

IN THE COUNTY COURT AT LEEDS

Case No: H01LS160

Courtroom No. 15

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Tuesday, 28th February 2023

Before:
HER HONOUR JUDGE CLAIRE JACKSON

B E T W E E N:

1. SIMON APPLESON
2. DOMINIC BROOKS
3. HARRY WATERHOUSE
4. ALEX HOBSON

Applicants

and

LINDSEY FRANCES FOLEY

Respondent

MS RACHEL CARROLL appeared on behalf of the Applicants
NO APPEARANCE by or on behalf of the Respondent

APPROVED JUDGMENT

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HHJ JACKSON:

1. This is the hearing of the Claimant's, being Simon Appleson, Dominic Brooks, Harry Waterhouse and Alex Hobson, application for committal of the Defendant, Lindsey Foley. This hearing has taken place in person at the Leeds Combined Court Centre.
2. The brief background to the application is that the Claimants are, or were, members of a band known as Victors. They appointed Ms Foley as their manager, but she has ceased to act in that capacity for them. Despite this, the Claimants assert that Ms Foley continues to control accounts relating to the band and holds money belonging to them.
3. Proceedings were issued and Ms Foley was ordered to hand over information in relation to Victors, together with control of online accounts, but the Claimants assert she has failed to do so. They therefore seek committal of the Defendant for her failure.
4. I will now set out the more detailed background to the application before me.

The Proceedings

5. On 9 June 2021, the Claimants issued proceedings against the Defendant for breach of fiduciary duty and breach of contract. Amongst the remedies claimed, was an injunction for the Defendant to deliver up various documents and account log in details. The Defendant failed to file a defence and the Claimants, therefore, made an application for judgment in default. In support of the application for default judgment, the First Claimant, Simon Appleson, provided a witness statement, dated 20 May 2022. The application was heard by District Judge Bond on 21 July 2022. The Defendant did not attend nor was she represented at the hearing.
6. District Judge Bond granted a mandatory injunction by way of an order dated 21 July 2022. The order contains a penal notice which applies only to paragraph one of the order. Pursuant to paragraph one of the order, the Defendant was required, by 4pm on 18 August 2022, to deliver to the Claimants' solicitors:
 - (a) copies of any financial statements, or documents, recording payments made to the Defendant on behalf of the Claimants or any of them;
 - (b) copies of all contracts the Defendant has entered into concerning the exploitation of the Claimants' recording and publishing catalogues;
 - (c) log in and password details for any social media, or other online accounts, established by the Defendant in the Claimants' name, or in their trading name, Victors, or on the Claimants' behalf, or if the Defendant cannot provide such details, recovery credentials for each applicable account.

Alongside that order, the Claimants obtained a money judgment for debt and/or damages. The assessment of damages was adjourned with liberty to restore until 4pm on 21 July 2023. Pursuant to paragraph six of the order, the Defendant was also ordered to pay the Claimants' costs, summarily assessed at £4,850.

The Committal Application

7. The order of District Judge Bond was personally served on the Defendant at a residential address on 12 August 2022 at 3.54pm by Michael Cain. The Claimants assert that the Defendant has failed to deliver up the relevant information and items pursuant to paragraph one of the Order by the date fixed by District Judge Bond being 4pm on 18 August 2022, and she has continued to fail to deliver the information and items since that date. The Defendant has also failed to pay the Claimants' costs as required by paragraph six of the

- Order. To the best of the Claimants' knowledge, the Defendant has made no attempt to contact the Claimants or to explain why she has failed to comply with the order. As a result, the Claimants made an application to commit for contempt, dated 20 October 2022.
8. The application is made pursuant to CPR Rule 81.31. Pursuant to CPR 23.21, the application had to be made to the County Court at Leeds, being the court where the underlying claim was made.
 9. A sworn affidavit of Nicholas William John Berry, supporting the application, was filed on 15 November 2022. The application and an order of HHJ Klein, dated 24 October 2022, listing the hearing of the application for 17 November 2022, were personally served on the defendant by Michael Cain on 9 November 2022 at 8.20pm. Due to the failure to personally serve the Defendant with the affidavit of Nicholas William John Berry, dated 15 November 2022, the Claimants sought an adjournment of that hearing to enable them to effect personal service.
 10. The Claimants then went on to make an application for relief from sanctions in respect of the failure to personally serve the Defendant with the affidavit, and also sought permission to rely on further evidence by way of a sworn affidavit of John Appleson, the father of the First Claimant, dated 16 November 2022. The matter was heard before HHJ Kelly on 17 November 2022. The Claimants were represented by counsel. The Defendant did not attend, nor was she represented.
 11. HHJ Kelly granted the Claimants relief from sanction and gave permission for the Claimants to rely on the evidence of both Mr Berry and Mr Appleson. Pursuant to paragraph two of the order, the Claimants were required to personally serve the Defendant with the affidavit evidence by 4pm on 16 December 2022.
 12. On 13 November 2022, at 7.55pm, the defendant was personally served with a letter from Gunner Cook LLP, the order from HHJ Kelly, a hearing notice, the affidavit of Mr Berry, the affidavit of Mr Appleson, and correspondence from Ditto Music Distribution dated 18 November 2022. The matter was then listed before me in January 2023.
 13. Due to concerns I had, particularly regarding the admissibility of the email from Ditto Music Distribution, which was not exhibited to an affidavit, I adjourned the matter to give one further, and final, opportunity for the Defendant to attend. My order made clear that this hearing was to be the substantive hearing of the application and that the Defendant should attend. That order was personally served on the Defendant on 17 February 2023; she has not appeared.

The Absence of the Defendant

14. The first issue I must, therefore, consider is whether it is appropriate to proceed in the absence of the Defendant. I have considered the case of *Sanchez v Oboz and Oboz* [2015] EWHC 1613 Ch and the nine-stage checklist therein. My findings on the considerations are as follows.
15. The Defendant was served with a notice of hearing on 17 February 2023. The Defendant was originally served with the application, and notice of the first hearing, on 9 November 2022. She has, therefore, been aware of these proceedings for at least four weeks. She has been served with a notice for this hearing, on 17 February 2023, and has, therefore, had 11 days to prepare for this hearing. Taken as a whole, the Defendant is aware of this hearing and has had sufficient time to prepare. Despite this, no reason has been advanced for the Defendant's non-attendance. As a result, the court considers that the Defendant has waived her right to be present at the proceedings.
16. The Defendant has failed to engage with the proceedings at any stage. She has been aware of this application for four months, but has not engaged with it. My order dated 19 January 2023 made clear that this hearing is intended to be the substantive hearing of the

- application, and that should the Defendant fail to attend, the court may proceed in her absence.
17. In all of those circumstances, it is reasonable to conclude, and I do conclude, that the Defendant knows of this hearing and is indifferent to the consequences of this case proceeding in her absence. A further adjournment will not secure her attendance or facilitate her representation. This is the fourth hearing of the application. The Defendant has not attended on any occasion. There is, therefore, little prospect that a further adjournment will secure her attendance.
 18. There is an inherent disadvantage to the Defendant in not being able to present her account of events at this hearing, but that is the result of her own decision to not attend the hearing or even to contact the Claimants, or the Court, to explain a reason for this.
 19. In contrast, the dispute between the Claimants and Defendant have been ongoing for several months. The Defendant was required to provide the information and documents by 18 August 2022. The Claimants are a young, upcoming band whose commercial success has been hindered by the Defendant's failure to co-operate and comply with the order dated 21 July 2022. Any further delay in this process will cause undue prejudice to the Claimants, not least because they are required to decide whether they wish to proceed with the assessment of the damages claim by 21 July 2023. They face a ticking clock unlike the Defendant. The weight of prejudice is, therefore, in favour of proceeding today.
 20. In my judgment, undue prejudice will not be caused to the forensic process if the application is proceeded with in the absence of the Defendant. The Claimants have provided three affidavits, with accompanying exhibits, in support of the application. The evidence is, from those affidavits, clear and the court is able to assess the claim on the basis of those affidavits. The authors of those affidavits have attended court today, but I have not required them to confirm their already sworn evidence on oath.
 21. Finally, the Defendant has had a fair opportunity to engage in these proceedings and it would be a waste of the court's resources, and an unfair imposition on other litigants, if this matter was to be relisted again.
 22. In light of the above findings, and applying the test set out in *Sanchez v Oboz and Oboz*, and the overriding objective, it is in my judgment appropriate for me to proceed with the hearing today in the absence of the Defendant.

The standard of proof

23. The standard of proof for whether the matter constitutes a contempt is the criminal standard of proof of beyond reasonable doubt; see *Re: Bramblevale Limited* [1970] Ch 128.

The issues regarding the committal application

24. The issues which I must consider at the hearing are:
 - (a) does the application for committal satisfy the procedural requirement set out at CPR 81.4?
 - (b) has the committal application been personally served, or has personal service been dispensed with?
 - (c) was the order of District Judge Bond, dated 21 July 2022, properly served before the time fixed for doing the act in question, or was personal service dispensed with?
 - (d) did the aforesaid order have a proper penal notice endorsed on it?
 - (e) what was Ms Foley required to do by the aforesaid order?
 - (f) is Ms Foley in breach of the aforesaid order?
 - (g) is the court satisfied to the criminal standard of the aforesaid breaches?

I will consider the issues in turn.

Issue (a)

25. CPR 81.4 provides that:

1. Every contempt application must be supported by written evidence given by affidavit;
2. The contempt application must include a statement of the matters listed at CPR 81.42, unless wholly inapplicable.

22. The application has been supported by three sworn affidavits, two from Mr Berry and one from Mr Appleson. Those affidavits contain within them, and exhibit to them, all the evidence relied upon. The application, therefore, does comply with both CPR 81.4 generally and CPR 81.42.

Issue (b)

23. CPR 81.5 provides: “unless the court directs otherwise, in accordance with Part 6 and except as provided in paragraph two, the contempt application, and evidence in support, must be served on the Defendant personally”. The application and evidence has, as already set out in this judgment, been personally served on Ms Foley by Michael Cain on various dates. This is confirmed by Mr Cain’s statements. Notice of this hearing was personally served on Ms Foley on 17 February 2023. The Defendant has, therefore, had sufficient notice of the application, and of this hearing, by way of personal service to prepare for the hearing and to attend.

Issue (c)

24. The order of District Judge Bond was personally served on Ms Foley on 12 August 2022, as confirmed by Mr Cain in his evidence of service. The order of District Judge Bond provided the date for compliance as 18 August 2022. In my judgment, therefore, there is no issue as to the timing in this matter.

Issue (d)

25. The order of District Judge Bond is endorsed with a proper penal notice providing that if Ms Foley disobeys paragraph one of the Order, she may be held in contempt of court and may be imprisoned, fined, or have her assets seized. The penal notice is clear on the face of the Order.

Issue (e)

26. It is plain from District Judge Bond’s Order what Ms Foley was required to do. The mandatory requirements of the order and obligations on Ms Foley are in plain and clear terms, namely:

“Deliver to the Claimants’ solicitors copies of any financial statements, or documents, recording payments made to the Defendant on behalf of the Claimants or any of them, copies of all contracts the Defendant has entered into concerning the exploitation of the Claimants’ recording and publishing catalogues, and log in and password details for any social media, or other online accounts, established by the Defendant in the Claimants’ name or in their trading name Victors, or on the Claimants’ behalf, or if the Defendant cannot provide such details, recovery credentials for each applicable account.”

27. The date for complying as I have already noted was 18 August 2022.

28. I note in passing that the order for costs was not the subject of a penal notice, and therefore, the failure to pay the costs, pursuant to the order of District Judge Bond, is not amenable to contempt proceedings.

Issues (f) and (g)

28. Despite having sufficient time to prepare and deal with the application and this hearing, Ms Foley has chosen not to attend. The reasons for her absence are unknown, but are consistent with her failure to engage with the proceedings at any time. Having considered the evidence produced in this case, and in particular, the correspondence from Ditto Music exhibited to the second affidavit of Mr Berry, it is clear that Ms Foley still controls the log in and password details for social media, or other online accounts, established by her in the Claimants' name or in the name of Victors. In the light of the correspondence from Ditto Music, it is unarguable that that is the case. Ditto Music's correspondence confirms that there is an online account, that that account relates to the band Victors, that it was established by the Defendant, and that the Defendant controls the log in and password details for that account. If there was any doubt in relation to the latter point, it is noted that, given the Defendant set up the accounts, she should have the log in details or at least be able to do a recovery process. The Defendant is in breach of paragraph 1(c) of District Judge Bond's Order.
29. Despite it being clear that Ms Foley has, at least, the details relating to Ditto Music, these have not been provided to the Claimants, despite the terms of the Order of District Judge Bond. It follows necessarily that given Ditto Music are dealing with a contract entered into on behalf of the Claimants by the Defendant, and that given the Defendant has not delivered up any information in relation to the Ditto Music contracts, that the Defendant is also in breach of paragraph 1(b) of District Judge Bond's Order.
30. In relation to paragraph 1(a), the documents required to be delivered up were plainly held by the Defendant as shown by the affidavit of Mr Appleson in relation to a meeting held on 27 February 2020, and pages 28 to 38 of exhibit NWJB1. The Defendant, therefore, unarguably holds information relating to the Claimants and Victors. She was ordered to deliver this up, she has not done so. No reason for such failure has been given to the court, and therefore, given the clear wording of District Judge Bond's order, the court must conclude that the failure by the Defendant in this regard was also intentional.
31. In relation to all matters relating to issues (f) and (g), I am satisfied, therefore, that the Defendant held the relevant information or items, could deliver them up, has not delivered them up and that is intentional, and I am satisfied in relation to all those matters on the criminal standard of proof, being beyond reasonable doubt.

Conclusion

32. In my judgment, therefore, Ms Foley is, beyond reasonable doubt, in contempt of court for failing to comply with the obligations imposed on her by paragraph one of the order of District Judge Bond, dated 29 June 2021. In particular, Ms Foley is guilty, to the criminal standard of proof, of contempt of court as she did not deliver to the Claimants' solicitors:
 - (a) copies of any financial statements, or documents, recording payments made to the Defendant on behalf of the Claimants, or any of them;
 - (b) copies of all contracts the Defendant has entered into concerning the exploitation of the Claimants' recording and publishing catalogues;
 - (c) log in and password details for any social media, or other online accounts, established by the Defendant in the Claimants' name, or in their trading name Victors, or on the Claimants' behalf or, if the Defendant cannot provide such details, recovery credentials for each applicable account by 4pm on 18 August 2022.
33. I will now hear submissions on the issue of sentencing.

End of Judgment

Transcript from a recording by Ubiquis
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This transcript has been approved by the judge.