes.

> MR JUSTICE FLAUX: So he has had a conversation with Mohamed, he's now having a conversation with Mahdi.
>
> MR QURESHI: What he's saying is, he's asking him for an update: "We're doing well, our activities are running smoothly. Last night we bought the scrap metal at Mahamoud Harbi Square, and the first district, the matter was concluded, went well. Tonight we're counting on concluding the same act." "Did the people hear our action?" "Yes, indeed a judicial inquiry has been initiated."
>
> It's a little bit more than scrap metal.
>
> "It's fine that a judicial inquiry is taking place but it's important that the act must have a resonance with the westerners and at Menelik Square."
>
> I'll pause there because what Ms Boulton has said, with some degree of incredulity, is the reference to scrap metals can't possibly be code for grenades, but of course when we see what Mr Boreh said, it's a little bit more than fixing a gate, which was Mr Abdillahi's explanation and the explanation that those who are instructed by Mr Boreh seek to project even now.
>
> Mahdi Abdillahi: "Yes, the act was heard by the westerners and even had resonance. The third act is expected tonight." "I would like you to call me at 11 o'clock hours on a telephone number that Mohamed will give you." "Done, let the struggle continue."
>
> Doesn't sound like a conversation about fixing a gate, I'm sorry to say." (my underlining)

82. It is clear from the passages I have underlined that the submissions which Mr Qureshi QC was making about the implausibility of the explanation that references to scrap metal were to fixing a gate were made on the basis that this was a conversation on 5 March 2009, after the grenade attack on Nougaprix supermarket the previous evening. That is the context in which he was submitting that what happened *"last night"* was more than just buying or moving scrap metal. Equally, it was on the basis that *"the act last night"* was the Nougaprix attack that Mr Qureshi QC was able to submit that *"the same act"* tonight was not referring to fixing a gate. Whilst it can no doubt be said that the suggestion that this was a conversation about fixing a gate was always implausible, whenever the conversation took place, I simply do not see how Mr Qureshi QC could or would have made these submissions if he had known that the conversation was in fact on 4 March 2009, before the Nougaprix attack and that there was no evidence of any grenade attack on 3 March 2009 which could make *"the act last night"* a grenade attack.

83. In contrast, if Mr Gray was listening to the submissions and concentrating on them, which was clearly a major reason why he was at the hearing, because he was the partner in charge of the case, it is difficult to see how he could have failed to

appreciate that Mr Qureshi QC was making submissions on the false basis that he thought the conversations were after the Nougaprix attack. He was aware of the dating error, which he had initially considered a "big issue" and he was also aware that the conviction in Djibouti was unsafe and the evidence on which it was based (principally the wrongly dated transcripts) unreliable. Yet here was his own counsel putting forward submissions which only made sense if counsel thought the transcripts were dated 5 March 2009 after the Nougaprix attack. If he was listening and concentrating, then it beggars belief that he did not appreciate that Mr Qureshi QC was still working on the basis of the wrong dates and thereby inadvertently misleading the court. In those circumstances, in my judgment, any honest solicitor would have immediately taken steps to correct his own counsel's misapprehension and thereby ensure that the court was not misled.

84. That the court was proceeding on the basis that the conversations took place after the Nougaprix attack is clear from the following passage at p. 39 immediately after the submissions I have already quoted:

> "MR JUSTICE FLAUX: It's a bit difficult, assuming it was Mr Boreh, why on earth would he be interested in the --because he's obviously not in Djibouti, he's presumably in Dubai, so doesn't know what's going on, so he's asking these two brothers effectively what has been the reaction to what has happened, and have the public reacted and comments about how is it going to effect the westerners and so forth, and Place Menelik is presumably where the president's palace is.
>
> MR QURESHI: It's where westerners congregate.
>
> MR JUSTICE FLAUX: But it's difficult to see how the gates of a villa have anything to do with that, really. Unless we're all going to go and admire the gates or something.
>
> MR QURESHI: My Lord, a common sense meeting of the minds might take that view…"

85. Furthermore, this issue of the terrorism conviction allegedly being trumped up was not being refuted by Mr Qureshi QC as part of some irrelevant side-show. He was relying upon it to demolish comprehensively Mr Boreh's case that the actions against him, including the Commercial Court proceedings, were politically motivated. This is clear from the exchange between Mr Qureshi QC and the court immediately following the passage I quoted in the previous paragraph:

> "MR JUSTICE FLAUX: I don't have to decide today whether Mr Boreh has participated in terrorist acts. All you're saying is that you at least have an arguable case that part of your case against Mr Boreh is that he has participated in terrorist acts.
>
> MR QURESHI: My Lord, I go further than that. I say it's simply outrageous for the defendant to maintain a position which of course suits him, and he articulates this through those he has instructed, that somehow the Djiboutian government is

> pursuing a vendetta against him which is reflected in trumped up charges. I say it's outrageous, because the persistent position adopted by the defendant to criticise a foreign friendly state, which I hasten to add in May was being told that English business, by a minister for Africa, here in London, was being encouraged to do business with Djibouti because of the importance of the port, that somehow this foreign state has taken it upon itself to pursue a vendetta against Mr Boreh, who was just going about his ordinary business, pursuing his commercial interests, and the fact that he was placed in a position to pursue his commercial interests didn't create any form of conflict of interest, and so the terrorism charge is trumped up. The pursuit of his companies which never paid any tax, and he never paid any tax, is trumped up, even though that started in 2005, is simply, with respect untenable. It can work up to a point as a smokescreen and as a diversion, but we take strong objection, because to impugn a foreign state in the way that Mr Boreh has done without any evidence whatsoever is a matter than we say, it's incumbent on us to ensure that this court is fully aware of the fallacy of the defendant's position, and that's why we put the evidence in, my Lord."

86. It is difficult to see how this position of righteous indignation could have been maintained, at least as regards the terrorism conviction, if that conviction was unsafe and the evidence on which it had been based was unreliable, which Mr Gray knew, even though Mr Qureshi QC did not. It is tolerably clear that if Mr Boreh had found this out, he would have exploited it to suggest that Djibouti was acting from illegitimate political motives to oppress him. Again, on the basis that Mr Gray was listening to and concentrating on the submissions, this must have been something he was acutely conscious of, particularly given the discussion with Al Tamimi at the meeting only two weeks previously about the importance of not implying, in the context of the extradition request, that the Djibouti judgment was incorrect.

87. The issue about the effect of the telephone conversations was debated between the court and Mr Butcher QC for Mr Boreh later in the hearing on 10 September 2009. First, at pp 109-110, Mr Butcher QC referred me to the judgment of the Court of Appeals of Djibouti of 23 June 2010 convicting Mr Boreh of terrorism, to which I have already referred in detail at [17]-[20] above:

> "MR BUTCHER It starts in circumstances where it has been decided that Mr Boreh is going to be tried in absentia, and that he will not be permitted the representation of his choice, because he had chosen a French advocate to represent him, who had been refused a visa, effectively.
>
> MR JUSTICE FLAUX: But he did have a local lawyer, though; didn't he?
>
> MR BUTCHER: Yes, but he hadn't actually been instructed. Then what one sees is at page -- and I'm going to come to the material which we have now seen very belatedly which

> underlies this, which only increases the problems, the concerns about this. Your Lordship sees on page 1288 that, six paragraphs down, I think: "the national police detectives that took over the judicial investigation already launched into the attack, tapped at first, a telephone call, and that was from Mohamed, alias "the boss," to Mr Boreh, who was escaping abroad, during which it is said he summarised a criminal act. In the first call, he told the persons he was speaking to, Mr Boreh, that a similar action would be carried out that evening and that it is a success by indicating to Mahdi, his brothers and others, wanted to talk to him to provide the details. On the same day, 5 March, there were conversations Mohamed Abdillahi and Mr Boreh. "This telephone conversation, tapped by the police, removed any shadow of doubt about the involvement of Mr Mohamed and his brother Mahdi in a operation orchestrated from the outside, consisting of a terrorist act because they discussed the purchase of scrap metal meaning grenade and the commission of a similar act this evening during the conversation."
>
> Then it's said that that was on the 5th, then it's said: "On the evening of 8 March at about 7 pm, another grenade explosion went off at the national police station." So that's not on the same day. It says that the explosive device that was launched over the police wall was caused by a detonation. Then it says that there was a search of the home of Mr Mahdi Abdillahi, which led to the discovery of important political documents including pamphlets intended to incite tribal hatred distributed in the town by the members of the ARCHE…"
>
> And then you will see that there's an account at the top of 1290: "During their interview with the detective, the two individuals denied any involvement in the attacks, as well as having had any contact with Mr Boreh. When they heard the telephone taps, they ended up by admitting that they had contact with Mr Boreh. Mr Mohamed affirmed that the transcript of his telephone conversation was about the attack on the Nougaprix supermarket.""

88. Anyone listening to these submissions with the knowledge Mr Gray had must have appreciated that the telephone conversations were being referred to on the basis that they were on 5 March 2009, the day after the Nougaprix supermarket attack. Indeed, Mr Butcher QC refers to the date of 5 March expressly. Then, at pp 120-122 when Mr Butcher QC referred me to passages in the transcripts exhibited by Mr Gray, that is the transcripts bearing the wrong date of 5 March 2009 :

> "MR BUTCHER Now if you would now look at the -- well, your Lordship has seen the telephone tap.
>
> MR JUSTICE FLAUX: Yes, and that's where?

MR BUTCHER: Which is at 5169 and 5172 in the translation.

MR JUSTICE FLAUX: 5169 in the French that is, yes.

MR BUTCHER: There's this talk about –

MR JUSTICE FLAUX: In Somalian, yes.

MR BUTCHER: Yes. It was translated into French and then into this. Your Lordship will have seen that. There is talk about acts, "a similar act is expected tonight," that's how it's translated, and there is at the end towards the end of 5173, there's talk about: "Let the struggle continue. As soon as the people have heard the acts well I will increase the gestures on my side." That is all that there is in relation to that telephone tap, nothing which identifies this as being a grenade attack or anything of the sort.

MR JUSTICE FLAUX: But this is Mr Mahdi, right? This is the conversation between Mr Boreh and Mr Mahdi?

MR BUTCHER: Yes.

MR JUSTICE FLAUX: And what is being said by the claimants in their extradition documents is that although there is a reference to ferraille, to scrap metal, that that clearly means grenades, because if you simply read it through on the basis it's scrap metal, and there's been an affair which has been executed and tonight we're going to execute the same act, did the westerners hear it, the reverberations and the echos and so forth, it's clearly a reference to the explosions. That's what's said.

MR BUTCHER: That's what's said. If your Lordship then sees the –

MR JUSTICE FLAUX: One has to inject a modicum of common sense into interpreting what's being discussed.

MR BUTCHER: Indeed, one does.

MR JUSTICE FLAUX: Leaving to one side whether your client's involved in this or not, whoever these people were who were speaking to one another, even if they think the line's not being tapped, it's extremely unlikely they're going to admit directly over the telephone, "Well actually I bought a hand grenade last night and set it off in the square", much more likely to say, "I bought some scrap metal, and the act we were going to do, we did that act and we're going to do another one tonight," and the response comes back, "Well that's all very interesting, but has it had an effect on the westerners, because

> that's what we really want to do, is to make the westerners understand, by having explosions in Djibouti that perhaps, you know, the United States and the French and so forth will do more to bring pressure to bear on the government."”

89. Again it is quite clear that this whole discussion between the court and Mr Butcher QC was predicated upon the grenade attack on the Nougaprix supermarket having taken place on the night before the telephone calls and, if Mr Gray was listening to the argument and concentrating on it, he must have appreciated that.

90. After that passage Mr Butcher QC made submissions about the fact that the confession of Mr Mohamed Abdillahi had been obtained in the middle of the night and that what he was really doing was distributing tracts or leaflets, which provoked this response from the court at p. 124, which again is only explicable on the basis that I considered the telephone conversations were on 5 March 2009, after the grenade attack on the Nougaprix supermarket:

> “Mr Butcher, I can't decide these things, but the fact of the matter is that I am not the slightest surprised that police in Djibouti were sceptical of this explanation. When you look at the telephone -- if you were looking at it from the point of view of an English criminal trial, which obviously is a very different creature from civil law systems, wherever they are, but the fact of the matter is if there were the evidence of that telephone tap, the relevant defendant, be it Mr Boreh or anybody else, would be cross-examined up hill and down dale about the fact that what was really being talked about was grenades. It had nothing to do with scrap metal, it's complete nonsense. You don't have resonating acts with scrap metal unless you are hurling it around the square or something. No doubt that point might have been taken. It's nothing to do with distribution of political tracts. That sort of evidence would be challenged over and over again. The defendant could say, as they very often do, as you know, maintain the story till the bitter end, but at the end of the day it would be a matter for the jury as to whether they believed it or not. I suspect they wouldn't believe it.”

91. A little later, following an intervention by Mr Qureshi QC to express concern that Mr Butcher QC was alleging that the confession of Mr Mohamed Abdillahi had been procured by torture, at p. 131 I said:

> MR JUSTICE FLAUX: Well, Mr Butcher's proposition as I understand it is that your client is effectively -- that the freezing injunction is discretionary, therefore it's effectively a form of equitable relief, your clients don't come before the court with clean hands, that I think is essentially what he's trying to make out.
>
> MR QURESHI: We have done, my Lord.

> MR JUSTICE FLAUX: But I'm not sure where any of this goes, because there is evidence before the court, at least sufficient evidence for the purposes of an arguable case, that the person to whom these telephone calls were made was Mr Boreh, and if what I'm being invited by both of you to do is to decide at least provisionally what it is all about, it seems to me at least arguable that this is all about grenade attacks in Djibouti.

92. After some further debate, there was this further exchange with Mr Butcher QC at pp. 135-137:

> MR JUSTICE FLAUX: And…as I've already indicated it seems to me, it comes back to the same point I made right at the beginning of the day, he says one thing, you say another thing, I can't decide it on an interlocutory basis, all I can say is there's an arguable case both ways. It seems to me they have at least an arguable case, Mr Butcher, that your client was involved in these terrorist activities.
>
> MR BUTCHER: My Lord, I will say that there is clearly a possibility –
>
> MR JUSTICE FLAUX: There may be all sorts of shenanigans going on in Djibouti.
>
> MR BUTCHER: There may also be a realistic possibility that what is being done here is the closing down of a political opponent. Mahdi Abdillahi, it was well known, was a political opponent. Both of the Abdillahis were saying that what they were doing was distributing a tract that was of a political nature, that it was one which supported Mr Boreh, and that what has actually happened here, in circumstances which are extremely troubling to say the least, might be the result of a political campaign.
>
> MR JUSTICE FLAUX: But at the moment, Mr Butcher, all I am talking about is the transcript of the telephone conversations. That's why I mentioned the point to you about what would happen in an English criminal court. All I'm talking about is the transcripts of the telephone conversations, in themselves, seem to me to give rise to an arguable case that what Mr Boreh was discussing with the Abdillahi brothers was the explosions which had taken place the previous night and the proposal that further explosions should take place. That's all.
>
> MR BUTCHER: But if your Lordship also says -- but it's also clearly arguable that this is a political campaign to stop a political opponent whose supporters were distributing leaflets, then you are in the realm –

> MR JUSTICE FLAUX: But there's nothing in the telephone conversation which says, "I tell you what, we've been" -- there seems to be a mistake about who was the boss, because there's some suggestion that the boss was actually Mr Boreh.
>
> MR BUTCHER: But, my Lord, obviously the Abdillahis say in terms that what they were doing was distributing leaflets.
>
> MR JUSTICE FLAUX: Well they would say that, wouldn't they?
>
> MR BUTCHER: They might say that because it was true.
>
> MR JUSTICE FLAUX: Confronted with the telephone conversation, Mr Mohamed Abdillahi maintained that he was distributing leaflets. Then when he's asked, "What's the mission you were on"?, he says, "I was on a mission but I'm not prepared to tell what you it was."
>
> MR BUTCHER: Because political opposition is not encouraged." (my underlining)

93. Again, as can be seen from the passage I have underlined, this discussion with counsel is obviously predicated upon the conversations having taken place on 5 March 2009 after the Nougaprix attack. Had I been aware that the conversation was in fact on 4 March 2009 before the attack and that there was no evidence of any grenade attack the previous night, 3 March 2009, let alone that the conviction and the evidence on which it was based were unsafe and were known to be so by Djibouti's solicitor sitting in court, I would have been far more receptive to Mr Butcher QC's submissions that, whatever else Mr Boreh and the Abdillahi brothers were referring to, it cannot have been grenade attacks and that it was much more likely to be the distribution of leaflets.

94. A little later on in the transcript for 10 September 2013 at p. 143, I returned to the effect of the arguable case on terrorism and made it clear that this seemed to me to be an aspect of risk of dissipation for the purposes of the freezing order application:

> "MR JUSTICE FLAUX: None of that changes the fact that I said a moment ago it seems to me that there's at least an arguable case against your client that he was involved in the grenade attacks in Djibouti, on the basis of the telephone conversation, which he hasn't denied is him… for the purposes of these proceedings, where I simply have to look at matters in terms of risk of dissipation, I'm not determining that it is your client and I'm not determining that he was involved, I'm simply saying there's an arguable case that he was involved.

95. In his reply submissions on the second day of the hearing, 11 September 2013, Mr Qureshi QC returned to the issue of the telephone transcripts and was somewhat disdainful of Mr Butcher QC's submissions that the conversations were about the

distribution of leaflets or any suggestion that the confession had been obtained by torture and there was this exchange with the court at pp34-35:

> MR QURESHI: My Lord, yes. The final point I make, and I make it because my learned friend went to some trouble, no doubt understandable trouble because he's instructed, to engage in a forensic analysis of the criminal proceedings, the substantive extradition request and the two volumes of exhibits to the extradition request. He spent a considerable amount of time going through the transcript and came close to making an allegation of torture as against the authorities in Djibouti, and it's my duty to make sure that insofar as such an allegation has been made, that is an allegation that is rejected emphatically. How he read the transcript in the way that he did, which provided an explanation on the part of Mr Abdillahi, worded in a manner in which we respectfully observe was identified by the prosecutor in his submissions as unsatisfactory at best, weasel at worst, for distribution of leaflets as being an explanation --
>
> MR JUSTICE FLAUX: Let's just cut this short. It seems to me, I indicated this to Mr Butcher yesterday. On the basis of the telephone transcript of the conversations that Mr Boreh had with the two brothers, for my purposes it is arguable that Mr Boreh was implicated in acts of terrorism. Leaving entirely to one side whether he's been convicted of them, and the basis on which he was convicted of them and whether it was a fair conviction and so forth, but there is evidence before the court in the form of telephone transcripts that he was involved in, and directing, terrorist acts. That is at least arguably, you would say, a matter which the court is entitled to take into account in relation to the risk of dissipation.
>
> MR QURESHI: The conclusion of my –
>
> MR JUSTICE FLAUX: But the fact that somebody's a terrorist doesn't of itself mean that there's a risk of dissipating assets, but I think common sense would suggest that it might be something that wouldn't necessarily need all that much further evidence before you reached that conclusion."

96. I doubt very much whether Mr Qureshi QC would have made submissions which were so critical of Mr Boreh and his lawyers, if he had known that the conviction and the evidence on which it was based was unsafe, let alone if he had known that those were matters well known to his instructing solicitor.

97. Following that exchange, I delivered my ex tempore judgment in which I concluded, so far as relevant to the present application is concerned, that the arguable case that Mr Boreh was involved in terrorist acts was one of four matters which demonstrated a real risk of dissipation of assets (the others being the withdrawal of assets from Djibouti in 2008, the divesting of his shareholding in HDHL and/or Net Support and

the unsatisfactory circumstances of the undertaking given to Hamblen J which I referred to at [23] above). My conclusion was as follows at [12]:

> "Fourth, it seems to me that there is, on the basis of the telephone transcript of conversations between Mr Boreh and the Abdillahi brothers, an arguable case that the defendant was involved in and directing terrorist acts in Djibouti. Whilst it is undoubtedly right that somebody who has acted as a terrorist would not necessarily be somebody who would dissipate his assets, in view of all the other evidence, it does seem to me the court is entitled to take a common sense view, and to take the view that somebody who is at least arguably engaged in terrorism is well able and likely to divert his assets to make himself judgment-proof. So it does seem to me that there is a real risk of dissipation here."

98. Finally in relation to the hearing and the judgment, in a short paragraph at the end of the judgment I concluded that there was nothing in Mr Butcher QC's point about Djibouti being politically motivated which should lead the court to refuse to grant the freezing injunction. Following the judgment, there was discussion about the form of the order and costs and the hearing concluded at 3.35 pm on 11 September 2013.

99. Mr Gray produced a handwritten note of the judgment at the time I was delivering it, which has been helpfully transcribed by Mr Gray for the purposes of the present hearing. That includes a reference to the telephone transcripts: *"On basis of telephone transcript involved in directing"* and in his typed up transcript Mr Gray suggests, correctly, that this was a reference to directing terrorism.

100. Immediately after the hearing Mr Gray sent an email to Ms Kahn. This was in response to an email she had sent on 4 September 2013, enclosing a draft letter to be sent to Interpol to which it was proposed to append the French version of the extradition request. The draft letter asserted that the extradition request [which I have referred to at [73] above but which made no mention of the fact that the evidence on which the original conviction had been obtained was unreliable and the conviction therefore unsafe] included specific evidence in the terrorism case against Mr Boreh which it was not required to. The draft letter continued that in the light of his allegations that the case against him was trumped up and politically motivated: *"this evidence clearly demonstrates a case to answer against [Mr Boreh]"*.

101. Mr Gray's email to Ms Kahn of 11 September 2013 states:

> *"Please send this to Djama [Ali] and make sure it goes out.*
>
> *Make sure in addition it quotes the judge yesterday on the terrorism in which he says there is a good arguable case on this."*

102. The day after the hearing, on 12 September 2013, evidently at Mr Gray's request, Ms Ngo Yogo II highlighted on the transcripts from the two days of the hearing the paragraphs dealing with the fact that the political motivation argument is immaterial and setting out all references made to the terrorism case. She sent these to Mr Gray

that evening highlighted in yellow as attachments to an email. Amongst the passages highlighted by her from the first day of the hearing were the exchanges with Mr Qureshi QC at pp. 39-40 quoted at [84] and [85] above, together with the totality of the exchanges with Mr Butcher QC at pp. 109-126, 128-133 and 135-141, some of which I have quoted at [87], [88] and [90]-[92] above. This exercise seems to have been carried out for the purposes of the letter which Gibson Dunn was proposing to send to Interpol (which was still in draft) asking them to impose a Red Notice against Mr Boreh.

103. On the day after that, 13 September 2013, Mr Gray asked Ms Kahn to come to the meeting room (at Gibson Dunn's London office) to discuss the latest draft of the letter to Interpol. That evening, Ms Kahn sent Mr Gray a draft of the letter (in French) following their discussion. That draft proposed to attach copies of the transcripts of the hearing. The draft then quoted what I had said about the arguability of the terrorism case on the basis of the telephone transcripts at p. 135, 136 and 143. It stated that I had concluded that there was a good arguable case that Mr Boreh was implicated in terrorist activities. The letter was subsequently sent to Interpol by fax.

104. I will return to the dealings with Interpol and other international agencies and the use made of my judgment after the hearing later in this judgment when I have considered the critical issue whether Mr Gray deliberately misled me at the hearing on 10 and 11 September 2013.

Did Mr Gray deliberately mislead the court at the 10/11 September 2013 hearing?

105. That the court was misled is something I have already determined in the judgment I gave on 13 November 2014. For present purposes, I need only quote [10], the beginning of [11] and part of [14] of that judgment:

> "10. Of course if the calls took place on 4 March then a completely different complexion could be placed upon those calls. The point that was being made by Mr Boreh that the only judicial inquiry that had ever taken place was in relation to leaflets would have considerable force. Although a rather half-hearted attempt has been made by the claimants to suggest that there may have been a grenade attack on 3 March, the fact of the matter is that at the time when the police questioned the Abdillahi brothers later in March 2009 it was only ever suggested by the police that there had been two grenade and terrorist attacks, one on the 4 March, that is to say the Nougaprix one, and one on the 8 March which was the attack, I think, on the police station. It follows that whatever it was that was being referred to as having taken place "last night" in a call that took place at lunchtime on 4 March cannot have been the Nougaprix attack; and there is no or no satisfactory evidence that it was some unknown grenade attack which had taken place on 3 March.
>
> 11. So it would appear, on the basis of that material, that this court was misled on the occasion of granting the freezing injunction…

> 14. I am quite satisfied that I was misled as to the dating of the telephone transcripts; and the paragraph in my judgment that I read out could not have been said unless I had thought that the calls had taken place on 5 March following the Nougaprix attack rather than on 4 March before the Nougaprix attack. So that my judgment cannot and should not be used to support a case that Mr Boreh had arguably taken part in terrorist activities."

106. I should add to that that, if the true position had been disclosed to the court (as it should have been) that the conviction was based upon evidence of a phone conversation which had been given the wrong date so both that evidence and the conviction were unsafe, but that Djibouti and its lawyers were still relying upon the conviction and the evidence of the telephone calls (without explaining the error that had been made) in their extradition request and in their evidence to this court, then I suspect that as far as this aspect of the case is concerned, the hearing on 10 and 11 September 2013 would have taken a different course. I agree with Mr Kendrick QC that the submissions being made by Mr Butcher QC about political oppression would have had considerably more force. Whether the court would still have granted the freezing order and other relief is another matter, but disclosure of the true position would clearly have been material to the exercise of the court's discretion.

107. It seems to me that any honest solicitor with the knowledge of Mr Gray as to the dating error and its impact on the safety of the conviction, who was listening to and concentrating on the exchange between the court and counsel would have appreciated that both counsel and the judge were proceeding on the misapprehension that the telephone calls were on 5 March 2009, after the Nougaprix attack, and would have taken immediate steps to correct that misapprehension. On that basis, the limb of the test in *Bryant* of objective dishonesty is satisfied, but the critical question which remains is the one of subjective dishonesty, what was Mr Gray's state of mind at the time of the 10 and 11 September 2013 hearing.

108. In his sixth affidavit sworn for the present hearing, Mr Gray says that he has no independent recollection of the exchanges between the court and counsel. He ascribes his failure to correct the misapprehension both the court and counsel were under to a number of factors: exhaustion and a lack of focus; his failure to notice that the wrongly dated transcripts rather than the corrected ones had been exhibited to the extradition request and, thus, the third affidavit; not appreciating the significance of the transcripts because of his firm belief (which he thought the court seemed to share) that the whole political persecution case was irrelevant to whether a freezing order should be granted; that from an early stage the court seemed to be receptive to Djibouti's submissions, so that from the early afternoon of 10 September, as his emails indicated, his thoughts had turned to issues of the steps to be taken in multiple jurisdictions if freezing relief was granted; that he sent and received a number of emails during the hearing, the majority concerned with this litigation, which may have affected his focus on the detail of the submissions and an assumption that Mr Qureshi QC would bring to the court's attention anything which should be brought to its attention, believing as he says he did that Mr Qureshi QC was aware of the misdating issue which meant that he paid less attention than he should have done to what was said at the hearing.

109. In his evidence in cross-examination, Mr Gray essentially maintained that explanation. He explained again that he had not appreciated that the wrongly dated transcripts were exhibited to his third affidavit. He said that he had thought long and hard about why he had not corrected the misapprehension and tried to explain it in his sixth affidavit, but he had not noticed at all what had taken place between the court and counsel. He did not think political motivation was a factor in the decision the court was going to make so he did not pay the attention to it which he should have done.

110. He accepted that if he had been paying attention, he should have spoken to leading counsel and said the wrong date had been referred to and therefore the court was proceeding on the wrong basis. He said that even when he did look at the transcripts he didn't appreciate that, otherwise if he had done, he would have done something about it in September 2014. He maintained then and throughout his evidence that he had not appreciated that the court was misled until the hearing before me on 13 November 2014. For reasons I will come to when I deal with events between September and December 2014, I found that evidence quite remarkable.

111. Because I was anxious to understand what Mr Gray's state of mind was, I asked him specifically what he was doing when the discussion was taking place with counsel and he gave a lengthy answer. I propose to quote this section from Day 1 of the present hearing in full, because his answer contains a number of aspects of the excuse and explanation he now seeks to put forward which simply cannot be justified by his contemporaneous conduct for reasons I propose to set out in detail:

> "MR JUSTICE FLAUX: I'm sorry, Mr Gray, I want to give you a chance because this is very, very serious, but the thing I do not understand about your evidence is what on earth you were doing. What were you doing, doing your emails on your Blackberry or something? You are a partner in a city firm. You sat through a hearing in front of me for two days, during the course of which this was raised by both counsel, and it went to the risk of dissipation, because that is the point that I made to Mr Qureshi, and he said "Well, it goes further than that, because it showed how outrageous it was to suggest that this was all politically motivated". I just wonder what on earth you were doing while all this was happening?
>
> A. Well, my Lord, I can't remember exactly what I was doing. I did send -- I know I did send a few emails in the afternoon. I possibly shouldn't have done that. It seemed to me early on in the hearing that it was going the right way, and there were numerous things that a favourable judgment would have meant we had to do very quickly, such as taking steps in other jurisdictions, and I know that my thoughts turned to that early and I know that -- as I say, I did send a few emails, and my understanding -- I appreciate what's said about leading counsel and I don't say that -- and I don't make any allegation against him, but my understanding of this whole extradition process was that he did understand what was going on. He said to me, when -- before we even embarked upon this exercise, when we

> were thinking who should do it, because, as counsel for Mr Boreh has said, I have never done an extradition request. He put it to me. I have never done an extradition request, I don't really know what one looks like; and leading counsel said to me that he was familiar with these, that this was something that we should play a role in and not just leave it with Al Tamimi.
>
> So from that period onwards to the hearing, I understood -- I may have been wrong, but I understood that he believed that this date change was significant. I had a long conversation with him about it. He had all the material. The only thing I changed was the date, and I thought he agreed with me that there was still an arguable case and that this really wasn't as important as we had first thought. I fully appreciate the effect it has on the conviction, but this is, as it were, taking the case and looking at it afresh, and its importance diminished in my mind. The date issue diminished in my mind. I was thinking far more of the suspicious language. To me, that was the real thing. What was "scrap metal" about? There was just no -- it didn't seem to me to be an innocent explanation I had heard for that. It has been said, well, that meant leaflets, but that's not what the Somali says, the two are not the same. And why not talk about leaflets if that's what you are talking about? Well, they are inciting…genocide."

112. In answer to me, Mr Gray denied that he realised that the court had been misled when he read the judgment. Mr Kendrick QC then put to him the email he had sent Ms Kahn, which I have quoted at [101] above, and suggested that this demonstrated that he had been paying attention at the hearing on the first day, 10 September 2013 and had a transcript. Mr Gray said that was not what happened at all and it was leading counsel who had suggested this be referred to in the letter to Interpol. Mr Kendrick QC referred to the highlighting of the transcripts prepared at Mr Gray's request by Ms Ngo Yogo II and put to Mr Gray that he and his assistants had pored over the transcripts for the purpose of writing the letter to Interpol. He said he didn't think he had pored over it but he had given it to one of the associates to write a letter, although he accepted that he had called Ms Kahn to the meeting room to review the draft letter.

113. I will consider the further dealings with Interpol and others and Mr Gray's evidence about that later in this judgment when I have set out my detailed conclusions about whether he had deliberately misled me at the hearing. Obviously this is a matter which has required anxious consideration, given the seriousness of any conclusion that Mr Gray deliberately misled the court and the implications of that conclusion for Mr Gray himself and his career. I have also had well in mind that the standard of proof in a case of this seriousness is such that the court should not make a finding of dishonesty, unless there is cogent evidence upon which to reach that conclusion.

114. I have also considered carefully the submissions made on behalf of Mr Gray by Mr Simpson QC. The essential point which Mr Simpson QC advanced with considerable conviction was that, through reading the detailed analysis of the evidence and how the court had been misled in the letter from Byrne & Partners of 4 September 2014 and their subsequent letters, leading up to the hearing on 13 November 2014, the other

lawyers involved (counsel and Gibson Dunn lawyers) all had the same degree of knowledge as Mr Gray and yet they did not consider that the court had been misled. Therefore, he submitted, since they were all honest and no-one was suggesting the contrary, the court could not and should not conclude that Mr Gray was dishonest.

115. Despite the impassioned plea which Mr Simpson QC understandably made that it would be unjust in those circumstances for the court to conclude that his client was dishonest, if all the other lawyers were honest, I consider that the submission suffers from a fundamental fallacy, namely that, contrary to the submission, the other English lawyers did not share Mr Gray's knowledge. Apart from Mr Fitzgibbon, who was a newly qualified solicitor, the only English lawyer and officer of the English court in the employ of Gibson Dunn who was at the meetings on 27 August 2013, at which the strategy was developed of not disclosing to either the Dubai court or in turn the English court that the conviction was unsafe and the evidence on which it was based was unreliable, was Mr Gray. It was Mr Gray who then carried the strategy into effect, most significantly for present purposes in his fourth affidavit, which was positively misleading as set out below, for reasons of which only he, amongst the English lawyers, was aware. He was the only English lawyer and officer of the court who sat through the hearing on 10-11 September 2013, knowing what the strategy was and knowing that the court was proceeding on a misapprehension.

116. None of the other English lawyers (including counsel) knew about the strategy of not disclosing that the conviction was unsafe and the evidence on which it was based was unreliable, and they certainly did not learn of it from the Byrne & Partners letters. Byrne & Partners were not aware of the meetings of 27 August 2013 and the notes of them, since they were only disclosed after the 13 November 2014 hearing. Furthermore, none of the other English lawyers was aware that Mr Gray had known about the strategy at the time of the hearing and had known about the misdating error before the hearing and throughout it, for the simple reason that he never told any of them about his actual knowledge of the dating error and its implications. The first that any of them knew that he had known about the dating error was when he sent the texts to Mr Qureshi QC after the 13 November hearing referred to at [204]-[208] below. I will return to this question of Mr Gray's knowledge and his failure to disclose it later in the judgment when I deal with events between September and December 2014.

117. Having considered all the evidence I am unable to accept Mr Gray's explanation that he was not aware at the hearing that both the court and counsel were labouring under a complete misapprehension about the date of the telephone transcripts. In my judgment, Mr Gray was well aware at the hearing of the implications of the discussions taking place between the court and both leading counsel and that those discussions were proceeding on the false basis that calls took place on 5 March 2009, after the grenade attack on the Nougaprix supermarket the previous evening. In the circumstances, I have concluded that Mr Gray did deliberately mislead the court at the 10-11 September 2013 hearing and that there is cogent evidence to that effect.

118. My reasons for reaching the conclusion that Mr Gray did deliberately mislead the court are as follows:

(1) The issue of the misdating of the transcripts had first cropped up less than three weeks previously and Mr Gray had immediately recognised that it was, as he later said, "a massive issue". Although he sought to downplay it as a minor matter

which just required changing a few dates in the extradition request, he knew it was in fact a lot more serious than that. As he accepted in cross-examination, the misdating meant that the conviction was unsafe and the evidence on which it was based, the transcripts and the confession of Mohamed Abdillahi, were unreliable. That was precisely why it was a big or massive issue and I consider that it is inconceivable that less than three weeks later, he would not have been acutely aware if both counsel and the judge were proceeding on an interpretation of the evidence which did not appreciate that the transcripts were misdated.

(2) Despite his knowledge that the conviction was unsafe and the evidence on which it was based was unreliable, from 26 August 2013 onwards he adopted a strategy of not revealing this to any court or outside agency such as Interpol. Hence the tactic of *"getting away with the date error"* or *"fudging the error of the date"* rather than being entirely open and frank with the Dubai court (and thereafter the English court) about the unreliability of the evidence and the unsafety of the conviction. As I have already held, *"fudging the error of the date"* was the language of concealment and not the approach of a solicitor of integrity.

(3) That evasive approach could not be justified by the assertion in his evidence that he thought that, even when the transcripts were given the correct date, Mr Boreh had a case to answer. The truth is that he appreciated that the case that the "act last night" was a grenade attack was dependent upon there having been a grenade attack on the evening of 3 March 2009; hence the search for evidence of such an attack. Some false evidence was produced by his clients, which conveniently not only asserted there had been an attack, but also explained why no-one had heard about it. However, by 28 August 2013, Mr Gray knew to put it at its lowest that this so-called evidence would not bear scrutiny and, by the time of the hearing on 10 and 11 September 2013, he knew that he had no evidence of any grenade attack on 3 March 2009.

(4) In any event, even if he had convinced himself that Mr Boreh still had a case to answer on the basis of the telephone transcripts with the correct date, the proper and honest course to have taken would have been to ensure that the Dubai court and, in due course, the English court was made aware that the original conviction was unsafe and the evidence on which it was based unreliable, so that the conviction could not stand and would have to be quashed. Then any extradition request could and should have been put forward only on the basis that Djibouti considered there was a case for Mr Boreh to answer at a fresh trial on the basis of the transcripts bearing the correct date. However, I suspect that the problem with taking that course might well have been that Mr Boreh would be handed back his passport and able to leave Dubai before the extradition request on that proper basis was presented and considered, something which, as the meeting at Kroll reveals, was to be avoided at all costs. That is why the strategy was developed at those meetings on 27 August 2013 of not disclosing to the Dubai court or the English court thereafter that the original conviction was unsafe and the evidence on which it was based was unreliable. Those meetings were attended by representatives of Djibouti, Mr Sultan (at Kroll) and Mr Djama Ali (at both meetings). As I held at [63] above, it is to be inferred that they agreed with the strategy and in following it Mr Gray no doubt thought he was acting in the best interests of his client.

(5) Contrary to Mr Gray's purported recollection in his evidence, I do not consider that he explained the full implication of the dating error to Mr Qureshi QC either in their telephone call on 26 August 2013 or at any time thereafter. In particular, I do not consider that he ever told Mr Qureshi QC that the conviction was unsafe or that the evidence on which it had been obtained was unreliable. I consider that Mr Gray only told him that there was an error in one document referred to in the extradition request. Not only is this consistent with the contemporaneous documentation, such as Mr Gray's own email referred to at [46] above, but as I have already held at [40] above, since Mr Simpson QC on behalf of Mr Gray expressly disavowed any allegation of professional misconduct against Mr Qureshi QC, Mr Gray simply cannot have explained the full extent of the problem to him. If Mr Qureshi QC had been aware that the conviction was unsafe and the evidence on which it was based (specifically the telephone transcripts and the confession of Mohamed Abdillahi) was unreliable because the calls had in fact taken place before the Nougaprix attack, Mr Qureshi QC simply could not and would not have made the submissions he made to the court on 10 and 11 September 2013 which I have quoted above.

(6) The strategy of not revealing to any court or outside agency that the conviction was unsafe and the evidence on which it was based was unreliable continued into the third affidavit in support of the freezing order application, which Mr Gray had sworn only a week before the hearing. As I have already found, paragraphs 163.4, 163.6 and 164 of that affidavit involved equivocation, on any view conduct which fell a long way short of the standard of professional integrity and candour which the court is entitled to expect of an English solicitor.

(7) I accept that Mr Gray did not deliberately include the wrong transcripts in the exhibit to his affidavit and this was an inadvertent mistake by the Gibson Dunn staff who put the exhibit together so that when the hearing started he would not have known that the wrong transcripts had been exhibited. However, once Mr Qureshi QC started making the submissions he did on the morning of the first day of the hearing quoted at [81] above, Mr Gray must have appreciated that the discussion with the court was proceeding on the false basis that the phone calls had been after the Nougaprix attack, not before, as he knew was in fact the position. It beggars belief that he did not realise that counsel and the court were under that misapprehension. Furthermore, as the passages from the transcript of both days of the hearing which I have set out at [81] to [95] above demonstrate, the issue about the telephone calls being evidence that Mr Boreh was implicated in a grenade attack on the Nougaprix supermarket the night before the calls was not the subject of some passing reference, but was an issue to which counsel and the court returned again and again. In those circumstances, I simply do not accept Mr Gray's evidence that because he was tired or doing his emails or leaving it all to Mr Qureshi QC, he was not listening or concentrating. On the contrary, the fact that immediately after the hearing had finished on 11 September 2013, he asked Ms Kahn to include in the draft Interpol letter references to the transcript of the previous day where the court had said there was an arguable case that Mr Boreh was involved in terrorism, demonstrates that he was listening and concentrating as one would expect of the partner in charge of a case of this seriousness, sitting behind counsel in court. Of course what I had said about the case being arguable was on the basis of my reading of the transcripts, which was that they were on 5

March 2009, referring to the Nougaprix attack the previous night. Mr Gray knew that the court was proceeding on the wrong basis.

(8) Furthermore, at Mr Gray's request, Ms Ngo Yogo II highlighted in yellow extensive sections of the transcripts of the hearing which I am quite sure he did go through and discuss with the associates which passages should go into the draft letter to Interpol. The excerpts which went into the draft which Ms Kahn sent him on the evening of 13 September 2013 included the passage from p. 136 of the first day's transcript which I highlighted at [90] above, from which it was obvious that the basis upon which I was saying that there was an arguable case that Mr Boreh was implicated in terrorism was that the telephone calls were talking about the Nougaprix attack and so were after the attack. Even if, contrary to the findings I have already made, Mr Gray was not aware at the hearing that the court and counsel were proceeding on a false basis, he was aware of it when he read this and it was incumbent upon him to come back to court straightaway to correct the error.

(9) The final reason why I have concluded, regrettably, that Mr Gray deliberately misled the court at the hearing in September 2013 concerns his behaviour and reaction when Byrne & Partners wrote to Gibson Dunn on 4 September 2014 drawing attention to the misdating and pointing out that the court had been misled. I will set out my findings about this later in the judgment, but for the present I simply record that he treated their perfectly reasonable letter and subsequent correspondence with disdain and then engaged in a course of thoroughly evasive and positively misleading conduct, up to and including at the hearing on 13 November 2014. Whilst I accept that different people react to problems in different ways and it is not inconceivable that someone might try to cover up in a deliberate manner an inadvertent error, that is unlikely. Accordingly, although his subsequent evasive and misleading conduct is not determinative evidentially, it is strong support for the conclusion I have reached that Mr Gray did deliberately mislead the court at the hearing in September 2013 and that in the period from September to December 2014 he was being deliberately evasive in the hope that it would not emerge that he had been aware of the misdating error at the September 2013 and had not taken steps to correct what he appreciated was a misapprehension on the part of counsel and the court.

119. Before leaving the subject of the September 2013 hearing, I should just deal with the position of the other Gibson Dunn lawyers who were at the hearing. According to Mr Gray, Ms Merchant and Ms Kahn were present, although Lord Falconer told me Ms Merchant was not at the hearing all the time, so I simply do not know how much of the exchanges about terrorism she heard. I should also make it clear immediately that Mr Kendrick QC has not made any allegation of misconduct or impropriety against them. Both were very junior foreign qualified lawyers working under the direction of Mr Gray, who was the only partner on the case. Neither is an English solicitor and thus neither is an officer of the English court unlike Mr Gray. Nothing in any of the findings I have made about Mr Gray's knowledge or conduct is intended to be critical of either of them.

Events following the hearing until September 2014

120. Following the letter to Interpol sent by fax after Mr Gray and Ms Kahn discussed the draft on 13 September 2013, there was to be a hearing before the Commission of Control (CCF) of Interpol in Lyon at which the Commission would determine whether to impose a Red Notice against Mr Boreh. On 17 September 2013, Mr Gray drafted an email to be sent to Interpol before that hearing in which he referred to my judgment saying: *"An English Court has already held that there is at least a good arguable case that Mr Boreh committed the crimes of which he is accused. In particular it noted the contents of the recorded telephone transcripts…"* This email was sent to CCF on Mr Gray's instructions.

121. This was the beginning of what was, as Mr Kendrick QC put it, a campaign by Djibouti and Gibson Dunn to use that part of my judgment which had said there was an arguable case of terrorism against Mr Boreh in their dealings with Interpol and other law enforcement agencies and in their efforts to extradite him from Dubai. Given that Mr Gray had misled the court and my judgment was based upon an erroneous interpretation of the transcripts, this use of the judgment was thoroughly improper.

122. At this stage, CCF decided to block the Red Notice, so on 21 October 2013, Gibson Dunn wrote to CCF asking it to reconsider that decision stating that: *"an English judge…concluded…that there is a good arguable case against Mr Boreh…In the circumstances, it would be a matter of great concern for Interpol to reach a decision that appeared to contradict a ruling of the English courts."* My judgment was also relied upon by Interpol Djibouti in seeking to persuade CCF to reverse its decision.

123. Thereafter Ms Kahn prepared a draft of a detailed Red Notice Request to be sent to Interpol which she sent to Mr Gray on 30 October 2013. He sent it back to her the same day, with his own comments on it highlighted, saying in his covering email: *"This is v good. See comments"*. The draft included an entire section headed "New Elements of Appreciation" which referred in detail to the hearing before this court on 10 and 11 September 2013 and quoted the same passages from the transcript recording what I had said (including the passage underlined at [90] above) as were in the fax letter sent out in September. The Request included full copies of the transcript. The draft then went on to contrast the position before this court which was described as *"the only foreign judicial authority who has yet decided on this matter"* with the position before the Spanish court where Mr Boreh's lawyer was said to have made misleading and demonstrably false submissions. Ms Kahn asked in her draft whether they should develop their answers to the arguments Mr Boreh had made before the Spanish court as they had in the extradition request, to which Mr Gray commented: *"yes-important to set out that they were misleading and that this fact was noted by the judge."*

124. Ms Kahn also asked whether the Request should exhibit both the original transcripts (the ones dated 5 March 2009) and the new transcripts (correctly dated 4 March 2009) to which Mr Gray replied that it should. In due course this Red Notice Request went to Interpol as a letter dated 5 November 2013 from Mr Ali together with both sets of transcripts. In due course, Mr Gray, Mr Qureshi QC and Mr Sultan attended a meeting with CCF in Lyon on 12 November 2013. Thereafter, a copy of the approved judgment of this court of 11 September 2013 was sent to CCF.

125. At the same time as this approach to Interpol at the end of October 2013, Mr Gray also contacted the Asset Identification and Removal Group within Homeland Security Investigations, part of the U.S. Department of Homeland Security. It is quite clear that this agency was only involved because Djibouti was alleging against Mr Boreh that the crime of terrorism had been committed. The correspondence from Mr Gray to Mr Todd Hyman of that agency was disclosed on 5 March 2015, at the beginning of the fourth day of the hearing, after a further waiver of privilege by Djibouti and Mr Gray was recalled to be cross-examined about this correspondence.

126. At 15.33 on 30 October 2013, at Mr Hyman's request, Mr Gray sent him French and English copies of the extradition request. Then five minutes later, he sent Mr Hyman a further email, the attachments to which were the report of the police interview of Mohamed Abdillahi, the report of the voice recognition expert and transcripts of two telephone conversations which the email clearly identified as being dated 5 March 2009 (in other words the wrongly dated transcripts). The email described these as the *"key exhibits"* to the extradition request. As Mr Kendrick QC pointed out to Mr Gray, his description of the confession as a key exhibit was completely inconsistent what he said in evidence on Day 1 of the present hearing in relation to the reference to the confession in the extradition request, that he did not think the interviews would be given much weight and that the key documents were the two new (i.e. correctly dated) transcripts.

127. Mr Gray claimed that the attachment to the email of the wrongly dated transcripts was inadvertent, but that is difficult to accept, given that he must have been acutely aware that the wrong transcripts had been deployed before the English court. It seems to me more likely that this email was continuing the strategy of concealing that the conviction and the evidence in support of it were unsafe.

128. Later that day at 17.52 on 30 October 2013 Mr Gray sent Mr Hyman copies of the exchanges with Interpol. The email refers to the recordings of the transcripts and then says this:

> *"An English judge reviewed the evidence as part of an injunction application, after it was raised by the defendant, who claimed the whole thing was fabricated/politically motivated. The judge concluded there was indeed a good arguable case against Mr Boreh.*
>
> *…*
>
> *It is therefore a matter of great surprise that Interpol have decided to act in this way, given that a) a court has already determined there is a case to answer and b) it is before the courts of another country.*
>
> *…*
>
> *In all the circumstances, I find it surprising that Interpol appear to be implicitly interfering with a judicial process, particularly given the severity of the offence."*

129. Two things are immediately striking about this email. First, there is heavy reliance on my judgment, even though he knew that it had been obtained on the basis of a misapprehension, which was quite improper, and second the reference to the severity of the offence gives Mr Hyman absolutely no clue that the conviction for this offence and the evidence in support of the conviction were unsafe. Overall I consider these emails to Homeland Security were positively misleading and Mr Gray did not have a satisfactory explanation for them in cross-examination.

130. On 23 November 2013 Mr Sultan responded to a request from the attorney general of the UAE for further information regarding the Extradition Request. His letter included this passage:

> *"Moreover, in the course of a civil proceeding initiated [in] the United Kingdom in 2012 by the Republic of Djibouti against Mr. Abdourahman Mohamed Mahamoud Boreh for abuse of office, Mr. Abdourahman Mohamed Mahamoud Boreh's attorney sought to maintain that the Extradition Request was without merit and irregular. In September 2013, the judge of the London High Court of Justice rejected these arguments finding on the contrary that given the Extradition Request, it was possible to maintain that Mr. Abdourahman Mohamed Mahamoud Boreh was a terrorist."*

131. On 27 January 2014, Mr Gray, Mr Qureshi QC and Mr Sultan attended another meeting with the CCF in Lyon to discuss reinstating of the Red Notice. On 11 February 2014, Interpol's Office of Legal Affairs notified Interpol Djibouti that the Red Notice would be reinstated subject to certain caveats relating to political motivation. Interpol Djibouti replied to request that the caveats be removed.

132. At the same time as these efforts by Djibouti to have the Red Notice fully reinstated and to persuade the Dubai authorities to extradite Mr Boreh were taking place, Djibouti was seeking to put what can only be described as improper commercial pressure on Mr Boreh to settle the present litigation. This took the form of threats to continue and expand the campaign against him through use of the terrorist charges made on behalf of Djibouti by Kroll. These threats were made in without prejudice discussions in January 2014 which Mr Boreh recorded secretly. However, Djibouti has not objected to their being disclosed and used in the present hearing which is perhaps not surprising, since the threats would fall within the exception to privilege identified by Robert Walker LJ in *Unilever Plc v Procter & Gamble Plc* [2000] 1 WLR 2436 at 2444, where exclusion of the evidence "*would act as a cloak for perjury, blackmail, or 'unambiguous impropriety'*". It is not necessary to go so far as to say that Kroll was blackmailing Mr Boreh, but contrary to the submissions made by Lord Falconer to the effect that what was said did not go beyond the permissible in settlement of hard fought commercial litigation, I have concluded that there was unambiguous impropriety given the nature of the threats.

133. At a meeting on 22 January 2014 between Mr Everett-Heath the Regional Managing Director of Kroll's EMEA business and Mr Boreh, Mr Everett-Heath informed Mr Boreh of the various steps that were being taken or would be taken against him if he did not settle the claim, all of which related to the terrorism allegations:

> "*Mr Everett-Heath**:** To repeat part of the conversation we had last time and to, I suppose, sort of lay out why the window is going to close quite soon potentially and that there will be a point at which certain actions will be irreversible and I wouldn't want that place to be reached without the chance of a settlement because my concern, and I come at this from the point of view as a consultant, there is a point at which the lawyers' voices become the loudest and all the lawyers say litigate litigate litigate litigate*
>
> *…*
>
> *… So, uhm, there's also the point at which certain actions, involving [pause] governmental agencies, take on a life of their own. So for example, there is the, as I'm sure you are aware, the extradition action is advancing in [Dubai] and uhm my understanding is that reasonably soon the Public Prosecutor will make his recommendation to the Technical Bureau of the Attorney General's office, they will conduct their review…*
>
> *…*
>
> *… Similarly there are, as I'm sure you are aware, you have the money laundering actions which are being commenced here, in the US because of the clearing of dollar transactions and the point comes when government agencies, when the Department of Justice and Home Land Security gets involved in the US after a while you can't turn them off, that's all they do…*
>
> *…*
>
> *… the argument is that somebody is going to say that you do [laundering] and if they decide to investigate you then they'll start freezing assets, closing down bank accounts and you're pushed out of the financial network. I don't know how fast that will advance in America but I know it's underway. I don't know how fast things are going to advance here but on the money laundering charge but I know it's underway and it seems to me that there is a narrowing window when this can all be stopped before these actions become unleashed there is still a point now where these things can be turned off, settlement can be reached and peace can break out once more and I'm worried that if it goes on very much longer the chance is that there is no room for stopping it."*

134. Later in the meeting it became clear that Djibouti was seeking to extract a "price" in excess of the amount of the claim in the Commercial Court proceedings for not pursuing criminal proceedings against Mr Boreh:

> *"Mr Everett-Heath : Yup, as I say the position of my client, last time we had this conversation you outlined in the preliminary*

> *stage what you thought was a reasonable view and as I think you understand that was not acceptable to my client. Their positioning on the spectrum is very different and we'll go through the numbers in a second, later, but I think before we get to numbers their view of this is shaped not just by their perception of the outcome of the High Court actions, it's the broad array of actions being taken in various jurisdictions against you and some of which have monetary value and some which don't, some which are criminal in nature and are structured to make it difficult for you and ultimately your family to carry on doing business because the nature of these actions, some of them can be expanded to include members of your family*
>
> *Mr Boreh: Who?*
>
> *Mr Everett-Heath: Some of them can be expanded to include members of your family.*
>
> *…*
>
> *Mr Everett-Heath: And… uhm. So there is a monetary value to the High Court action which is a civil action; the criminal actions they don't have a monetary outcome, they have potentially the outcome of you being extradited and prison in Djibouti which I'm fairly sure you don't want to happen. I personally wouldn't want to be in prison anywhere; that's my view, it reduces one's ability to do things.*
>
> *Mr Boreh: I don't get scared easily.*
>
> *Mr Everett-Heath: I don't think it's a fear thing, I think it's a quality of life question.*
>
> *Mr Boreh: No problem.*
>
> *Mr Everett-Heath: My quality of life, as low as it is, prison is even lower than mine, it would definitely be reduced significantly if I were in jail – I think that's fairly obvious and maybe you don't think that's a meaningful threat, maybe you don't think it's a likely outcome. Bluntly, I've seen this a number of times, I would not be confident of the Public Prosecutor or the Attorney General are going to do anything predictable.*

135. Later in the same meeting, Mr Everett-Heath returned to the topic of the criminal proceedings and the impact of the judgment of 11 September 2013 in these terms:

> *"Well there's a greater likelihood of winning it but putting the maths to one side, that's not the case when it comes to the criminal actions and I think potentially that's more problematic*

> *and they appear to be getting traction and I don't think the judge in the High Court in London did you any favours in the way that he approached that matter and he made life considerably harder for you. I don't know the outcome because it hasn't happened yet of the Interpol meeting on 30th, I don't think that matters either to be honest because the Riyadh Convention means that the UAE can extradite you regardless of that and they've now ratified the Riyadh Convention. Will they, won't they, I don't know, it seems to be tipped in favour and I think that's problematic and once that action has taken place I would be concerned if I was you, genuinely concerned by what the Department of Justice and the Homeland Security office might do in the US.*
>
> *Mr Boreh: Will do? To me?*
>
> *Mr Everett-Heath: That is problematic because once they start putting embargoes and bounds on you then you can't play with any bank*
>
> *Mr Boreh: I don't deal with any banks*
>
> *Mr Everett-Heath All your money is forced out of the system*
>
> *Mr Boreh: You have already frozen all of my accounts*
>
> *Mr Everett-Heath: You can't undo that… [Text omitted.] … All I am saying is that if you are jailed in Djibouti if the Department of Justice, Homeland Security puts bounds on your activities*
>
> *Mr Boreh: Who?*
>
> *Mr Everett-Heath: Homeland Security of the Department of Justice*
>
> *…*
>
> *Mr Everett-Heath… So to go back to the beginning if there is room to reach settlement now is a good time to do it because some things will be irreversible later…"*

136. Mr Everett-Heath then set out Djibouti's offer to settle, which as I have said, was for more than the amount being claimed in the present proceedings and continued:

> *"Mr Boreh: So I sell all my houses; I sell all my assets; I give you my shares; then what do I gain?*
>
> *Mr Everett-Heath: You walk on. You don't look over your shoulder. It's finished.*
>
> *Mr Boreh: Walk on as a poor man.*

> *Mr Everett-Heath: Not as a poor man. You still have the relationship with BAT, you have income, you have other funds; life carries on. Mr Boreh, between you and me, I find you am impressive and effective man, I have full confidence you can rebuild your life [laughing]. Some people I would be less sure of; you will be fine and you get a chance to have a life again which you won't have if you're in a jail in Djibouti.*
>
> *…*
>
> *But you'll be less unhappy because the whole thing is over. You and your children can get on with your life and carry on with things. I stress as I said before this is not about justice this is about settlement. Justice is available to you in the criminal actions and the civil actions if you want to trust in that. This is a way of avoiding that; not taking that chance; starting your life again; giving them [i.e. his children] a fair chance in life."*

137. Mr Everett-Heath subsequently telephoned Mr Boreh in the light of what he said were "*recent events… with regards to the authorities in Dubai"*, relating to the extradition request, to "*see if there was any way in which we could get some momentum in conversations around how settlement might be reached"*. He continued:

> *"… you might think that there is a greater benefit from recovering your previous life in essence and making this whole problem go away which is the reason we talked about last time for reaching a settlement".*

138. Later in the phone conversation, this exchange occurred:

> *Mr Boreh: OK well let's say again I will be taken to Djibouti or not taken to Djibouti but that hasn't got any monetary value and it doesn't worth [figure omitted]*
>
> *Mr Everett-Heath: Look Mr Boreh I'm not making a direct connection, I'm making the outsider's observation that, right or wrongly, I'm assuming that you would like to get on with living your life and resuming your interests and not having this distracting you, getting in the way, consuming your time, having limitations on your travel, having the possibility - and you can take your view and I can take my view on the likelihood of the outcome - but the possibility of being put in jail in Djibouti for the rest of your life, these seems to me like things that if I were in your shoes I simply wouldn't want to have, I would want this to go away. I would want to return to my life, to see my family, to go back to England, to travel the world freely. At the moment you can't and it seems to me that that must on some level be irritating and at the worse level disturbing and there is a way in which all this stops and that's if you reach a settlement with my client and the question really*

> *here is to what extent do you want this to go away and to what extent do you want to offer a settlement that my client will find acceptable. You know, no one is going to make you, it's up to you.*

139. It is not suggested by Mr Kendrick QC that Mr Gray or Gibson Dunn were party to these discussions or aware of what Kroll was saying on behalf of Djibouti. However, I have referred to them extensively because, as I have already held, contrary to Lord Falconer's submissions, the threats made to Mr Boreh go way beyond what is permissible even in the hardest fought commercial litigation. What was being said was that, if he settled the litigation (in fact for more than it was worth) he could avoid the risks of extradition to Djibouti, being in prison there for the rest of his life, money laundering and similar criminal-related actions in the US and elsewhere which would force his *"money out of the system"*, those actions being expanded to members of his family, restrictions on travel and having to spend the rest of his life; *"looking over [his] shoulder"*.

140. As I have said, it is not necessary to decide whether these threats amounted to blackmail as a matter of English criminal law, but on any view they amounted to thoroughly improper pressure on the part of Djibouti. The fact that it was prepared to trade the terrorism charge for a lucrative financial settlement speaks volumes as to whether it genuinely believes Mr Boreh is a terrorist. As Mr Kendrick QC rightly submitted, no state would agree to sell freedom to a person it genuinely believed to be a terrorist. It is striking that Djibouti called no evidence to explain what instructions were given to Kroll or how these threats were made, notwithstanding that affidavits were served from both Mr Sultan and Mr Ali and that details of the conversations with Kroll were all set out in the witness statement of Yvonne Jefferies of Byrne & Partners dated 9 January 2015 in support of the present application. I infer that Djibouti did instruct Kroll to adopt this strategy and that they knew it was improper. I will return later in the judgment to the relevance of all this to the exercise of the court's discretion.

141. On 21 May 2014, Dubai refused the extradition request. On 11 June 2014 Al Tamimi issued a criminal complaint in Dubai on behalf of Djibouti against Mr Boreh alleging orchestration of a terrorist attack from within the UAE. This request asserted that the telephone call informed Mr Boreh that an explosion had occurred in the supermarket, and exhibited the Djibouti conviction and the misdated transcripts, further evidence of the continued and improper use on behalf of Djibouti of evidence which was known to be unsafe. In fact on 17 June 2014, Dubai refused that criminal complaint, but nothing daunted, on 22 June 2014, Djibouti filed a further criminal complaint with the Abu Dhabi Public Prosecutor, exhibiting the misdated transcripts, the Djibouti conviction and the purported confession of Mohammad Abdillahi, all of which Djibouti knew to be unsafe. On 25 June 2014, CCF of Interpol informed Interpol Djibouti that the Red Notice was to be blocked again.

Mr Gray's conduct between September and December 2014

142. On 4 September 2014 Byrne & Partners wrote a detailed letter to Mr Gray referring to their discovery that the transcripts were misdated and that the court had been misled. The letter stated that once the transcripts were given the correct date, Djibouti's case against Mr Boreh was unsustainable because (i) the calls cannot have been reporting

on the Nougaprix attack which had yet to take place; (ii) the confession of Mohamed Abdillahi was unsafe and (iii) the account that the calls were about distribution of leaflets was the only one that made sense of the transcripts. Byrne & Partners also complained about the dissemination of my judgment. The letter asked a series of perfectly proper and reasonable questions: (i) whether Djibouti accepted that the calls were in fact on 4 March 2009; (ii) if so, what steps Djibouti intended to take to have the conviction quashed and to investigate the circumstances of the interrogation of Mohamed Abdillahi and whether it was accepted that the conversations related to distribution of leaflets; (iii) what steps they proposed to take to inform the court that it was misled by the submissions advanced and (iv) what dissemination there had been of the judgment accompanied by what representations.

143. As Mr Dutton QC fairly and correctly accepted on behalf of Gibson Dunn, the court and Byrne & Partners should have been informed straight away after receipt of that letter in September 2014 of the misdating issue, that Mr Gray had known about it at the time of the hearing and that the court had been misled. It is not necessary or appropriate for the purposes of this judgment, to say more than that, in failing to come straight to the court, there may well have been an error of judgment by the English lawyers other than Mr Gray. However, Mr Gray was in a different position from all the other English lawyers, since he alone knew about the strategy devised at the 27 August 2013 meetings and he alone knew that he had been aware of the dating error at the time of the September 2013 hearing, that the court was proceeding on a fundamental misapprehension and that he had done nothing to correct the position.

144. I have no doubt that if London partners and associates (specifically the senior London Disputes Resolution partner Mr Philip Rocher and the associate who became involved Mr Mark Handley) had been aware at the time in September to November of last year that Mr Gray had known of the dating issue before and at the time of the September 2013 hearing, they would have appreciated that the court had been seriously misled and they would have come straight to court the moment they learnt that he had been aware of the dating error at the time of the hearing, *a fortiori* if they had learnt that he had deliberately misled the court. However, unfortunately, Mr Gray did not inform them then or at any time until the weekend of 29/30 November 2014, that he had known about the misdating issue at the time of the hearing in September 2013. Instead he embarked on a course of evasive and misleading conduct which only came to an end when, following my order of 13 November 2014 requiring Gibson Dunn to file an affidavit setting out, inter alia, whether any of its lawyers was aware at the time of the 10-11 September 2013 hearing that the transcripts were misdated, he was forced to come clean about what he had known and swore his fifth affidavit dated 29 December 2014.

145. In cross-examination Mr Gray said that he took Byrne & Partners' letter of 4 September 2014 seriously, but it is fair to say that his immediate reaction was one of disdain describing it in an email to Mr Qureshi QC on 9 September 2014 as *"bollocks"* and *"a storm in a teacup"*. He claimed in cross-examination that the whole thing had slipped his memory, which I found difficult to accept, given what I have held to have been his state of mind at the time of the hearing in September 2013.

146. On 8 September 2014 Ms Kahn (who had been seconded to Gibson Dunn's Dubai office since March 2014 and who had gone to Djibouti to investigate) sent Mr Gray

an email reporting on a meeting with Mr Djama Ali (and someone else whose name has been redacted) and saying:

> *"…this means… that we must find out what happened the day before [3 March]. Djama vaguely remembers some events taking place on March 3, 2009. He told me that the first week of March 2009 was a very troubled one, with something happening almost every day. He contacted both the police and gendarmerie, so that they would search for any report, minutes, statement… dated from March 3, 2009 or reporting on any event that would have occurred on such date".*

147. How Djibouti had previously dealt with this problem of no-one having reported any grenade attack of any description on 3 March 2009 has been seen from the false statement from the police officer dated 27 August 2013 which was dropped almost as soon as it was produced. There is an echo of that in what appears to be being said at this meeting which follows through into the evidence which was subsequently produced, referred to below.

148. The precise sequence of the emails to and from Mr Gray on 9 September 2014 is difficult to establish because Ms Kahn was in Djibouti, Mr Gray was travelling on the other side of Africa, apparently in Cameroon, and Mr Qureshi QC was in England. However, it seems that what is set out below is the correct sequence. Mr Gray responded to Ms Kahn's email of 8 September 2014 by asking her: "*to get back to me re my questions yesterday please? Ie how we can now accept the date is wrong and why we thought it was right in the first place?*" She responds saying that the problem came from the initial transcripts prepared by the gendarmes referring to the conversations as being on 5 March 2009. She goes on to say: *"The recordings do still make sense in that [Mohamed Abdillahi] and Boreh are planning the attacks which occurred on the following days ('tomorrow we'll do it again'), To restore full credibility, however, it is key that we find evidence on what happened on March 3. if the Djiboutian court-which relied on the transcripts-got the date wrong, it seems even more important to offer retrial."*

149. Mr Gray then asks Ms Kahn: *"What did we say to the English Court? Extradition Request was part of that"*. She responds setting out some transcript references and states that I formed my opinion not on the decision of the Djibouti court but on the transcripts which in my opinion indicated that Mr Boreh was involved in terrorist activity. Mr Gray then asks her to send him the extradition request as filed which he couldn't easily locate. As he explained in cross-examination, it was difficult to search for emails when he was travelling in Africa. He asks her: *"Did we anywhere explain why we put the correct date in the extradition (Thank God!) but why the transcript one was wrong?"*

150. He then sends Ms Kahn another email (timed at 22.50 in Cameroon or 18.50 in London) before she sends him the extradition request in which he says:

> *"I've looked through all this again.*
>
> *What you need to do is look at your old emails. I can see we originally thought it was 5 March and then changed it to 4.*

> *This was between mid-August and us finishing the extradition. You are on all the emails I have looked up, but I don't have time to go through them.*
>
> *Please re-read the extradition requests in full, as well as sending to me. I actually don't see the date issue as a big deal. The extradition was accurate but I can see we didn't mention the date disparity in court, otherwise we were satisfied it was ok.*
>
> …
>
> *Was Nougaprix also 4 March? If so, it took place a few hours after the call"*

151. The next email in the sequence appears to be one from Mr Gray to Mr Qureshi QC a few minutes later stating: "*The whole thing in the Byrne letter about dates is bollocks- we identified it as 4 March in the extradition request. The date on the transcripts was wrong but we dealt with that. This is all a storm in a teacup. I am still getting all the info though."* Mr Qureshi QC replied a few minutes later: *"Ok good. We know they are slimey but really important we verify because they have gone to town"* a further indication it seems to me that Mr Qureshi QC had never appreciated the full implications of the misdating issue.

152. Miss Kahn initially responded to Mr Gray's email set out at [148] above explaining how the discrepancy had been discovered, that the right date was on the call logs and that as they were drafting the extradition request, they realised the disparity between the date in the Djiboutian judgment and the date of the recordings, which they then knew from the call logs was 4 March. She pointed out that the Nougaprix attack did take place a few hours after the call. She then sent him another email attaching the extradition request and an English translation. She went on to say:

> *"I do not think that we ever developed on the date discrepancy nor try to explain why the date of the transcripts (and consequently the date referred to in the Djiboutian decision) was different from that of the extradition request). As this had not been directly challenged by Boreh, it somehow would have been shooting ourselves in the foot".*

Mr Gray responded: *"You have to go back through the emails. We did all discuss it. It was a massive issue"*.

153. Ms Kahn came back later the same evening, still 9 September 2014, in these terms:

> *"The initial extradition request referred to the conversation as intercepted on 5 March 2009…*
>
> *We became aware of the date issue on 25 August 2013. See your email 'extradition' attached followed by your email of 26 August 2013 ('FW CONFIDENTIAL….') 'I have spoken with Khawar and we agreed that having reviewed the evidence we*

> *can get away with the date error. It is only in the judgment, which is awful anyway, and not in the evidence.'*
>
> *On 26 August 2013 you circulated a revised version of the extradition request where the date of the recordings had been changed to 4 March (see DRAFT V2)"*

154. Although Mr Gray was not disposed to agree with what Mr Kendrick QC put to him about this particular email exchange, it seems to me clear that what Ms Kahn was saying to him was that, it was he who decided not to disclose the discrepancy in the date, in circumstances where Mr Boreh had not raised the point, because to do so would be *"shooting ourselves in the foot"*. In other words, disclosing the misdating of the transcripts would run into the whole issue about the original conviction and the evidence upon which it had been obtained (the transcripts and the confession) being unsafe. Mr Gray was quite right in his reaction that this was a *"massive issue"*. I asked him if he could explain how he had gone in such a short time from saying in the email set out at [150] above that he did not see the date issue as a *"big deal"* to saying it was a *"massive issue"*. He accepted there was an inconsistency, but could not explain it. It seems to me that the obvious explanation is that, by the time of the later email he was beginning to appreciate that it was going to be difficult to go on *"fudging the date issue"* as Ms Kahn realised he had made a conscious decision not to disclose the discrepancy in the dates.

155. Mr Gray's response the following day 10 September 2014 to Ms Kahn's email set out at [153] above is instructive as well. He tells her that none of what she has sent him is very helpful and then sets out a strategy for a reply to the Byrne & Partners letter which would involve going through the extradition request noting why no-one was misled because the request referred to 4 March 2009 and saying that although the evidence referred to the 5 March date, there was to be a re-trial so any errors in the court documents are immaterial. Although he denied this, the rest of the strategy seems to have been to throw as much mud as possible at Byrne & Partners and their client rather than facing up to the point they were asking about.

156. Later the same day he emailed Mr Handley and Miss Haywood in London about a proposed response to Byrne & Partners, saying:

> *"So you know re the terrorism letter, when we went back to the files we realised they were being misleading. The extradition refers to the correct date which is 4 March, it does still all make sense. There is a document where it's showing wrongly, we think in error, and that error was repeated in the Djibouti court documents. None of this changes the facts, and none of us relied on those court documents. We are double checking various other issues including the language points, but overall we are fairly comfortable about it."*

157. As Mr Gray accepted in cross-examination, this was telling Mr Handley that it was no big deal but, although again he was not disposed to accept this, it clearly did not give Mr Handley anything like the full picture. Apart from anything else, it does not tell him that Mr Gray had sat through the hearing in September 2013 knowing that the

court and counsel was proceeding on the basis of the wrong date, without being told that the conviction and the evidence on which it was obtained were unsafe.

158. A letter was prepared in response to Byrne & Partners' letter which was dated 11 September 2014 but which was in fact sent on 18 September 2014. That letter sought to maintain that the court had not been misled at the hearing in September 2013 on the basis that the extradition request bore the right date and the court had relied on the narrative of the conversations. This was an extraordinary suggestion, since Mr Gray was well aware that the attention of the court had not been drawn to the discrepancy between the dates in the extradition request and in the transcripts, and that this failure to alert the court was deliberate, as Ms Kahn had reminded him only days previously (if, which I doubt, he had forgotten), since to reveal the discrepancy would be *"shooting ourselves in the foot"*. The letter goes on to state that they do not know what was being referred to in the call of 4 March 2009 call as having happened on the previous day, but it could be a reference to a number of possibilities including an unreported grenade attack or the distribution of leaflets.

159. Ms Kahn in Djibouti was then occupied in seeking to gather some evidence of what had allegedly happened on 3 March 2009. She obtained three statements from anonymous police officers dated 25 September 2014, claiming that they had been in the police station in the Place Harbi on the evening of 3 March 2009 when they heard an explosion. Two of them say that when officers arrived at the site of the explosion they found nothing abnormal and no physical damage, which is why there was apparently no subsequent detailed investigation. The third says he saw a cloud of dust rising from behind the wall where the explosion took place and then says that the relevant wall to this day shows traces of something having exploded against it. As Mr Kendrick QC put to Mr Gray, wisely they have not deployed those inconsistent statements. I suspect that, as with the statements produced in the immediate aftermath of the discovery of the dating error, they would not bear close scrutiny. Furthermore, neither Mr Sultan nor Mr Ali has attended to be cross-examined on their affidavits, specifically to explain in this context how it is, if this is evidence of a genuine incident, no mention is made of it in the discussions with the U.S. Embassy in June 2009, referred to at [67] above.

160. Byrne & Partners responded on 30 September 2014 to Gibson Dunn's letter. Their letter rightly pointed out that the court was given an inaccurate account of the evidence in the transcripts. It continued that given Gibson Dunn's perplexing stance that the submissions were not misleading despite this material error, they were left with the distinct impression that Gibson Dunn were aware of the error prior to the hearing but nonetheless thought it acceptable for matters to proceed as they did. They asked Gibson Dunn to confirm who was aware of the error at the time of the extradition request and at the time of the September 2013 hearing. They urged Gibson Dunn and their client to consider taking appropriate steps to quash the conviction with immediate effect and to set the record straight in the English proceedings, for which the minimum should be a joint letter to me inviting me to retract that part of the judgment where I had said Mr Boreh was arguably involved in terrorism.

161. It is striking that Mr Gray did not take up that invitation which is what it seems to me any honest solicitor conscious of his duties to the court would have done. His failure to do so and his descent into what became even more evasive conduct provide further support for the conclusion I have reached that he deliberately misled the court. When

the letter from Byrne & Partners of 30 September 2014 was provided to Mr Qureshi QC his response in an email of 1 October 2014 was to say it needed to be addressed carefully. He said this:

> *"We were not aware of the dating issue.*
>
> *...*
>
> *THIS IS GOING TO BE PROBLEMATIC AS THEY ARE LIKELY TO WRITE TO THE JUDGE"*

The email also set out a proposed draft response to Byrne & Partners which included a paragraph asking them to send a draft of their proposed joint letter to the court. That paragraph was not included in the letter eventually sent on 14 October 2014. Once again, that email confirms that Mr Qureshi QC did not know the full implications of the misdating issue.

162. In response Mr Gray said: "*We did know about the dating issue. I recall we took the view as set out in our first letter – it was an error, but not one relied upon. The extradition request uses the correct dates.*" That response still does not tell Mr Qureshi QC the full implications of the issue, in particular it does not tell him that Mr Gray had appreciated at the hearing in September 2013 that the court and counsel were proceeding on the false basis that the transcripts were dated 5 March 2009 whereas he knew they should be dated 4 March 2009.

163. Byrne & Partners responded to Gibson Dunn's letter of 14 October 2014 in a letter of 3 November 2014. They deal first with the suggestion that there might have been some other incident on 3 March 2009: *"But even if there were such interpretation, Mr Boreh was not prosecuted on the basis of this after-invented, alternative case and it is not the ground of his conviction. The case actually brought against him was false"*. They then repeat the request previously made. As Mr Kendrick QC put it, they would not be put off:

> *"We note your denial that the court was deliberately misled as to the date of the conversation, but you still have not answered our question as to whether you, your clients or your counsel were aware of that error and its significance (i) at the time when the extradition was drafted or (ii) at the time of the hearing before Mr Justice Flaux. Please now do so."*

164. Mr Gray's response was not to provide a straight answer to what were perfectly reasonable and proper questions but to say to Mr Qureshi QC: "*I suggest we leave a response until the last minute. This is becoming a non-point*".

165. On 4 November 2014, Byrne & Partners issued an application for an Order that affidavits be sworn stating when the dating errors were discovered by Gibson Dunn and the claimants. The reaction of Mr Gray on 5 November 2014 was to write back saying that Byrne & Partners' queries *"have been fully and properly addressed"*, which was simply not the case. The letter asked what amendments to the affidavit evidence Byrne & Partners were seeking. Byrne & Partners wrote back to Gibson Dunn the same day setting out in detail the evidence that needed to be corrected. The

letter said what was expected at the very least was: (i) an affidavit confirming that the transcripts of the calls dated 5 March 2009 exhibited at PMJG7 were misleading and that the court's conclusion that there was an arguable case of terrorism was reached as a result of my having been misled and (ii) an explanation on affidavit as to how the misleading transcripts came to be put before the court, whether Gibson Dunn, their clients or counsel had known that the transcripts were not dated 5 March 2009 at the time of the hearing and if not when Gibson Dunn, their clients and counsel discovered this. Again, in the circumstances, this was an entirely proper and reasonable request.

166. Mr Gray discussed this letter in an email exchange with Mr Qureshi QC headed "The famous tape transcript" in which having quoted extensively from Gibson Dunn's letter of 14 October 2014, he said:

> *"So the question is what next? The fact is that there is nothing to correct in my affidavit. I am referring to the evidence and not to the conviction itself at 163.6 and I go on to say at 164 that this evidence in support is at the very least reflective of a case to be answered by Mr Boreh… The only question is how we address the fact you didn't correct Flaux's obvious misunderstanding. I can't remember it happening but obviously it did, and I guess we say that you were unaware of the error and we did not notice it at the time…*
>
> *We can't concede this one even if we wanted to."*

167. There are a number of aspects of this reaction which are deeply unsatisfactory. First, as I have already held, far from his third affidavit not requiring correction, it consisted in the relevant part of complete equivocation. Second, this email recognises that I was under an "obvious misunderstanding". How Mr Gray could square that with continuing to maintain that the court was not misled, given what was in fact his state of mind about this, at the time of the September 2013 hearing, escapes me. Third, on the basis of his evidence to the court at the present hearing that he had told Mr Qureshi QC everything about the misdating issue on 26 August 2013, by suggesting that Mr Qureshi QC say to the court that he was unaware of the misdating error, he was effectively inviting Mr Qureshi QC to lie to the court. In fact of course, saying that he was unaware of the dating error is entirely consistent with what Mr Qureshi QC has said in his letters to the court, that Mr Gray did not in fact explain to him the full implications of the misdating error.

168. Fourth, the statement he was proposing that he should make that: *"We did not notice it at the time"* is essentially the thin line he has sought to take throughout the present hearing and the lead up to it that he was not listening or concentrating to what was happening at the September 2013 hearing, evidence which I do not accept for reasons I have already given. Fifth and finally, despite his denial in cross-examination, the reference to not being able to concede this one "even if we wanted to" was, as Mr Kendrick QC put to him, because he recognised, even though Mr Qureshi QC did not, that to do so would be to admit that he had deliberately misled the court and would mean that the strategy of concealing the unsafety of the extradition proceedings would begin to unravel.

169. I found Mr Gray's attempt in cross-examination to explain away this email deeply unsatisfactory. Equally unsatisfactory was his attempt to explain away the reference in the transcript to the act being heard by westerners and having resonance, in circumstances where he knew that there was no evidence that would pass muster of a grenade attack on 3 March 2009, by saying that he thought it was just the Abdillahi brothers giving Mr Boreh reassurance.

170. Mr Qureshi QC responded to this email later on 6 November 2014 in these terms:

> *"1: I will review all the correspondence and see where the letter can be sent. We really do not want this issue to be considered by Flaux J once more, because we have pretty much got what we wanted/ were likely to get from the freezing order variation application.*
>
> *2: I have no recollection of the date issue. We discussed at length the need for accuracy in the transcription translation. It is obvious the Djibouti authorities messed up in terms of translation typo.*
>
> *WAY FORWARD*
>
> *A. We will have to send a letter making it clear it was an error, not material. The evidence implicates Boreh, no attempt to mislead.*
>
> *B. We can hopefully avoid this being ventilated in open court because it's bound to generate adverse comment from the Judge."*

As Mr Kendrick QC rightly put to Mr Gray, this demonstrates that leading counsel was on a different plane of understanding from Mr Gray. He was saying he had no recollection of the dating issue. He only recollected discussing that the extradition request had to be accurate.

171. Mr Qureshi QC then drafted a letter to be sent to Byrne & Partners in the concluding section of which he said:

> *"… We accept that the tape dating issue is an unfortunate error – it is certainly nothing more than that, and <u>we are grateful to you for drawing it to our attention</u>*
>
> *<u>It is after examining the terrorism documents in the light of [the Byrne letter of 4 September 2014] that Mr..Gray… and Leading Counsel became aware of an understood the nature of the tape dating issue</u> and why we maintain that a proper reading of the transcript in fact supports the position that the conversation referred to the attack which took place later that day."* (emphasis added)

172. Whilst what this draft letter said was no doubt true for Mr Qureshi QC, the underlined passages presented obvious difficulties for Mr Gray because it was not the Byrne letter which had alerted him to the misdating issue and its implications. Rather he had known all that since before the September 2013 hearing. It was in those circumstances that he redrafted the letter so that the second paragraph above read:

> *"Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing. They have re-examined the terrorism documents in light of your allegations and maintain that a proper reading of the transcript in fact supports the position that the conversation referred to the attack which took place later that day…"* (emphasis added)

173. The highlighted passage was his redraft. He sent it in a marked up version to Mr Qureshi QC as an attachment to an email on 7 November 2014 which stated:

> *"I think we're on thin ice if we say we didn't ever know about this from the beginning until their letter [of 4 September 2014]. Remember, they know we've been to see Interpol lots of times.*
>
> *I think it's better we say we were not alive to the distinction at the hearing, which is true. I've re-read the transcript, and it's only Butcher who cites the wrong date…"*

174. Mr Qureshi QC said this was ok to be sent, so the letter went out in this form. In my judgment, Mr Gray's attempt in cross-examination to justify this letter or the email he sent was hopeless. On any view, the reference to being on thin ice was not the comment of an honest solicitor, but of someone who was practising equivocation. Although he denied this in cross-examination, it is quite clear that he thought he would be on thin ice because, since it might well come out that Gibson Dunn had sent both the original incorrectly dated transcripts and the ones with the correct date to Interpol, if he said that he didn't know about the misdating issue until the Byrne letter, he would get caught out in a lie. So his redraft of the letter continued his strategy of equivocation and saying something which, whilst literally true, failed to disclose the full picture and gave a thoroughly misleading impression. Despite the careful changes he made to the second paragraph quoted at [172] above, Mr Gray appears to have overlooked the words underlined in the first paragraph quoted which still gave the misleading impression that he had not been aware of the misdating error until Byrne & Partners drew it to his attention.

175. Quite apart from the misleading aspects of this letter, as Mr Gray was constrained to accept in cross-examination, whilst Byrne & Partners were asking two questions: (i) had Gibson Dunn been aware of the misdating error at the hearing of 10 and 11 September 2013 and (ii) had they been aware of the error before the hearing, he had deliberately only answered the first question and avoided the second. Of course answering the second, unless he positively lied, would mean having to admit that he had been fully aware of the misdating error from 23 August 2013 which would lead to the awkward question of whether he had deliberately misled the court at the hearing. Therefore the strategy he continued to pursue was one of equivocation and evasiveness, not answering the second question.

176. Mr Kendrick QC put to him that the letter of 7 November 2014 was "straight dishonest" which he cavilled at but his response about the letter gave an important insight into his real state of mind:

> *"Well, I don't think that, no. We were only answering a question -- as I said, we were only answering the question on the hearing. I accept it was a very evasive letter, but I thought it was acceptably evasive because -- and that's why -- but I realised it was important, and that's why I was very careful to run it past leading counsel. This is not the sort of letter that I would have sent out by myself, as it were, because I recognised that it was important."*

177. Quite apart from the unedifying attempt to pass at least some of the blame onto leading counsel, who of course did not know that Mr Gray had sat through the September 2013 hearing knowing about the full implications of the misdating error, I found the attempt by an English solicitor and partner in a City firm to justify a positively misleading letter to the other side's solicitors as *"acceptably evasive"* breathtaking. This letter was clearly dishonest and it was designed to deceive Byrne & Partners into thinking that Mr Gray had not been aware of the dating error at the September 2013 hearing. It had the desired effect, because Byrne & Partners wrote back on 9 November 2014 saying: *"You have now told us that Mr Gray and leading counsel were not aware of the misdating and we accept that."*

178. However, the problem for Mr Gray was that Byrne & Partners were not going to abandon their application for affidavits. The letter went on:

> *"Please provide the same confirmation in respect of the other lawyers within your firm instructed on this matter. (We ask in particular because we believe your firm may have been involved in preparing the Dubai extradition request which contains the correct dates of the telephone calls). We note, however, that your letter studiously avoids addressing whether your clients knew that the transcripts were falsely dated and were therefore misleading. We can only infer from your continued silence that they did."*

179. During Monday 10 November 2014 a further (fourth) affidavit was being drafted by Mr Gray and others within the firm. Mr Gray was in the United States at the time. In the morning of that day there was a conference call between Mr Qureshi QC and Miss Haywood of counsel and Mr Handley, Ms Kahn, Ms Merchant and Ms Holmes, a junior solicitor at Gibson Dunn in London, to discuss the draft affidavit and the forthcoming hearing of the application for affidavits which was due to be heard on 13 November 2014. Mr Gray did not participate in the call. There was some discussion of a suggestion that had been made that Mr Qureshi QC write to the court which he was agreeable to doing. He is recorded as saying: *"If there was an error, it is my understanding that it would be inadvertent, there was never any intention"* a further indication that Mr Qureshi QC did not have a full appreciation of the misdating issue and certainly did not know that Mr Gray had in fact deliberately misled the court.

180. Mr Qureshi QC later said that it needed to be checked when the error was discovered. Ms Kahn said that the reason she went to Djibouti in August 2013 was to determine the date so at the time of the extradition request they knew the date was 4 March. There was then this discussion:

> *Mr Qureshi QC: Well we didn't relay that to the court.*
>
> *Mr Handley: It seems from what Aurelie said that someone here knew that the date was something other than what we later relied upon.*
>
> *Mr Qureshi QC: It is an obvious point and the judge is [this was not completed but I suspect he meant the judge would pick up on the point]*.
>
> *Mr Handley: Can we check when we knew this and work out why this was not reflected in the freezer evidence.*
>
> *Mr Qureshi QC: We are going to have to say yes we knew this in late August. We need to say the date of the inconsistency was not drawn out in the affidavit evidence. We need to get this out on Tuesday. It looks like we are going to have a hearing on Thursday in any event. It looks like it is just going to be on costs.*
>
> *Mr Handley: Yes.*
>
> *Mr Qureshi QC: Can we work out what our costs are. We might have to consider this in more care and retrospection.*
>
> *Miss Haywood: If we agree this today, then we are accepting that our conduct in the application is inappropriate. If we are going to end up fighting about the [again this was not completed but I suspect Miss Haywood was making the point that there would be a hearing anyway on 13 November 2014 about Djibouti's application for Mr Boreh to disclose more information about his assets]*.

181. What emerges clearly from that discussion is that none of the participants in the call appreciated that Mr Gray was the person at Gibson Dunn who had not only known about the misdating error and its full implications for the safety of the conviction and the evidence in support of it, but who had sat through the September 2013 hearing with that knowledge. If any of them had known that, I have no doubt that they would immediately have advised Djibouti that the court should be informed straight away. Also, reading between the lines, I consider that both counsel recognised that the court was likely to conclude that it had been misled, hence Miss Haywood's comment that if they agreed to provide the affidavits, they would be accepting that the conduct at the application [i.e. in September 2013] had been inappropriate and Mr Qureshi QC's comment that it was an obvious point. Although I have not heard evidence from any of them, it seems to me I can infer from this discussion that they were in effect

considering whether to accept that the court had been misled, albeit inadvertently. That ties in with what Mr Handley said to Mr Gray later in the day, referred to below.

182. This is important because it was a much repeated theme of the submissions addressed by Mr Simpson QC to the court on behalf of Mr Gray that since none of these other lawyers, all of whom were accepted to be honest, had thought that the court had been misled, it could not be said that his client was dishonest in concluding, as he asserted constantly throughout cross-examination, that he had not appreciated that the court had been misled. Mr Simpson QC submitted that there was what he described as "group think", that all the lawyers, including Mr Gray, had the mindset that the court had not been misled, therefore Mr Gray cannot be criticised for not realising that the court had been misled.

183. I cannot accept that submission. Quite apart from the point I have just made as to the other lawyers suspecting the court would conclude it had been misled and the fact that Mr Handley, at least, clearly considered that the court had been inadvertently misled, there is a fundamental fallacy in the submission which its repetition failed to recognise: the critical difference between Mr Gray and the other lawyers is that, as I have held, he had been party to the strategy agreed at the 27 August meetings and he had sat through the entire September hearing knowing that the court was proceeding on a misconceived basis, because the court thought the transcripts were dated 5 March 2009 and had no appreciation that the conviction was unsafe, whereas he knew that the transcripts were in fact dated 4 March 2009 and that the conviction was unsafe. I am afraid that I simply disbelieve Mr Gray's evidence that he did not appreciate at all material times that the court had been misled. He, in contrast to all the other lawyers, knew that he had deliberately misled the court.

184. Later on 10 November 2014, Mr Qureshi QC did write a letter to me, copied to Mr Butcher QC addressing the assertion made in the various Byrne & Partners letters that misleading submissions had been made to the court at the September 2013 hearing. He confirmed that the letters in response from Gibson Dunn accorded with his recollection and understanding in relation to the terrorism issue. He said that he did not believe that any aspect of his submissions could properly be characterised as "misleading" but took full responsibility and apologised for any error manifested by his conduct. It is to be noted immediately that this letter was concerned exclusively with Mr Qureshi QC's own position and was not purporting to deal with the position of Mr Gray.

185. In the meantime on the afternoon of 10 November 2014 after the conference call and once business had opened in the United States where Mr Gray was, Mr Handley had an email exchange with Mr Gray in relation to the fourth affidavit. It begins with Mr Handley saying: *"Sana and Aurelie have been asked to complete what they can with the affidavit and asked to go back through their emails and see if there is an explanation for how we got all the right dates in the extradition request but mischaracterised the dates for the freezer."* This accorded with what it had been agreed should be investigated during the conference call that morning.

186. Mr Gray's response, minutes later was as follows:

> *"This is a waste of time. Please do not do that.*

> *All you are likely to find is that on date X we realised the error, addressed it and moved on. Is that something you think is appropriate to admit to the court? Would you like me to publicly apportion blame on other lawyers? All you are doing is falling into their trap. And it would not end there.*
>
> *The fact is we were not alive to it at the hearing, we did not mean to mislead the court and we are addressing it that way."*

187. Mr Gray really had no proper explanation for this disgraceful email in cross-examination. He was forced to accept that Mr Handley was obviously right when he said later that the court should be informed. However, the attempt to suggest that other lawyers were to blame, when he knew that he was the only English solicitor who had sat through the September 2013 hearing knowing the full implications of the misdating issue, was wholly wrong. This email, as Mr Kendrick QC put to Mr Gray, albeit he would not accept the point, was deceiving Mr Handley into thinking that he, Mr Gray, had not known: *"we were not alive to it at the hearing"* again the words of equivocation, whereas others in the firm had.

188. Furthermore, Mr Handley's response demonstrates that he was deceived into thinking that the court had been inadvertently misled at the September 2013 hearing. That response was the proper one of a reasonable and honest solicitor:

> *"We just need to know what happened. So far we have not answered Byrne's two fundamental questions: 1) when did we know; and 2) how is it that we got the dates right for the extradition, but used other dates for the Freezer? If the realization occurred before evidence was served for the Freezer, or before the Freezer hearing, or before Byrne's letter of September 2014, then yes I do think that is something we have to admit to the Court. Obviously no one meant to mislead the court, but it has turned out we have. We can either find out what happened now, or we can do it in a few weeks after they've applied to lift the Freezer…"*

189. Mr Gray responded *"I tried calling you to discuss this. Please call me on 25366".* Mr Gray's evidence subsequently in his sixth affidavit, repeated in cross-examination, was that he had told Mr Handley on the telephone that he Mr Gray had known of the dating error at the time of the September 2013 hearing. I was told by Mr Dutton QC that Mr Handley's recollection was that he had not been told. In his seventh affidavit, Mr Gray was at pains to point out that (rather as with Mr Qureshi QC in relation to the discussion on 26 August 2013) he accepted that he and Mr Handley had a genuine difference of recollection.

190. This was one of the aspects of the involvement of other lawyers which led Mr Simpson QC, when I asked him towards the end of Day 3 whether he was making an application that Mr Handley and Mr Qureshi QC should be called to be cross-examined, to say on instructions that he was making such application, although later that evening the application was withdrawn. When Mr Simpson QC sought to explain to the court the following morning why the application had been withdrawn, he said it was prejudicial to his client that the question of calling other witnesses for cross-

examination had only been raised by the court towards the end of his submissions and, in effect, sought to blame the court for not itself insisting earlier that Mr Qureshi QC and Mr Handley be called (the formal position was that the court called Mr Gray).

191. This submission was misconceived. Mr Kendrick QC made it quite clear before the hearing began that the only lawyer for Djibouti who was being accused of professional misconduct was Mr Gray. In those circumstances he did not require any of the other lawyers to attend to be cross-examined. In those circumstances, it was for Mr Gray and his counsel to make any application that Mr Qureshi QC or Mr Handley or anyone else should be called to be cross-examined, not for the court. The question of whether allegations were being made against Mr Qureshi QC and thus whether he would need to be a witness or be separately represented was canvassed at the case management hearing I convened on 26 February 2015, a few days before the hearing began, to deal with this very issue of Mr Qureshi QC's position. Mr Kendrick QC again made it clear that he was not making any allegations against anyone other than Mr Gray, although his client's position was reserved. Mr Simpson QC was at that hearing and it was incumbent upon him to make any application then or at the outset of the hearing on 2 March 2015, when the matter was touched on again, that Mr Qureshi QC (or for that matter Mr Handley) should be called, if he considered that that was in the best interests of his client. Certainly at the beginning of the hearing on 2 March 2015, Mr Gray and Mr Simpson QC knew exactly what the case was for Mr Boreh that he had deliberately misled the court and been guilty of misconduct, as that case had been set out in painstaking detail in Mr Kendrick QC's skeleton argument.

192. What Mr Simpson QC cannot do, which he certainly appeared to be trying to do, is to tie the hands of the court by suggesting that it would be unfair or unjust for the court to make any finding adverse to Mr Gray in relation to his conversations with Mr Qureshi QC or Mr Handley when neither of them had been called to give evidence. Given that Mr Gray accepts that in each case there is what he describes as a genuine difference of recollection, it is difficult to see what prejudice Mr Gray could have suffered from the fact that neither of them was cross-examined, which could or should restrain the court from making findings it would otherwise make. Indeed I suspect that, if either of them had been called, he would have given compelling reasons why Mr Gray's recollection of conversations was wrong, but it is unnecessary to speculate about that.

193. For the present it is only necessary to say that I do not accept Mr Gray's evidence that, on 10 November 2014, he informed Mr Handley that he, Mr Gray, had known about the misdating issue at the time of the September 2013 hearing. It is inconceivable that, if Mr Handley had been told that, he would not have insisted that the court was told that at the hearing on 13 November 2014. To the extent that Mr Gray had tried to pre-empt that reaction by "pulling rank" as the partner in charge (which both Mr Kendrick QC and Mr Simpson QC sought to suggest, for differing reasons, had happened but which I find as a fact did not happen) I have no doubt that Mr Handley, who emerges from this whole sorry tale with credit, as a conscientious and honest solicitor, would not have been intimidated by that and would have gone straight to Mr Philip Rocher, the senior London Disputes Resolution partner, to inform him of everything Mr Gray had told him or tried to order him to do. At that point Mr Rocher would no doubt have insisted the court was fully informed immediately.

194. On 11 November 2014, Mr Gray's fourth affidavit was sworn. In a number of respects, despite Mr Gray's protestations to the contrary, it was a highly misleading document. It was no answer for Mr Simpson QC to point out that six other lawyers (including Mr Qureshi QC) had a hand in drafting the affidavit. The only lawyer who knew that Mr Gray had been aware of the dating error before and at the time of the September 2013 hearing and who had sat through the entire hearing with that knowledge, knowing also that the court was proceeding on a misapprehension, was Mr Gray himself. It follows that whilst he knew it was misleading, the other lawyers involved in the drafting would not have known that.

195. The extent to which the affidavit was misleading emerges at an early stage. At paragraph 6 the affidavit said: *"without prejudice to the position that the application [for affidavits] is both unnecessary and diversionary, in order to ensure that the Court is fully appraised of all facts and matters underpinning the serious allegations levelled in the application, I have set out matters below."* That was clearly designed to give the court the impression that Mr Gray was setting out the position in full as regards the misdating issue and knowledge of it. However, as Mr Kendrick QC pointed out, that statement was deliberately evasive because Mr Gray had a strategy, which was still in place, of evading the question Byrne & Partners were asking about who had known when about the misdating issue.

196. Of particular concern in this context are paragraphs 38 to 41 of the affidavit in the section headed "Knowledge of the Date Error":

> *"38. Although they no longer suggest that leading counsel or I intended to mislead the court, the defendants contend, without any evidence, that our clients must have done. As I set out below, there was no intention to mislead the court by our clients or this firm. If this court was misled, I apologise.*
>
> *39. Byrne have asked who knew of the dating error within the firm and when. Without any way waiving privilege, it is correct we provided advice regarding the extradition request. This was one of a number of parallel workstreams. The internal work of the firm is, of course, privileged. Given the enormous volume of internal email traffic and the number of lawyers involved in the overall matter, it would be a significant task to work out who exactly knew what and when. If that exercise was undertaken I do not believe the information would have any utility in this matter. I am confident in the event no lawyer in the team intended to mislead either this court or the Dubai courts.*
>
> *40. In short, the error was in my affidavit and I take responsibility for its contents. I repeat that the error was inadvertent and I sincerely apologise to the Court if that error caused it to be misled.*
>
> *41. I should also address a further accusation made by Byrne & Co, namely that the claimants themselves sought to mislead the court. That is simply wrong. They played no*

> *role in the drafting of my affidavit. We have raised the transcript dating error issue with them. Without waiving privilege, I understand they did not spot the error until it was referred to them. It was then pointed out it was widely known there had been an explosion on 3 March ... that being a period of significant instability. They believe Boreh was seeking to destabilise Djibouti in order to then return and play the saviour. Of course, the court does not need to determine whether that is correct or not."*

197. Despite the denials of Mr Gray in cross-examination and the detailed submissions of Mr Simpson QC as to why I should not reach this conclusion, I have concluded that these paragraphs are evasive and misleading and deliberately so. Starting with paragraph 38, Mr Kendrick QC put to Mr Gray that this was a cocktail of literal truth and deceit. Whilst it was quite right that Byrne & Partners had accepted that neither he nor Mr Qureshi QC intended to mislead the court, in his case that was because he had misled Byrne & Partners in the letters I have referred to into believing that he was not personally implicated. As Mr Kendrick QC rightly put it, what Mr Gray was now doing in paragraph 38 was banking that earlier misleading.

198. In my judgment, paragraph 39 is also misleading. Quite apart from the fact that it fails to disclose his own involvement, it suggests that it would be an enormous task to find out who knew what and when within the firm whereas he knew already that he had personally known of the dating error before the September 2013 hearing. The statement at the end of the paragraph that no lawyer on the team intended to misled either this court or the Dubai court was simply untrue in the light of the findings I have made that Mr Gray deliberately misled this court and the fact that a deliberate strategy had been adopted not to inform this court or the Dubai court that the conviction and the evidence upon the basis of which it had been obtained were unsafe.

199. The statement in paragraph 40 that the error was inadvertent is simply untrue, since he had been party to that deliberate strategy and had known at the time of the September 2013 hearing that the court and counsel was being misled. Paragraph 41 was misleading because, despite Mr Gray's protestations to the contrary, it gave the impression to anyone reading it, including the court that the clients, Djibouti, had only recently discovered about the dating error when it was raised with them by Gibson Dunn. This was not true since the clients had known about the misdating issue since August 2013, before the hearing of the freezing order application. So far as the suggestion that it was "widely known" that there had been an explosion on 3 March 2009, Mr Gray had no honest basis for saying that. All he was able to come up with when challenged in cross-examination was an unreported attack referred to in statements obtained from three anonymous police officers who contradicted each other as to whether there was any physical damage, of which attack there was no contemporaneous record. By no stretch of anybody's imagination was this "widely known".

200. Although Mr Simpson QC expended much effort in his submissions on behalf of Mr Gray in seeking to justify paragraphs 39 and 41, in my judgment they are indefensible. Mr Gray sought to justify them in his sixth affidavit as "the absolute truth" although he recognised rightly that they "carefully" did not say that he knew about the dating error. This is the language of obfuscation and evasion. These

paragraphs are a demonstration of what Lord Steyn said in *Smith New Court v Citibank NA* [1997] AC 254 at 274: "*It has rightly been said that a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood. It is also difficult to detect.*"

201. Mr Gray did not attend the hearing of the application before me on 13 November 2014. In his oral submissions, Mr Qureshi QC maintained that Mr Gray had not known of the dating error, otherwise paragraph 39 of the affidavit would have been worded differently. I have no doubt that if Mr Qureshi QC had known the truth, he could not and would not have made the submissions he did at the hearing.

202. In the event, as already set out above, I found that the court had been misled and that my judgment should not be used to support a case that Mr Boreh had taken part in terrorist activities. However, I also said in terms in [11] of my judgment that there was no suggestion that counsel or Mr Gray was aware of the error at the time of the September 2013 hearing. So far as Mr Gray is concerned, that demonstrates that the strategy of equivocation and evasion adopted in his fourth affidavit had succeeded at least for the moment. However, I ordered that the person(s) at Djibouti primarily responsible for giving instructions to Gibson Dunn should swear an affidavit confirming that the transcripts were misleading and whether any such person was aware at the time of the hearing that the transcript was misdated and if not, when they first became aware and in what circumstances. I also ordered that a partner of Gibson Dunn should swear an affidavit setting out after all necessary inquiries, inter alia, whether any lawyer was aware of the misdating of the transcripts and that the judgment of the Djibouti court was based on that error at the date of the September 2013 hearing. The original date for compliance with that order was 5 December 2014 but that was extended by a Consent Order of Teare J to 29 December 2014.

203. Immediately after the hearing which ended at 1.50 pm on 13 November 2014, Mr Gray sent Mr Handley an email timed at 1.53 pm London time, which just read: *"Well it looks like you were right."* Then at 2.24 pm London time Mr Gray sent another email to Mr Handley and Ms Holmes in which he said: *"Obviously I will have to fall on my sword re being told about the date discrepancy and take the heat for it"* This seems to have been a recognition on his part that he would now have to come clean about what he had evasively avoided in the fourth affidavit, an admission as to his own knowledge at the time of the September 2013 hearing.

204. Early that evening Mr Gray had a very telling text exchange with Mr Qureshi QC. At 1.57 pm London time, he texted Mr Qureshi QC saying: *"I hear we got stuffed. Let's not speak today. Let's sleep on it and speak tomorrow."* As Mr Kendrick QC put to him, he was obviously agitated and could not leave it there, because a minute later at 1.58 pm he sent another text saying: *"It turns out I was told about the error in August. I completely forgot about it, in the midst of so much. However I can see I will be accused of all kinds of things."*

205. As Mr Kendrick QC put to Mr Gray, by this stage in November 2014, there was no question of his having forgotten that he had known about the misdating issue before and at the time of the September 2013 hearing. Aurelie Kahn had gone back over the emails and reminded Mr Gray (if he needed reminding, which I very much doubt), on 9 September 2014, that it was he who had decided not to disclose the discrepancy in date because to do so would be: *"shooting ourselves in the foot"* and he had

responded by telling her it was a *"massive issue"* (see [152] to [154] above). What this text demonstrates, as Mr Kendrick QC put it is that he had not in fact ever told Mr Qureshi QC the full implications of the misdating issue otherwise it would have been worded completely differently, not least because if Mr Qureshi QC had been in on Mr Gray's strategy it would have said: *"We will be accused etc."*. However Mr Gray could not bring himself to tell Mr Qureshi QC the full truth so this was, as Mr Kendrick QC put it: *"a half-hearted apology"* in circumstances where: *"the writing was on the wall"*. Although Mr Gray was not disposed to accept what Mr Kendrick had written, he struggled to find any honest explanation for this text.

206. Mr Qureshi QC responded at 2.00 pm: *"Am in Ct on another matter. Speak at 4pm. Yes he did not like the freezing order app and hit us exactly as I expected. Terrorism.. needs to be considered v carefully".* Although my initial view was that what Mr Qureshi QC was talking about expecting to be hit on was the application for affidavits, on reflection I think he was referring to the other application with which I dealt on 13 November 2014, Djibouti's application for further information and disclosure of Mr Boreh's assets, which had remained live only on the issue of costs.

207. Mr Gray responded to this at 2.12 pm: *"Yes but what choice did we have. We agreed the strategy and it didn't work. Now we have to think v carefully about our next move."* Although Mr Qureshi QC seems to have been more focused on the application for information and disclosure, Mr Gray is evidently concentrating on the affidavit order. He said in cross-examination that the strategy to which he was referring was that of not identifying who knew about the misdating issue on the basis that he and Mr Qureshi QC both believed that the court had not been misled. That picks up on the submission which Mr Simpson QC subsequently made on behalf of Mr Gray that if honest lawyers like Mr Qureshi QC did not consider that the court had been misled, Mr Gray was not dishonest if he believed that the court had not been misled. As I have already indicated, the fallacy in that argument is that the critical difference between Mr Gray and the other English lawyers is that he had full knowledge of the misdating issue and engaged in a deliberate strategy from 26 August 2013 onwards to conceal its full implications and in particular that it rendered the conviction and the evidence on which it was based unsafe. Thus, whereas Mr Qureshi QC no doubt honestly believed that his submissions had not misled the court, even inadvertently, that cannot provide Mr Gray with any sort of defence because, in contrast, he sat through the September 2013 with full knowledge of the misdating issue and yet did nothing to correct the misapprehension the court was under, so, as I have found, he knew the court had been misled and honest belief to the contrary did not come into the picture.

208. Just completing the text exchange, Mr Qureshi QC relied at 6.54 pm saying: *"Freezing order. He didn't like parts of what we were asking for. Let's speak later or tomorrow 11 am London time."* This provides further confirmation that Mr Qureshi QC was concentrating on the Djibouti application for further information and disclosure. Later he repeated the same concern in another text at 9.00 pm: *"freezing order. He did exactly what I felt he might. Terrorism…That needs to be the subject of considered response."*

209. In conclusion on this section of the analysis of the facts, during the period September to November 2014 (and until his fifth affidavit referred to below) I find that Mr Gray engaged in a strategy of equivocation and evasion which was not one which any

reputable and honest solicitor could ever have adopted and the concept of *"acceptable evasion"* is clearly anathema to the standards of professional conduct to be expected of an officer of the court. I consider that the explanation for such a dishonest strategy cannot have been to cover up an honest mistake at the time of the September 2013 hearing. Rather, it was designed to prevent his own knowledge of the misdating error and the fact that he had sat through the September 2013 hearing knowing that the court was being misled ever coming out. Although this dishonest strategy in 2014 does not prove that he deliberately misled the court in 2013, it is strongly supportive of that conclusion.

Events after the November hearing and the affidavits sworn

210. Although there were isolated instances of Djibouti still relying on the conviction in materials which went to various organisations including development banks, that seems to have been inadvertent rather than deliberate and steps have now been taken to inform all such organisations that the conviction is no longer relied upon. Mysteriously given that CCF at Interpol were sent a copy of my 13 November 2014 judgment by Gibson Dunn on 8 December 2014, on 6 January 2015, CCF informed Interpol Djibouti that the Red Notice had been reinstated. As I said in the course of argument on Day 3 of the hearing, I have little doubt that if Interpol had had any idea about the material which was before this court at the present hearing, they would have withdrawn the Red Notice straight away. Following my indication that I would if necessary order Djibouti to write saying that an urgent meeting with Interpol should be convened, I understand Djibouti has taken steps to have the Red Notice lifted.

211. Understandably, Mr Boreh and his legal advisers remain concerned that Djibouti is still intent on engaging in political oppression against him, but in my judgment there is insufficient evidence from which I could conclude that any deliberate steps had been taken against him based on the original conviction and evidence since the 13 November 2014 hearing. Lord Falconer told me on instructions that Djibouti was very keen to regain the trust of the court and I accept that assurance. It does not follow, for reasons that I will come to, that Djibouti comes to the court with "clean hands" for the purposes of seeking injunctive relief now. In relation to Mr Boreh's concerns, once this judgment becomes public, I suspect they will have been addressed.

212. It was not until his fifth affidavit sworn on 29 December 2014 that Mr Gray made any admission in these proceedings that he had known that the transcripts were misdated and that the Djibouti judgment was based in part on that error both before the extradition request was finalised and prior to the hearing on 10 and 11 September 2013. He accepted that none of the London associates was involved with the extradition request or aware of the misdating error. He did say though that it was one of the Paris associates who drew attention to the error and that the Paris and Dubai associates were aware of the implications of the error. As I have already said when dealing with the deliberate misleading of the court by Mr Gray at the September 2013 hearing, it is no part of this application to seek to blame junior lawyers in Gibson Dunn who are not officers of the English court. Certainly Mr Gray could not seek to pray in aid as somehow excusing his conduct the fact that junior foreign lawyers were aware of the misdating error, and to be fair to him, he has not sought to do so.

213. At the same time, affidavits were served sworn by Mr Sultan and Mr Ali, neither of whom was tendered for cross-examination. Mr Sultan admitted that he had known of

the dating error on 23 August 2013. He also admitted to having been at the September 2013 hearing but said he did not realise that the matter was proceeding on the basis that the relevant calls took place on 5 March. He had assumed that transcripts with the correct date would be used at the hearing.

214. Mr Ali confirms that he was the prosecutor at the trial of Mr Boreh where transcripts dated 5 March 2009 were used, but he had no reason to doubt that date at the time. He became aware of the dating error on 23 August 2013. He describes how after undertaking some research: *"I understood that a grenade attack had occurred on 3 March 2009"*, and that a Gibson Dunn associate assisted in collecting that evidence, which has not been used yet due to Dubai having rejected the extradition request. He later describes some of the steps that will be taken to rectify any injustice by Djibouti, including the potential appointment of Louise Arbour former Chief Prosecutor at the International Criminal Tribunals for Yugoslavia and Rwanda and a Canadian Supreme Court Justice to accept appointment as an independent investigator with a mandate to review the entire case file before any possible re-trial.

215. It is striking that neither Mr Sultan nor Mr Ali grapples with the difficulties with and inconsistencies in the so-called evidence of a grenade attack on 3 March 2009 or with the fact that contemporaneously the Djibouti authorities did not identify in their discussions with the United States an attack on 3 March 2009 as one of the grenade attacks which had occurred and considered that the Government of Eritrea, not Djiboutians such as Mr Boreh were behind the attack (see [66] above). I consider that neither Djibouti nor Mr Gray genuinely believes that there was ever a grenade attack in which Mr Boreh was implicated on 3 March 2009 or that that can have been what Mr Boreh and the Abdillahi brothers were talking about in the telephone calls on 4 March 2009.

Events after December 2014

216. I can deal with the last part of the analysis of the factual background shortly. It was after Mr Gray's fifth affidavit was sworn in which he said that he had spoken to Mr Qureshi QC on 26 August 2013 about the misdating issue and believed Mr Qureshi QC had appreciated the significance of the date error, that Mr Qureshi QC wrote a letter to the court on 2 January 2015. He said that he had no recollection of any conversation on the bank holiday Monday 26 August 2013 and he understood there was no written record. He said that Mr Gray had assured him at the time that the extradition request and exhibits would be checked independently by at least two Gibson Dunn lawyers after it was finalised by the UAE lawyers. It was shortly prior to this letter that Mr Qureshi QC was dis-instructed by Gibson Dunn.

217. There was a case management hearing on 22 January 2015 at which it was accepted by counsel on behalf of Djibouti (Lord Falconer) and Gibson Dunn (then Mr Michael Brindle QC) that Mr Gray would be cross-examined at the forthcoming hearing. I ordered disclosure of certain correspondence referred to in the fifth affidavit and laid down a timetable for the service of further evidence. In the event, Mr Gray served two further affidavits, the sixth on 19 February 2015 and the seventh on 26 February 2015.

218. I held a further urgent case management hearing on the afternoon of Thursday 26 February 2015 after Mr Qureshi QC had expressed concern that allegations of impropriety were being levelled against him. Mr Kendrick QC made very clear that,

whilst his clients' position was reserved, no allegation of misconduct was being made against Mr Qureshi QC or any lawyer other than Mr Gray. In those circumstances it did not seem to me to be necessary for Mr Qureshi QC to attend the hearing the following week or be represented. If Mr Simpson QC who attended the 26 February hearing on behalf of Mr Gray thought differently and considered that Mr Qureshi QC should be called as a witness and cross-examined, that was the moment at which he should have spoken out.

219. Because of matters raised in some of the materials I was able to consider overnight I communicated with the parties on the morning of 27 February 2015 that I considered Mr Qureshi QC should be present at the hearing or at least be represented. In the event, he was in attendance throughout.

Consequences of the court having been deliberately misled

*Applicable legal principles*

220. Mr Kendrick QC's primary submission was that if the court concluded that it had been deliberately misled (as I have done) then I should set aside the entire Freezing Order made on 11 September 2013, that is to say both the freezing injunction and ancillary relief and the proprietary injunction granted over the shares in HDHL encompassed within paragraph 4 (e) of the Order. His fall-back position was that even if the proprietary injunction could stand, the freezing injunction over Mr Boreh's own assets must be set aside.

221. Mr Kendrick QC put his case that the court should set aside the Freezing Order on the basis of two related but distinct principles. First the duty of every litigant and solicitor not to mislead the court and second the doctrine that those who seek equitable relief, such as an injunction, must come to the court with "clean hands". So far as the first principle is concerned, although Mr Kendrick QC submitted that this duty is exemplified by the duty of full and frank disclosure on *ex parte* applications for relief, he submitted that, whilst the duty of full disclosure may not apply at the *inter partes* stage, there is an obligation on the parties at any stage not to knowingly mislead the court. He referred to a passage to that effect in *Gee on Commercial Injunctions 5th edition* (2004) at 9.009 and to a recent Administrative Court judgment of Jay J in *Shaw v Logue* [2014] EWHC 5 (Admin), an appeal from a ruling by the Solicitors Disciplinary Tribunal, where having summarised the duty of full and frank disclosure by reference to the decision of the Court of Appeal in *Brink's Mat v Elcombe* [1988] 1 WLR 1350, the learned judge held at [37]:

> "Even more axiomatically, there is a separate duty arising at all times not to mislead the Court and, should the Court have been inadvertently misled, to correct that as soon as possible. These duties are prominent in the Solicitor's Code of Conduct."

222. Mr Kendrick QC also relied in this context upon the long established principle that anything which approaches deception of the court is fatal to an application as set out in the judgment of Lord Cozens-Hardy MR in *R v Income Tax Commissioners ex p. Princess Edmond de Polignac* [1917] 1 KB 486 at 505:

> "…the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say 'We will not listen to your application because of what you have done'."

223. In his written submissions Lord Falconer took issue with the suggestion in Mr Kendrick QC's skeleton argument that it mattered not whether the hearing in September 2013 was *ex parte* or *inter partes*, pointing out that I had ruled against Mr Butcher QC when he had suggested that I should approach the hearing as one which was *inter partes* on notice. Lord Falconer submitted that the duty of full and frank disclosure was not applicable here. By the time of his closing submissions, I understood Lord Falconer to accept that one of the strands of authority to which the court could have regard at least by analogy was the cases on the duty of full and frank disclosure.

224. In my judgment it must be right that, although the duty of full and frank disclosure does not apply at the *inter partes* stage, the court should apply the same principles by analogy when considering the duty not to mislead the court (which applies at any stage) and the consequences of a breach of that duty. It would be very odd if different legal principles applied to a deliberate breach of duty and different consequences followed from that breach depending upon whether the misleading was at the *ex parte* stage (when a duty to make full and frank disclosure also applies) or at the *inter partes* stage. That point is made good here because the effect of the deliberate misconduct was to mislead not only the court but Mr Butcher QC, Mr Boreh's counsel, so in one sense the misleading is as serious, if not more serious, than if it had occurred on an *ex parte* application. Thus, as I see it, the cases on the effect of a deliberate failure to make full and frank disclosure provide a useful analogy and guide in the present case.

225. In the context of the duty of full and frank disclosure on an *ex parte* application for an injunction, both parties agreed that [62]-[63] of my judgment in *Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602 was an accurate summary of the applicable legal principles:

> "62. As the Court of Appeal stated in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 and as has been repeated in subsequent cases, the purpose of this rule is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on ex parte applications. However, even if there has been material non-disclosure, the Court has a discretion whether or not to discharge an order obtained *ex parte* and whether or not to grant fresh injunctive relief. Discharge of the order is not automatic on any non-disclosure being established of any fact known to the applicant which is found by the Court to have been material, <u>although it would only be in exceptional circumstances that a Court would not discharge an order where there had been deliberate non-disclosure or misrepresentation</u>. It is not alleged in the present

> case that any of the alleged non-disclosures or misrepresentations was deliberate. Whilst it is no answer to a complaint of non-disclosure to say that even if the relevant matters had been placed before the Court, the result would have been the same, that is a relevant consideration in the exercise of the Court's discretion.
>
> 63. In exercising that discretion, the overriding question for the Court is what is in the interests of justice. This is very clear from all three judgments in the Court of Appeal in *Brink's Mat*. Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had been disclosed, the judge at the ex parte hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this:
>
> > "Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained."" (my underlining in [62]).

226. The decision of the Court of Appeal in *Behbehani v Salem* [1989] 1 WLR 723 provides helpful guidance as to the approach to be adopted where the failure to make full disclosure was deliberate and conscious. There the judge on the *inter partes* hearing held that the failure to make full and frank disclosure at the *ex parte* application for a *Mareva* injunction was a deliberate and conscious failure by the plaintiff's solicitor, albeit not a contumacious one in the sense that he knew that what was concealed would have an effect on the judge's mind. He discharged the injunction and awarded indemnity costs against the plaintiff, but then re-granted the injunction on the same terms. The Court of Appeal reversed the learned judge and discharged the second injunction.

227. In dealing with the approach to be adopted where there has been bad faith, Woolf LJ said at 728H:

> "If of course it can be established that there has been bad faith, either on behalf of the parties or their legal advisers, that will be a most material matter in considering whether injunctions which have been granted should be discharged, and, if they are discharged, whether it is appropriate in the circumstances to re-grant injunctions either in the same terms or in similar terms."

228. Both Woolf LJ at 729F and Nourse LJ at 738F regarded it as beside the point that the judge on the *ex parte* application might have still granted the injunction if the full disclosure had been made to him.

229. Assistance as to the approach to be adopted where there has been bad faith by an applicant is also to be found in two first instance decisions of judges of the Chancery

Division who are now in the Court of Appeal. First the decision of Geoffrey Vos QC (sitting as a Deputy High Court Judge) in *St Merryn Meat Limited v Hawkins* [2001] CP Rep 116. In that case the claimants had obtained evidence of fraud against the relevant defendant by bugging his phone. The bugging had not been disclosed to the court on the *ex parte* application for a freezing injunction. The learned Deputy Judge held that this was a material non-disclosure. The learned Deputy Judge held that the injunction must be discharged, even though the defendants had admitted fraud and even though a remedy in damages would be impossible if they had dissipated their assets.

230. He stated the applicable principles in a case of that kind at [106] to [108] in passages which have some resonance with the present case:

> "106. In a case of this kind, where bad faith by the Claimants has been established, the court must be astute to ensure that the Claimants are deprived of any advantages they may have derived from their serious breaches of duty to the Court.
>
> 107. I accept that Mr Bard is entitled to ask me to consider as against that principle, the fact that the defendants have admitted fraud and that a remedy in damages will be impossible if they have dissipated their assets. I accept also that there is evidence before the court that there is a good arguable case against the defendants and evidence that they may indeed dissipate their assets before judgment. But this evidence cannot outweigh the necessity to demonstrate to the Claimants (and other applicants for without notice interim orders) the gravity of their duty of disclosure and the consequences of ignoring them.
>
> 108. I accept also that the rules I have described must not be used as an instrument of injustice. I do not, however, think that it would be unjust to deprive the Claimants of the relief that they have obtained in flagrant breach of their obligations of absolute good faith. I take into account in this respect that, throughout this application, the claimants have sought to maintain and advance what I have decided to be a deliberately false and dishonest case."

231. Second, in *Re OJSC Ank Yugraneft v Sibir Energy* [2008] EWHC 2614 (Ch); [2010] BCC 475 Christopher Clarke J had to consider an application by Millhouse and Mr Abramovich to set aside an order for appointment of a provisional liquidator which had been made *ex parte*. It is only necessary for present purposes to refer to the statement of the relevant principle which the court should adopt at [106]:

> "As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In

> complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

232. Turning to the "clean hands" doctrine, it is a well-established principle that misconduct in the presentation of an application for equitable relief, including for an injunction, can itself give rise to a defence based on the equitable maxim "*he who comes into equity must come with clean hands"*. In *Fiona Trust v Privalov* [2008] EWHC 1748 (Comm) Andrew Smith J summarised the effect of three earlier decisions of the Court of Appeal at [20]:

> "Mr. Hamblen relies upon three decisions of the Court of Appeal in which claimants have been deprived of equitable relief because of their misconduct in connection with the presentation of their case in the course of the litigation: *Armstrong v Sheppard & Short Ltd.* [1959] 2 QB 384; *J Willis & Son v Willis* [1986] 1 EGLR 62; and *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873. These authorities are examples of cases in which the court regarded attempts to mislead the courts as presenting good grounds for refusing equitable relief, and show that this is so not only where the purpose is to create a false case but where it is to bolster the truth with fabricated evidence: see *Gonthier v Orange Contract Scaffolding Ltd* especially at para 36. Further, as is clear from *J Willis & Son v Willis*, such misconduct can deprive a party of equitable relief notwithstanding the trickery was detected and therefore not pursued to the trial of the claim. However, in all these cases the misconduct was by way of deception in the course of litigation directed to securing equitable relief…"

233. As Lord Falconer correctly pointed out, the scope of the doctrine is limited. The misconduct complained of must bear an *"immediate and necessary relation"* to the equity that is sued for, here the Freezing Order: see the well-known statement of principle by Eyre LCB in *Dering v Earl of Winchelsea* (1787) 1 Cox 318:

> "It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands: but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense."

234. This principle was recently applied by the Court of Appeal in *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328; [2013] 1 CLC 596. In that case the Court of Appeal set aside a summary judgment granted in favour of RBS by Burton J which the bank had obtained by dishonestly suppressing relevant facts. The bank had also applied to the learned judge for an anti-suit injunction on the basis that the defendant had commenced proceedings in breach of an exclusive jurisdiction

clause. The Court of Appeal upheld the judge's conclusion that, notwithstanding the valid exclusive jurisdiction clause, the bank had engaged in misconduct which had an immediate and necessary relation with the equitable relief claimed: the bank had suppressed facts in the course of the substantive proceedings before the English court and had continued to argue, even after discovery of the true position that it had not concealed those facts.

235. The relevant principle and how it should be applied were set out in the judgment of Aikens LJ (with which Sir Maurice Kay V-P and Toulson LJ agreed) at [159] and [163] to [165]:

> "159. It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 319 the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corporation and others v Yuri Privalov and others* [2008] EWHC 1748 (Comm) Andrew Smith J noted that there are some authorities [the three Court of Appeal cases he referred to] in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief. *Spry: Principles of Equitable Remedies 8th edition* (2010) suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.
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> 163. In my view it is vital to identify carefully the two elements with which we are concerned; that is "the equity sued for" and "the misconduct" said to make RBS' hands unclean. The "equity sued for" is an injunction to restrain Highland and Scott Law from continuing to be in breach of (or in Scott Law's case refusing to be bound by) the jurisdiction clause in the FLD by bringing proceedings in which it is alleged that RBS had "knowingly misrepresented material facts and withheld critical information from [Highland] as part of [RBS'] scheme to acquire the 36 Loans at severely understated values". The misconduct alleged against RBS, through SG, falls into two Stages. First, there is the fact that RBS did not accept without challenge the judge's findings made in the Quantum judgment

> about the matters surrounding the transfer of the 36 Loans, the BWIC and the subsequent suppression of facts until the Quantum trial itself. Secondly, the fact of the lies of SG in the 2012 trial in trying to challenge the findings that the judge had made in his Quantum judgment.
>
> 164. As I read [185] – [192] of the 2012 judgment, Burton J accepted that if the misconduct of RBS (through SG) had ended with an acceptance of the conclusions made in the Quantum trial, then he would not have regarded the misconduct of RBS as being sufficiently immediate and having the necessary relation to the equity sued for to fall foul of the "unclean hands" doctrine. Thus, at the start of the 2012 trial, even though RBS might have pleaded a challenge to the various findings Burton J had made in the Quantum trial, if RBS had then accepted them, the judge would have held that RBS had not come to court with "unclean hands" because, to continue the metaphor, RBS would have "washed them". Therefore, it seems, the judge would have rejected Highland/Scott Law's "unclean hands" defence to RBS' claim for an anti-suit injunction.
>
> 165. But what tipped the balance the other way was the action of RBS in continuing to challenge four principal findings of fact made by Burton J in the Quantum trial, which I have summarised at [58] above, particularly through the evidence of SG in the 2012 trial, Burton J's reaffirmation of his Quantum judgment findings (save for the more nuanced finding in relation to motivation for termination) and his conclusion that SG had lied again. Does the fact that RBS persisted in challenging the judge's findings of fact in his Quantum judgment and its insistence that there had been no concealment of "The Suppressed Fact" constitute misconduct and, if so, does it have the necessary immediate and close relationship to the particular anti-suit injunction claimed? In my view the answer to both questions is "yes" and I shall briefly explain why."

236. One respect in which the application of the clean hands doctrine seems to me to have a wider impact than the application of the duty not to mislead the court, although ultimately the distinction may not matter for reasons I will come to, concerns the effect of the equivocation and evasion by Mr Gray between September and December 2014 and the further deliberate misleading of the court in his fourth affidavit. So far as that breach of the duty not to mislead the court is concerned, it seems to me that, if I were to conclude that, notwithstanding that the deliberate misleading of the court in September 2013 should lead to the Freezing Order being set aside, it was appropriate to grant a fresh Freezing Order, the fact of the deliberate misconduct in September to December 2014 would not of itself be a reason not to grant that fresh Order.

237. However, when that deliberate misconduct is viewed as a failure to come to equity with clean hands, then it seems to me it would be a basis for refusing to grant a fresh Freezing Order, by parity with the reasoning in the *Royal Bank of Scotland* case. It seems to me there is an immediate and necessary relation between the misconduct of

deliberately misleading the court in September to December 2014 and the equity now sought of a fresh Freezing Order. Nevertheless, it is not necessary to decide whether there is this distinction to be drawn between the application of the two principles, because, for reasons set out below, I do not consider it appropriate to grant a fresh freezing injunction, on the basis of the original deliberate misconduct.

238. One other aspect of the applicable legal principles which arises is the relevance, if any, of the fact that the relevant misconduct is that of the solicitor and not of the client. Lord Falconer submitted that in those circumstances, the Freezing Order should not be set aside. In my judgment there are two answers to that submission. The first is that, as a matter of principle, where a court is being invited to impose some sanction for negligence or misconduct, solicitor and client are to be regarded as indivisible. That principle applied before the enactment of the CPR as demonstrated in cases of dismissal for want of prosecution by the decision of the House of Lords in *Birkett v James* [1978] AC 297.

239. The same principle applies post-CPR. Mr Kendrick QC drew my attention in that context to the decision of the Court of Appeal in *Daryanani v Kumar* [2001] C.P. Rep 27. In that case the judge at first instance had declined to strike out a claim on the basis of prejudice caused by delay on the ground that he drew a distinction between the claimant and his solicitor, the latter being to blame for the delay. In concluding that the judge was wrong to draw that distinction, Mantell LJ at [29] held that the approach of not distinguishing between solicitor and client still applied under the CPR:

> 29 In the context of this appeal and concentrating on the particular issue, the underlying thought processes might well be those articulated by Lord Justice Ward in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 1666 at 1675:
>
> > "Ordinarily this court should not distinguish between the litigant himself and his advisors. There are good reasons why the court should not: first if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent … were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other."
>
> Is that way of thinking still valid? In my view it is. There does not seem to be any post CPR authority directly in point but in *Burt -v- Montague Wells* (Unreported 26 July 1999) this court declined to distinguish between a claimant and his solicitors in what was described as an "unhappy wrangle about costs" Sedley LJ stating that "the acts of one are the acts of the other" and in *Training in Compliance Ltd v Dewse* (Unreported 10 July 2000), which was an appeal against a condition imposed

that the defendant Mr Dewse should pay £100,000 into court as a condition of getting leave to amend, at p.66 of the transcript Peter Gibson LJ said this:

> "There is no doubt that the CPR give the court greater powers, enabling the court to choose between a wider range of remedies and sanctions, and that in the exercise of its powers the court must have regard to the overriding objective which recognises the principle of proportionality. The CPR relate to the making of a wasted costs order against legal representatives, as had the RSC; but I see no justification for Mr Pooles' submissions on the CPR requiring the court to draw distinctions between a party and his legal representatives. Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to the fact, though it does not follow that that would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the CPR as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting. However, in the present case there is in fact no evidence at all as to what the defendant knew of the action or inaction on his behalf taken by those representing him. In my judgment, therefore, in this case there is even less scope for making an order against the legal representatives which would leave the defendant himself without any sanction against them.""

240. Lord Falconer sought in the present case to rely upon the decision of the Court of Appeal in *Eastglen International Corporation v Monpare SA* 1987 WK 493266 in support of the proposition that where the deliberate misleading of the court was solely the fault of the solicitor, the client should not suffer and the court would retain a discretion to continue a Freezing Order, in other words such a case falls within the *"exceptional circumstances"* I identified at [61] of *The Nicholas M*.

241. In *Eastglen* Mr Mahmoud, a Nigerian businessman met Mr Jarade and Mr Mahmoud decided to invest in property in this country. They entered a form of joint venture whereby Mr Jarade would locate houses to buy, then Mr Mahmoud would buy them and they would share the profits on resale. Mr Jarade in fact bought the houses in his own company name and sold them on to Mr Mahmoud at a secret profit. For that purpose he used a solicitor a Mr Saul. Mr Saul also acted for Mr Mahmoud on the purchases without disclosing his conflict of interest. Following a meeting Mr Jarade said that he needed the secret profit to forestall creditors. This perturbed Mr Mahmoud who consulted Mr Saul as to what could be done. Mr Saul recommended a Mareva injunction and Mr Saul swore the necessary affidavits and obtained the injunction on behalf of Mr Mahmoud.

242. Mr Jarade then applied to set aside the injunction on the grounds that there had been a failure to make full and frank disclosure. It emerged that the claim as set out in the writ was that there was an agency contract under which Mr Jarade would obtain the properties on behalf of Mr Mahmoud and would be paid a 10% commission. This was all complete fabrication on the part of Mr Saul, presumably to disguise his conflict of interest. The application to set aside the original Mareva injunction was adjourned and Mr Mahmoud, now using new solicitors issued fresh proceedings and obtained a fresh Mareva injunction, fully disclosing what had happened in the first action. There was then an application to set aside the second injunction on the ground that the non-disclosure in the first injunction was so serious that it would not be right to allow the second injunction to stand. Gatehouse J set aside the second injunction referring to what Sir John Donaldson MR said in *Bank Mellat* about the need for full and frank disclosure on such *ex parte* applications. The Court of Appeal allowed the appeal.

243. Sir John Donaldson MR said this:

> "I stand by everything that I said in the Bank Mellat case about the importance of full and frank disclosure, and I would support any policy of the courts which was designed to buttress that by declining to give anybody any advantage from a failure to comply with that obligation. I would go further and say that it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit. This is the most important duty of all in the context of ex parte applications.
>
> Thus I can well understand the learned judge reaching the conclusion which he reached, but I think that he failed to take into account, at any rate expressly, and if he did take it into account I think he failed to take it into account to any real extent, one unusual feature in this case. This is that the fault was entirely and completely that of the solicitor, Mr Saul.
>
> It is said by Mr Sheridan that that is a factor to be taken into account but it really would not make any difference and is not decisive. He says that as a matter of ordinary principle, the principal is responsible for the actions of his agent. That no doubt is true. He says that in the cases where courts have been concerned with dismissing actions for want of prosecution it has been no answer that, as is usually the case, the solicitor was solely to blame. That again is also true, although I think it has to be said that if there will be very considerable difficulties in the client formulating a claim for damages against

> the solicitor, that is a factor which is taken into consideration. In this case if the injunction is discharged and a judgment is obtained by Mr Mahmoud against Mr Jarade, there would be very considerable difficulties in deciding how much better off he would have been had there been a Mareva injunction.
>
> Be that as it may, it seems to me that that responsibility of a principal for his agent cannot be decisive in all circumstances and that one has got to look at the facts of every particular case. Mr Mahmoud is a gentleman who comes here from abroad. He approaches a perfectly reputable English solicitor. When trouble breaks out he asks the solicitor what can be done: he is told, "You get a Mareva injunction" (I am sure he did not use those exact words), Mr Mahmoud says, "Please do that" , and the matter is left entirely to the solicitor. It does seem to me that it would be visiting the sins of the solicitor to an undue extent in this very exceptional situation if Mr Mahmoud were to be deprived of relief to which he always was entitled, when he himself has done nothing wrong.
>
> Mr Sheridan says that that is not quite right. He says that Mr Mahmoud can be criticised because on 27th and 28th June he discovered that Mr Saul knew far more about these transactions than he had previously thought. Mr Sheridan says that at that moment he should have said to Mr Saul, "I will have no more to do with you: I must get another solicitor." Alternatively at the very least he should have said, "I want to see the affidavits which are being sworn in connection with the application for a Mareva injunction." I think that really is a counsel of perfection. It may be that an English resident familiar with litigation might have done it, but to say that a gentleman who is resident abroad and who is met with this sort of situation for the first time in his life should be expected to take that sort of action is unreasonable. It is a fair argument, but it has to be rejected.
>
> Therefore, purely on the basis of the exceptional nature of this situation, where not only was Mr Mahmoud always entitled to a Mareva injunction had the matter been disclosed, but the nondisclosure was solely the responsibility of his solicitor, I would be minded to allow this appeal."

244. Despite Lord Falconer's attractive submissions, I do not consider that *Eastglen* lays down any general principle that where the deliberate misleading or non-disclosure is the fault of the solicitor, the client should be relieved from the normal consequences of such contumelious conduct, which is that the freezing injunction is discharged. That general principle applies save in an exceptional case of which *Eastglen* was an example. One has a strong sense that the Court of Appeal found for Mr Mahmoud at least in part because Mr Saul's misconduct involved concealing his own conflict of interest from Mr Mahmoud. Indeed the Court was sufficiently concerned about Mr Saul's conduct to refer him to the Solicitors Complaints Bureau. By contrast, Mr Gray no doubt thought, however misguidedly, that the strategy of deliberate misleading which he adopted was in his client's best interests and, whatever else he was doing, he was not deceiving his own client. Nothing in *Eastglen* is of assistance to Djibouti in the present case.

245. That leads me on to the second reason why the fact that it was Mr Gray who deliberately misled the court does not enable Djibouti to say that the Freezing Order should stand. This is that, unlike in the case of Mr Mahmoud in *Eastglen*, Djibouti are not blameless ingénues here. The strategy of concealment from the courts that the conviction was unsafe and the evidence upon which it was based was unreliable was developed at the meeting at Kroll on 27 August 2013 attended by Mr Sultan and Mr Ali and the meeting the same day at Al Tamimi attended by Mr Ali and, as I have already held at [63] above, it is to be inferred that they agreed with this strategy. Furthermore, Mr Sultan attended the hearing on 10 and 11 September 2013 throughout and, although he says in his affidavit that he did not appreciate that reference was being made to the wrong transcript, in the light of the fact that he was been aware of the strategy, I am extremely sceptical about that evidence and he has not attended to be cross-examined. Accordingly, it cannot be said in this case (unlike in *Eastglen*) that the misconduct was solely and exclusively that of the solicitor.

246. There are other aspects of Djibouti's conduct which can only be described as reprehensible and which inevitably bear upon the question whether it would be appropriate to grant a fresh freezing injunction: (i) their continued use of my judgment internationally notwithstanding that they knew it was based on a misapprehension; (ii) the so-called evidence they have produced of a grenade attack on 3 March 2009 when they can have no genuine belief that there ever was such an attack; (iii) the continued reliance upon the unsafe conviction and the unreliable confession in their criminal complaint in Dubai in June 2014, after their extradition request had failed and (iv) the thoroughly improper pressure put upon Mr Boreh by Kroll on behalf of Djibouti to settle the litigation. These are four particularly egregious examples of reprehensible conduct, all of which fall a long way short of the standards of behaviour which the court is entitled to expect of a sovereign state.

Application of those principles to the facts

247. I propose to deal first with the freezing injunction because I agree with Lord Falconer that the aspect of the Freezing Order which concerns protection of proprietary rights is in a different category to the freezing injunction. So far as the freezing injunction is concerned, the court was clearly deliberately misled at the hearing on 10 and 11 September 2013, in a manner which was material to the exercise of my discretion on one of the matters which Djibouti had to demonstrate, namely risk of dissipation. However, the misdating issue had a wider significance in this sense. If the full honest picture had been put before the court as it should have been, what would have emerged is that the conviction in Djibouti had been obtained on what Djibouti now knew was a false basis and yet no steps had been taken to quash the conviction. Although it and the evidence upon which it was based were known to be unsafe, they were still being relied upon in the extradition request as set out in [73] above.

248. In those circumstances, the submission made by Mr Butcher QC that the allegations of terrorism against Mr Boreh were part of a campaign of political oppression would have had considerably more force and on the basis of the true position, would have found considerably more favour with the court than they did. Whether I would have granted a Worldwide Freezing Order in those circumstances it is difficult to say, but as the Court of Appeal said in *Behbehani*, that is beside the point. Also irrelevant for present purposes, for the reasons given in the *St Merryn Meat* case quoted at [230] above, are various points made by Djibouti in Lord Falconer's skeleton argument

which are said to support the granting of the original injunction because they demonstrate that Mr Boreh was dissipating assets.

249. Given the seriousness of what occurred and the fact that Mr Gray deliberately misled the court at the hearing on 10 and 11 September 2013, I have no doubt that applying by analogy the principles derived from the cases I have referred to at [221] to [231] above, it is necessary to demonstrate to these claimants the importance of honesty and openness in all applications to the court, *a fortiori* in applications for worldwide freezing relief, by setting aside the freezing injunction. As Mr Kendrick QC put it at the outset of his written submissions: "*the devastation caused by the hydrogen bomb of a [freezing order] is far wider than the strict legal effect"* (per Jacob J in *OMV Supply and Trading AG v Clarke*, 14 January 1999, quoting an earlier judgment of his own in *Alliance Resources Plc v O'Brien*). In cases where such wide ranging orders are sought, the importance of the court not being misled, let alone deliberately misled, cannot be over-emphasised. That is so whether the misleading is at an *ex parte* application or an *inter partes* hearing. This court operates in large measure on trust of the parties and lawyers who appear in cases before it, so that an abuse of trust such as occurred here has to be dealt with by discharging the relief which had been obtained by misleading the court.

250. There are no exceptional circumstances here such as could justify either refusing to set aside the freezing injunction or granting a fresh freezing injunction. Certainly, for the reasons I gave above, there is nothing in the decision of the Court of Appeal in *Eastglen* which assists Djibouti. That was a case which was out of the norm on its own peculiar facts. Here, unlike in that case, there is no question of the solicitor having misled his own client as well as the court. Furthermore, for the reasons I have also given, I am far from satisfied that what occurred was entirely the fault of Mr Gray, in the sense that the strategy of concealment which essentially led him to deliberately mislead the court was one which was formulated at meetings on 27 August 2013 which were attended by the Inspector General and the Attorney General of Djibouti. Where there has been such serious and deliberate misleading of the court as occurred here, I consider the court should refuse to grant fresh relief to Djibouti in order to express the disapproval and concern of the court at what has occurred and discourage others from similar conduct.

251. Accordingly, in my judgment, the freezing injunction must be set aside and I decline to grant any fresh freezing relief, on the basis that the deliberate misleading of the court is so serious that it would be wrong to let Djibouti retain any advantage from what occurred so far as the freezing injunction is concerned.

252. I have thought long and hard about whether that part of the Freezing Order which constitutes a proprietary injunction in respect of the shares in HDHL should also be set aside in view of the seriousness of Mr Gray deliberately misleading the court. Ultimately, I have concluded that this part of the injunction should not be set aside, although the freezing injunction should. The same approach was adopted by Blackburne J in *Tajik Aluminium Plant v Ermatov* [2005] EWHC 2241 (Ch) at [194]-[195].

253. As Lord Falconer rightly submitted the proprietary injunction is fundamentally different from the freezing injunction, as stated by Lord Mustill in the Privy Council in *Mercedes-Benz AG v Leiduck* [1996] AC 284 at 300:

> *"The courts administering the remedy always distinguish sharply between tracing and other remedies available where the plaintiff asserts that the assets in question belong to him and that the dealings with them should be enjoined in order to protect his proprietary rights, and Mareva injunctions granted where the plaintiff does not claim any interest in the assets and seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim."*

254. I also agree with Lord Falconer both that (i) a proprietary injunction over particular assets on the basis that the claimant has an arguable case that they are his property is far less intrusive than a freezing injunction. It preserves the asset until trial but it does not freeze a defendant's own assets or prevent a defendant from carrying on his day to day business and (ii) that the discharge of a proprietary injunction has a far greater effect on the substantive claim. If the defendant disposes of the asset, the claim becomes nugatory.

255. It seems to me, further, in relation to the proprietary injunction that the deliberate misleading of the court (which was in relation to the risk of dissipation and whether because of political oppression Djibouti should be entitled to a freezing injunction) did not really concern the proprietary aspect of the relief sought. On the basis that Djibouti has a sufficiently arguable case that the shares are its property the court would probably have granted a proprietary injunction even if it was not prepared to grant a freezing injunction. Accordingly, it seems to me it would be unjust to discharge the proprietary injunction.

256. In the circumstances, it is not strictly necessary to consider whether the application of the clean hands doctrine would have led to a refusal to grant the original freezing injunction or a fresh freezing injunction, since I have held that the deliberate misconduct in and of itself requires the freezing injunction to be set aside and the refusal of any fresh freezing injunction. However, I consider that the deliberate misconduct of Mr Gray for which Djibouti must take responsibility, involving as it did the court being deliberately misled about the terrorism conviction and the evidence in support of it, in order to bolster the application for freezing relief, had an immediate and necessary relation to the equity sued for, here the original freezing injunction so that Djibouti did not come to the court with clean hands.

257. The position is not improved so far as any application now for a fresh freezing injunction is concerned. In my judgment, there has been other misconduct or impropriety by Djibouti or for which Djibouti must take responsibility, specifically the misuse of the original injunction and of my judgment of which I gave the most egregious examples at [246] above and the further deliberate misleading of the court by Mr Gray between September and December 2014. Those matters taken cumulatively or individually are misconduct which on any view has an immediate and necessary relation to the equity sued for, here the application for a fresh freezing injunction.

258. It is no answer that, somewhat late in the day, Djibouti is taking steps to remedy some of this misconduct, for example by seeking the appointment of Louise Arbour or by applying to Interpol to have the Red Notice lifted. In other respects, there is no clear assurance that Djibouti will not continue to act in a way which means their hands are still dirty, for example by relying on the so-called evidence it has gathered of a

grenade attack on 3 March 2009 or by improper pressure on Mr Boreh to settle the present proceedings. In any event, even if all the misconduct referred to at [246] above were remedied, one of the principal grounds of Djibouti not having clean hands, namely the misconduct of Mr Gray in deliberately misleading the court both in September 2013 and between September and December 2014 would remain unremedied, for the same reason as the misconduct of the bank in the *Royal Bank of Scotland* case, that Djibouti through Mr Gray has not admitted the deliberate misleading of the court, but has maintained throughout this hearing that any misleading was inadvertent, which, as I have held is simply untrue.

259. It follows that I would, if necessary both discharge the original freezing injunction and refuse the application for a fresh freezing injunction on the alternative ground that Djibouti has not come to the court with clean hands.

Soprim Administration

260. Mr Boreh also makes complaint that Djibouti has acted improperly by seeking to intermeddle in the appointment of a provisional administrator in Djibouti for the construction company Soprim, which is part of Mr Boreh's family's group of companies and is managed by him. It is alleged by Mr Boreh that Djibouti itself was behind that appointment, apparently with a view to impeding an arbitration claim which had been brought against it by Soprim. Mr Boreh's case at the hearing in September 2013 was that Djibouti's campaign against him included its orchestration of the administration of Soprim, and Djibouti served evidence denying that allegation. It is now alleged by Mr Boreh that the evidence put before the court by Djibouti at the September 2013 hearing was untrue and that the truth, which is that Djibouti was indeed behind the appointment of Soprim's provisional administrator, had been concealed by dishonest evidence.

261. In my judgment, it is not necessary to examine this issue further on the present application. Mr Kendrick QC accepted that this point taken on its own could not be decisive of the application and at best it is a makeweight point which, if established, could be added to other evidence of Djibouti acting improperly or abusing its position as a sovereign state. Since the point is not determinative and I have concluded the freezing injunction should be set aside for other reasons, I need say no more about it.

Conclusion

262. Accordingly, for the reasons set out above, the application by Mr Boreh to set aside the Freezing Order is granted in respect of the freezing injunction and ancillary relief to it but refused in respect of the proprietary relief. I will hear counsel on the form of Order and on other consequential matters such as the Costs applications in paragraph (2) of the Application Notice.