Case No: BR-2020-000333

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**

**[2021] EWHC 1189 (CH)**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 26 March 2021

BEFORE:

**MR JUSTICE MORGAN**

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BETWEEN:

**(1) GARY TAYLOR**
**(2) MATTHEW DIX**

Applicants

- and -

**ERROL ANTHONY LUESHING**

Respondent

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**MR J TITMUSS** appeared on behalf of the Applicants

The Respondent did not appear and was not represented

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**APPROVED JUDGMENT (1 of 2)**
**Approved**

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1. MR JUSTICE MORGAN: This is an application by Mr Taylor and Mr Dix (who are the joint trustees of the estate in bankruptcy of Errol Anthony Lueshing) to commit Mr Lueshing to prison for contempt of court, in particular, for failing to comply with an order made by the court on 27 May 2020.

2. The application was originally issued on 30 June 2020 and was issued as amended on 18 November 2020. The application has come before the court on a number of earlier occasions. It came before Miles J and then before Zacaroli J and it came before me for an effective hearing on 12 February 2021. On 12 February, I adjourned the matter and, in the light of what has happened since 12 February, it has become appropriate for the trustees to restore this application for a hearing today.

3. Mr Lueshing is not present at the hearing today. He was not present at the hearing on 12 February 2021 but his brother and his niece did appear at that hearing and I was told then that Mr Lueshing was suffering from COVID and was unwell and was not in a position to attend the hearing. Today, I have not been given a specific reason why he has not come to court, although I am going to refer to medical matters in a moment. Mrs Blackman (the respondent's niece) has attended and has given me certain information about Mr Lueshing.

4. At the outset of the hearing, two matters were addressed. The first related to the mental capacity of Mr Lueshing and the second concerned whether it was appropriate for the court to hear this application in his absence or, alternatively, to take some other course. On the question of capacity, there is guidance given in a note in Civil Procedure (2020) Volume 1 at page 722. That refers to the relevant provisions of the Mental Capacity Act 2005. Section 1 of the 2005 Act sets out five key principles on the question as to whether a person has mental capacity in general, and today I am concerned to see whether Mr Lueshing has mental capacity to deal with this litigation.

5. Referring to the key principles to the extent relevant, they are as follows:

> (1) A person must be assumed to have capacity unless it is established that they lack capacity.

> (2) A person is not to be treated as unable to make a decision unless all practicable steps to help them do so have been taken without success.
>
> (3) A person must not be treated as unable to make a decision merely because they make an unwise decision.

6. Section 3 of the 2005 Act gives further direction as to when a person is unable to make a decision. Section 3(1) provides that:

> "... a person is unable to make a decision for himself if he is unable—
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means)."

Section 3(3) provides that:

> "The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision."

Section 3(4) reads:

> "The information relevant to a decision includes information about the reasonably foreseeable consequences of—
>
> (a) deciding one way or another, or
>
> (b) failing to make the decision."

7. The note continues by saying that:

> "In legal proceedings, the burden of proof is on the person who asserts that capacity is lacking. If there is any doubt as to whether

> a person lacks capacity, this is to be decided on the balance of probabilities; see section 2(4) of the 2004 Act."

8. I also note that, in the decision of the Court of Appeal in *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511, it is suggested that a court may find it appropriate itself to investigate whether a litigant lacks capacity to conduct the litigation.

9. Those are the principles to be applied to this question of the mental capacity of Mr Lueshing to participate in this litigation.

10. I do not have any detailed medical evidence about Mr Lueshing. I do have a letter from a GP who has been involved in the care of Mr Lueshing since a comparatively recent date of 22 February 2021. The GP's letter to the court is dated 24 March 2021. The GP says that concerns about Mr Lueshing's memory were raised by his niece (that is Mrs Blackman). The GP said he performed a memory assessment, which Mr Lueshing scored poorly on. The result was that Mr Lueshing was being referred to the memory clinic for formal assessment of his memory and that assessment is taking place next week.

11. Mrs Blackman has written to the court by an email of 22 March 2001 and she refers to further matters. She refers to her concern about Mr Lueshing's health. She refers to the reference by the GP to the hospital for a further test (the one I referred to). She describes the position as being one where there is an obvious problem with his memory. She states that Mr Lueshing's mother has been diagnosed with dementia. She refers to Mr Lueshing having suffered a stroke in 2018.

12. Later in her email, she said the stroke left him with brain damage on his left frontal lobe and it robbed him of the ability to read and write. She says he cannot understand the paperwork and letters have been drafted by third parties. She also states that Mr Lueshing suffers from cognitive dissonance and a lack of understanding. She states that, when she tried to explain these court proceedings to Mr Lueshing, he has raised points about the legitimacy of the legal proceedings and, when it has been pointed out that the court orders which have been made are valid court orders, he appears to understand but then, a few days later, it appears to Mrs Blackman as if they have not had the previous conversation.

13. I have been given further background information about Mr Lueshing's behaviour in earlier years. This bankruptcy, for example, is based upon a series of liability orders for unpaid council tax. The liability orders go back to around 2010 and there were a series of orders up to 2018. Mr Lueshing appears to have ignored what was happening to him and the orders of the court made in respect of him.

14. I have also been shown that he was the subject of criminal proceedings, resulting in his conviction. The criminal acts which were found related to breaches of enforcement notices under the Town and Country Planning Act 1990. Following conviction, steps were taken to confiscate his assets. He was the subject of a substantial fine and a substantial order for costs and it was provided that, in default of payment of the fine and costs, he would serve a sentence of imprisonment. I am told that he has not paid the fine and the costs but that he has not (at any rate, yet) been required to serve the prison sentence.

15. The other material I have about Mr Lueshing comes from letters and emails which, on the face of it, he has written and he has sent. The stance taken in these communications with the court is that Mr Lueshing is not bound by statutes passed in this jurisdiction and he is not bound by the orders of the court. It may be that he accepts that there might be a court somewhere (what he calls a common law court) which would have jurisdiction over him but effectively he can ignore the bankruptcy order and he can ignore the order for which this committal application is made because they do not bind him; he says they are void.

16. The content of these communications with the court is arrant nonsense but, based on my own experience, Mr Lueshing is not the only person who has come out with such nonsense. There plainly exists an agency of some kind or a website of some kind that puts forward this nonsense and indeed sells it to customers who are faced with court orders and tax assessments and the like which they do not care for. Although the communications from Mr Lueshing might make one think that he has lost all grip on reality, unfortunately there are others who say the same thing in their cases and it would not be right, I think, to infer that everyone who says these things has lost mental capacity either in general or in connection with litigation.

17. I have to ask myself, on the material before me, whether it has been established that Mr Lueshing lacks mental capacity to deal with this litigation. If I held that he does lack mental capacity, then I ought not to proceed with this application where he is not represented by a litigation friend.

18. On the material before me, I am satisfied that it would be wrong to conclude that Mr Lueshing lacks mental capacity. As the Mental Capacity Act 2005 makes clear, the presumption is that he does have capacity. The burden of showing that he lacks capacity is on the person who so asserts. Mr Lueshing does not himself assert that. Mrs Blackman has raised concerns about her uncle's capacity. Even if I took the view that she makes a positive assertion that he lacks mental capacity rather than having mental impairment short of lacking capacity, I have to say that the material that is before me is not sufficient to demonstrate that fact.

19. The next question is whether I should decide this question for today's purposes and proceed with the hearing or whether I should say, now that the point has been raised, that the matter should be adjourned, perhaps until after the result of the forthcoming test is available.

20. I do have a concern on this point. It is also right that there may be more information about his condition in the near future and, if one was starting this case today, one might feel that the right thing to do is to put the case off for a short time and then have another hearing in the light of what emerges. However, my conclusion on the material before me is that Mr Lueshing does have mental capacity to deal with this litigation and this case has gone on already for a considerable time. I have referred to three earlier hearings and this is the fourth hearing.

21. Whilst references have been made in the past to Mr Lueshing having a stroke, the possibility that he lacked mental capacity has really only come to the surface in the last few days and, on the material before me, it is not established.

22. I did not understand Mrs Blackman, for what I think are very good reasons, to press for this matter to be adjourned. In many ways, there is an advantage to everyone (including Mr Lueshing) of having some sort of decision made about this application. I

do not think that it is necessarily in his best interests for there to be an adjournment because, every time the matter comes to court, more costs are incurred and there is a real possibility, to put it no higher, that he will end up paying these costs out of the bankrupt estate.

23. The conclusion I reach, therefore, is that I will not adjourn this application on the ground that Mr Lueshing lacks mental capacity to deal with this litigation.

24. The next matter is whether I should deal with this application at a hearing today in the absence of Mr Lueshing. Mr Titmuss (who appears for the trustees in bankruptcy) has referred me to the decision of Roth J in *JSC BTA Bank v Stepanov* [2010] EWHC 794 (Ch). Questions of this kind as to whether to proceed in the absence of a respondent to a committal application have come before the courts from time to time in the period since 2010. I think Roth J's decision has generally been followed but there are now more cases in which the courts have given reasons and stated principles which are relevant to what I am asked to do today.

25. One of the more recent cases is a decision of my own, *Charity Commission for England and Wales v Wright* [2019] EWHC 3375 (Ch). That decision sets out the materials I need to approach the question for today's purposes. At paragraph 41 in that decision, I referred to an earlier case in the Family Division, *Sanchez v Oboz* [2015] EWHC 235 (Fam), from which I derived nine matters which a court needs to consider. I will go through the nine matters. What I will do is identify the matter and then apply it to the facts of this case and then stand back and decide what to do.

26. The first matter is whether the respondent has been served with the relevant documents, including notice of the hearing. In this case, Mr Lueshing has been duly served.

27. The second matter is whether Mr Lueshing has had sufficient notice to enable him to prepare for the hearing. He has.

28. The third matter is whether any reasons have been advanced for his non-appearance. I have discussed already the question of his capacity and I have made my findings as to that. More specifically as to his non-appearance, I have had letters from him on

14 March 2021 and 20 March 2021. Whilst he does not in terms say that he will not appear at today's hearing, he indicates that he believes he is not obliged to appear and he also says he is not being required to appear. This is all to do with the stance he takes, an entirely wrong-headed stance, that this hearing and this court and all previous orders have really nothing to do with him. Those are not reasons as to an inability to attend today and I think I will proceed on the basis that he has not given a reason for his non-appearance.

29. The next matter is whether his behaviour is such that he has waived his right to be present. I consider that he has waived his right to be present, really for the reasons given in his letters to the court.

30. The next matter is whether an adjournment would be likely to secure his attendance or facilitate his representation. This case has been adjourned a number of times. It was adjourned on 12 February to give him a chance to rectify matters and, if he failed to rectify matters, to come to court to explain himself. He has chosen not to come to court, so the time for giving him a further adjournment on that ground has passed.

31. As to facilitating his representation, it has been explained to him a number of times that he is entitled to legal aid. It may be that he has not understood that. It may also be -- I think it is -- that Mrs Blackman, who has been seeking to help him, has not got on top of the legal aid position herself. I have heard comment about whether he lacks funds to instruct a solicitor. I think it likely that he has access to funds to instruct a solicitor, although I am not going to find one way or another what the position is on the material before me.

32. The next matter is the extent of the disadvantage to Mr Lueshing in not being able to present his account of events. The events do not appear to be open to any real argument and Mr Lueshing has never tried to explain what has happened and why it happened in a way that would exculpate him. What he has done instead is to say that the orders do not bind him and he therefore is free to ignore them. I have that account of events clearly in my mind.

33. The next matter is whether undue prejudice would be caused to the applicants by the delay. Certainly prejudice would be caused because they have come to court on a number of occasions and have so far made no progress. The lack of progress is holding out the proper administration of the bankruptcy estate. There will be prejudice to creditors if the matter does not get resolved. I also bear in mind, as the applicants very fairly point out, that, at the end of a very long day, there may be enough money in the bankruptcy estate to pay the costs but nonetheless they have a real interest in this matter being dealt with rather than being repeatedly adjourned.

34. The next matter is whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of Mr Lueshing. By that, I think I am asked to look at the process of determining the application and whether it would become complicated or difficult because Mr Lueshing is not here. That is not, I think, a relevant factor in this case. That will not arise.

35. Finally, in terms of the overriding objective, I am to deal with the case justly, expeditiously and fairly. I have confidence that I can deal with the case justly in the absence of Mr Lueshing. I am confident that I can deal with it fairly. As to expedition, that plainly points to proceeding with the case at today's hearing.

36. Also on the overriding objective, this matter has taken up a considerable amount of court time and that is largely attributable to the way in which Mr Lueshing has conducted himself. A further adjournment will take up further court time. Taking up court time is not something to be avoided at all costs whatever the consequences. Committal for contempt, of course, is a very serious matter and the court takes pains to deal with the case deliberately and carefully. But there comes a point when enough is enough and I am quite clear that today is the point when enough is enough and this matter ought not to be adjourned yet further.

37. There is another point which I mentioned in the *Charity Commission* case. Before proceeding in the absence of the respondent, of course, the court should consider what alternatives are reasonably available. It is quite common, with an absent respondent, for the court to issue a bench warrant for the arrest of the respondent. The respondent is then arrested but generally not brought to court immediately following the arrest.

There is often an overnight stay or an over-weekend stay in the cells. My experience of respondents who have been arrested pursuant to bench warrants is that they have found the experience a very disagreeable one. As I said in the *Charity Commission* case, arresting them is a very blunt instrument; it is a draconian step. If it is necessary, it will be done but, if it is not necessary, the court can decide not to do it and to proceed in the absence of the respondent.

38. I am persuaded in this case that, in fairness to Mr Lueshing, I should not arrest him and have him brought to court but I should instead proceed to hear this matter in his absence and see what conclusion I reach. If, at the end of the hearing, I convict him of a contempt of court, I will have to address the question of penalty and I will at that stage have to consider whether to sentence him in his absence or take some other course. Nothing I say at this moment bears on the decision I will reach following conviction if we reach that point, so I will not discuss that point further.

39. For all those reasons, I will proceed to hear the application.

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**This transcript has been approved by the judge.**