CLAIM NO. BL-2019-000541

NEUTRAL CITATION NUMBER: [2019] EWHC 1633 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST
CHANCERY DIVISION

Before: **Mr Justice Henry Carr**
7 June 2019

BETWEEN:

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

Claimants

-and-

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

Defendants

EDWARD LEVEY (Instructed by **CALIBRATE LAW LIMITED**) appeared on behalf of the First Claimant

DAVID HALPERN QC (Instructed by **BROWN RUDNICK)** appeared on behalf of the First to Third Defendants

MR STEPHEN JONES (the Seventh Defendant) appeared in person

APPROVED JUDGMENT

MR JUSTICE HENRY CARR:

Introduction

1. This judgment deals with two issues which have been argued before me today. The first issue is whether this committal application should be adjourned. The second issue is whether the seventh defendant, Mr Jones, should be cross-examined on his affidavit evidence, pursuant to CPR part 32, Rule 7.

2. The background to this application is as follows. The first claimant, Discovery Land Company LLC ("**DLC**") has brought an application to commit Mr Stephen Jones to prison for contempt of court. This application is brought, it is said, as a result of a failure by Mr Jones, a company of which he is a director, the first defendant, Jirehouse, and two other Jirehouse entities, the second and third defendants, to comply with certain undertakings given to the court at a hearing before Nugee J on 15 March 2019. Those undertakings are recorded in an order of the same date ("**the Undertakings Order**"). It is also alleged that Mr Jones is in breach of certain disclosure provisions contained in a freezing injunction, granted by Nugee J on 18 March 2019 ("**the Freezing Injunction**").

3. The application is also brought against the first three defendants to these

proceedings, (collectively "**Jirehouse**"), although the relief sought against Jirehouse is the same as the relief sought against Mr Jones, namely that he should be committed to prison for contempt of court.

4. Jirehouse are represented by David Halpern QC. Mr Jones, who is an experienced solicitor specialising, as I understand it, in tax, has been added as the seventh defendant in these proceedings. Mr Jones appeared in person on this application.

The adjournment issue

5. Practice Direction 81, paragraph 15.6, provides that, amongst other things, that:

> "The court will also have regard to the need for the respondent to be –
> (1) allowed a reasonable time for responding to the committal application including, if necessary, preparing a defence;
> (2) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;
> (3) given the opportunity, if unrepresented, to obtain legal advice…"

6. I am satisfied that Mr Jones has had a reasonable opportunity to respond to the committal application in which he has now filed a total of five affidavits. However, until I raised the matter at the start of the hearing, he had not been made aware of the availability of criminal legal aid, nor how to contact the Legal Aid Agency. Mr Jones stated at the hearing that he wishes to apply for legal aid.

7. Mr Levey, who appeared on this application on behalf of DLC, initially submitted that I should not adjourn this application to give Mr Jones the opportunity to

apply for legal aid. However, having requested a short adjournment to research the matter Mr Levey accepted that the case should be adjourned. Nonetheless, the submissions that Mr Levey initially made to me were persuasive. Therefore, and in deference to those submissions, I decided to give judgment on this issue.

8. On reflection, there is a more important reason for giving judgment. Had Mr Jones been made aware of his right to apply for legal aid at an earlier stage in this application, an adjournment, which will cause a significant waste of time and costs, would not have been necessary. It is important to avoid a repetition of this in the future.

9. Mr Levey submitted as follows. First, that whilst Mr Halpern was not representing Mr Jones, nonetheless Mr Halpern's submissions, which Mr Jones was at liberty to adopt, set out his defence to the application, as the same relief was sought against him as against Jirehouse. He pointed out that this gave the benefit to Mr Jones of a very experienced legal team. Secondly, he pointed to the prejudice that will, it is said, be caused to DLC by an adjournment, in circumstances where many millions of pounds which Jirehouse received as client money has not been returned. Thirdly, he suggested that legal aid would be means tested and would be likely to be refused to Mr Jones. Fourthly, he suggested that the Practice Direction required the court to have regard to the need for the respondent to be made aware of the possibility of obtaining legal aid and, in the circumstances of this case, there was no need to make Mr Jones aware of this possibility. He is not a layman, but a practising solicitor.

10. Whilst I am extremely reluctant to adjourn this application, in my view, as is now accepted by the parties, I must do so, as otherwise, Mr Jones would not receive a fair hearing in relation to allegations against him which are extremely serious and may have extremely serious consequences. DLC alleges that in breach of his undertaking given to the court, Mr Jones failed to procure the payment into court of the sum of $9.3 million by 4 pm on 19 March 2019; and, that he failed to procure repayment of an amount outstanding under a facility known as the Dragonfly facility in the sum of approximately £5 million by 4 pm on 22 March 2019 ("**the Payment Obligations**").

11. DLC further alleges that Mr Jones failed to provide information to the best of his ability as to what has happened to certain of the monies. The undertaking given by Mr Jones was to provide the information in the form of an affidavit by 4pm on 18 March 2019, and the Freezing Injunction required substantially the same information to be provided by 4pm on 20 March 2019, and then confirmed in an affidavit within three working days ("**the Disclosure Obligations**").

12. Mr Jones has accepted, as he must, that he breached the Payment Obligations, as none of the payments which he undertook to make have been discharged. He has not applied to be released from any of the undertakings and it is said by DLC that he remains in continuing breach of the Payment Obligations.

13. In relation to the Disclosure Obligations, Mr Jones accepts that compliance was

late, but contends that he complied on service of his third affidavit. That remains a live issue on this application.

14. I bear in mind that Mr Halpern is not representing Mr Jones and that the interests of Jirehouse may not be identical to the interests of Mr Jones. Mr Jones faces, potentially, a prison sentence and he is entitled to seek legal aid and separate representation. In ***Inplayer Limited (Formerly Invideous Limited), Invideous Dooel-Skopje, Pierre Andurand v Jack Thorogood*** [2014] EWCA Civ 1511 the Court of Appeal considered the consequences of a failure to inform an alleged contemnor of his right to apply for legal aid. At paragraphs 47 to 51, Jackson LJ said:

> "47 A committal application has the character of criminal proceedings. The alleged contemnor is therefore entitled to legal aid, so that he can be properly represented: see Kings Lynn v West Norfolk Council v Bunning (Legal Aid Agency, interested party) [2013] EWHC 3390 (QB); [2014] 2 All ER 1095 .
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> 48 Unfortunately no-one told Mr Thorogood of his right to legal aid during the first instance proceedings. Mr Thorogood subsequently learnt of his entitlement, with the result that he now has legal aid and is represented in this court.
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> 49 Mr Milford accepts that the hearing below proceeded without anyone telling Mr Thorogood of his right to legal aid in relation to the contempt application. Mr Milford also accepts that Mr Thorogood should have been told of his entitlement and then given an opportunity to instruct lawyers of his choice. Therefore there has been a breach of common law principles of fairness and ECHR article 6.3 (c) .
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> 50 I therefore uphold the third ground of appeal."

15. In my judgment, if I did not adjourn this hearing that would amount, in the

circumstances of this case, to a breach of the common law principles of fairness and the right to a fair hearing guaranteed by article 6.3(c) of the European Convention on Human Rights.

16. My conclusion in this respect is fortified by reference to the judgment of McCombe LJ in ***Haringey London Borough Council v Brown*** [2015] EWCA Civ 483, at paragraphs 38 to 41, where, again, the learned judge stressed the importance of informing a respondent to a contempt application of his right to legal aid, which information is essential to a fair trial.

17. I also bear in mind that whilst Mr Jones is a practising solicitor, he is not a criminal solicitor, nor is there any indication that he has had experience or expertise in contempt proceedings. Since none of the experienced legal teams, either for DLC or Jirehouse, appeared to be aware of this part of the Practice Direction, I see no reason to doubt that Mr Jones was himself unaware of it.

18. As to whether an application by Mr Jones for legal aid would be means tested, the Legal Aid Agency has issued guidance for providers as to how to apply for legal aid in civil contempt proceedings. Version 2 is dated May 2017. The guidance indicates quite clearly that legal aid in civil contempt proceedings is not subject to the usual means testing.

19. Therefore, in the circumstances of this case, I have concluded that this application must be adjourned. However, I have considerable sympathy with DLC's

complaint that a delay is prejudicial to it and that its money has not yet been returned. I bear in mind that its money may not be returned as a direct result of this application. However, Mr Jones has indicated in his evidence that he hopes and expects that the money will be returned in the third quarter of 2019. It may well be that his position will be improved if the money is returned before the restored date of this hearing, so that he is no longer facing allegations of continuing contempt.

20. In these circumstances I believe it is appropriate to order expedition of the resumed hearing. Since I have spent considerable time reading into the papers, I will give an indication that I should hear it, if possible. I am unavailable on the last three days of the term, but otherwise, hopefully, I am available. I am also available in the first two weeks of August, when I am sitting during the vacation in the applications court and time, if necessary, will be made available then.

21. There is also a question of whether I should grant legal aid at this stage, because otherwise it may not be possible to restore the hearing in time. Referring to the White Book (vol.1), paragraph 81.1.5, page 2310, this states:

> "It is clear from s.14(g) of the2012 Act [the Legal Aid , Sentencing and Punishment of Offenders Act 2012] that an application for legal aid may be made to the High Court by a person alleged to have committed contempt in the face of the court. It has been held that such an application may be made by a person alleged to have committed some other class of contempt, because such proceedings are “criminal proceedings”, as defined in section 14(h) of the 2012 Act and reg.9(v) of the General Regulations, as they are proceedings that involve the determination of a criminal charge for the purposes of art.(6)."

22. It seems to me that there will be a considerable saving of time if the application for legal aid is made to me now, which I am inclined to grant, which will enable Mr Jones rapidly to seek his own representation and for the hearing to be resumed in the timescale which I have indicated.

An Order for cross-examination of Mr Jones

23. Turning, then, to the second question which I need to address. Mr Levey contends that since Mr Jones has chosen to rely upon affidavit evidence, which is also relied upon by Jirehouse, pursuant to CPR Rule 32.7, I should make an order that he must be cross-examined on the contents of his statements. This is because Mr Levey contends that the explanations provided by Mr Jones in his witness statements are untrue and that he has made various misrepresentations in the course of the proceedings, both to the claimants and to the court. This, of course, is potentially relevant to sentencing, where Mr Jones has offered the explanation that, essentially, he made an innocent mistake.

24. Mr Jones has informed DLC's solicitors, Brown Rudnick, that he will not submit to cross-examination and hence will not be giving oral evidence. Mr Halpern QC submits that he is not a compellable witness, and therefore cannot be required to submit to cross-examination.

25. CPR rules 81.28(2)–(3) states:

> "(2) At the hearing, the respondent is entitled –
> (a) to give oral evidence, whether or not the respondent has filed or

> served written evidence, and, if doing so, may be cross-examined; and (b) with the permission of the court, to call a witness to give oral evidence whether or not the witness has made an affidavit or witness statement.
>
> (3) The court may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing."

26. Mr Levey's case is that although Mr Jones is not a compellable witness, since he has chosen to put in evidence, the court may give permission for him to be cross-examined. He relies upon a decision of the House of Lords in ***Crest Homes Plc v Marks*** [1987] AC 829 at 858G onwards. In particular, Lord Oliver said at 858H:

> "It is clearly established that although a contemnor is not a compellable witness, in proceedings against him for contempt, if he gives evidence, he can be cross-examined on it in relation to the contempt alleged."

27. The authority cited in support of that proposition is ***Comet Products UK Limited v Hawkex Plastics*** [1971] 2 QB 67. In that case, the Court of Appeal decided that where a respondent to an application for committal for contempt had chosen to deploy affidavit evidence before the court, the court had a discretion to allow cross-examination on the contents of those affidavits. However, the court must first be satisfied that the cross-examination will be confined to the allegations of contempt, rather than to wider matters relevant to the merits of the proceedings. I should add that the court must also be astute to avoid the possibility of self-incrimination during cross-examination.

28. However, those cases were decided before the coming into force of the CPR and, in particular, before the coming into force of CPR Part 81. A relevant authority under CPR Part 81 is the decision of Whipple J in ***VIS Trading v Nazarov*** [2015] EWHC 3327. Whipple J said at paragraphs 30-31:

> "30 In this case, the extent to which the Defendants are in continuing breach is in issue. In resolving that factual issue, Mr Milner suggests that it is for the Claimant to seek the Court's order to allow cross-examination of the First Defendant (as contemnor). He submits as follows in his skeleton: " *insofar as* [the Claimant] *might wish to cross examine* [the First Defendant] *as to the completeness of his disclosure, that is not permissible without a further application supported by evidence justifying the proposed cross-examination: see JSC BTA Bank v Solodchenko [2011] 1 WLR 906 at [31]-[36]".* Mr Milner says that because no application has been made, no evidence can be adduced from the First Defendant, and the Court cannot therefore hold his silence against him. This is, in effect, to suggest that the Court is fixed with the First Defendant's affidavit in which he says that he has now complied with the 21 May 2015 Order (and to repeat Mr Milner's point about the limited ambit of the hearing, addressed and rejected above, in a different way). Mr Milner argued that this was precisely what Proudman J had decided in Solodchenko (No 2) . Mr Gunning disputed these submissions on the basis that they were procedurally incorrect, noting that Solodchenko (No 2) pre-dated CPR 81 which came into force on 1 October 2012 by virtue of the Civil Procedure (Amendment No 2) Rules 2012 [SI 2012/2208]. He drew my attention to CPR 81.28 (2) which provides that the respondent to any committal application is entitled to give oral evidence, and if doing so may be cross-examined; but importantly, also to CPR 81.28(3) which provides that the Court " *may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing".* Thus, he said, the respondent cannot be compelled to give oral evidence. It followed that it was not for the Claimant to seek any order to cross-examine, because the alleged contemnor, as respondent to the application, has a right to remain silent; but the Court can draw an adverse inference from silence, as set out in the White Book at CPR 81.28.4 :
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> > "A person accused of contempt, like the defendant in a criminal trial, has the right to remain silent (*Comet Products UK Ltd v Hawkex Plastics Ltd [1971] 2 QB 67* , CA). It is the duty of the court to ensure that the accused person is made aware of that right and also the risk that adverse inferences may be drawn from his silence (*Inplayer Limited v Thorogood [2014] EWCA Civ 1511, November 25, 2014, CA, unrep.* , at para.41)…"

> 31 I agree with the Claimant's submissions on this point. The fact that the First Defendant has produced some documents, in purported compliance with the 21 May 2015 Order, does not determine the compliance issue in the First Defendant's favour; nor does it require the Claimant to make any application for cross-examination. Rather, the First Defendant is on notice of the Claimant's case that the Defendants have failed to comply with the 21 May 2015 Order, and the Claimant is entitled to continue to advance that case, even in the face of purported compliance by the First Defendant since the date of the application. The burden of proof remains on the Claimant throughout, to the criminal standard, and the Claimant can invite the Court to conclude, on the basis of all the evidence in the case, that the Defendants have not yet complied with the 21 May 2015 Order. If the contemnor chooses to remain silent in the face of that dispute, the Court can draw an adverse inference against him, if the Court considers that to be appropriate and fair, and recalling that silence alone cannot prove guilt. This is not to put the burden of proof on the First Defendant; far from it, the burden remains on the Claimant. Proudman J was dealing with a different situation in Solodchenko (No 2) , where she had already held a fact finding hearing and found Mr Kythreotis to be in contempt, before he subsequently purported to comply with the order; and did not concern the application of rules now clearly now set out in CPR 81."

29. I agree with Whipple J that under CPR 81 a contemnor cannot be compelled to give oral evidence, nor compelled to be cross-examined on affidavit evidence, but that an adverse inference may be drawn if he or she chooses to remain silent. It is also relevant to note in that case the course that Whipple J chose to take. She said at paragraph 57:

> "57 In light of that conclusion, I hardly need to go on to consider what significance the First Defendant's decision not to give oral evidence might have in relation to my overall evaluation of the First Defendant's case. It is very clear that there are substantial gaps in the disclosure provided to date by the First Defendant. But the fact is that the matters covered in the First Defendant's Fifth and Sixth Affidavits are all matters of fact, within the First Defendant's knowledge. If those matters were being explained truthfully, I would have expected the First Defendant to give evidence to me in person and submit to cross examination, to demonstrate that he really had done everything possible to comply with the 21 May 2015 Order. He did not do that. The fact that the First Defendant did not give evidence, despite his availability for the hearing, does him no credit at all,

> and I draw an adverse inference against him. The fact that he then put in a Sixth Affidavit, after the hearing, making a number of assertions, supports that adverse inference. The First Defendant is trying to avoid being cross examined. The obvious, adverse, inference to draw is that he is not telling the truth: he knows he has not disclosed all that he can."

30. In conclusion, I do not consider that Mr Jones can be compelled to be cross-examined or can be put to an election as to whether to rely upon his affidavit evidence or to submit to cross-examination. However, given that very serious allegations of dishonesty, both in respect of attempts to deceive the claimants and attempts to deceive the court, are advanced with some particularity against Mr Jones, if he chooses not to be cross-examined, having received appropriate legal advice, then it may be (and I reach no conclusion on this at the moment) that there is at the very least a risk that the court will draw adverse inferences against him. That is a matter that Mr Jones will need to consider with his legal advisers.