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Case No: CC-2023-MAN-000095

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester. M60 1DJ

Date: Tuesday, 28 May 2024
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Before:

HIS HONOUR JUDGE STEPHEN DAVIES SITTING AS A HIGH COURT JUDGE

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Between:

BOND TURNER LIMITED	**Claimant**
- and -	
PATRICK MAGINN	**Defendant**

- -
- -

MR VICKERS (instructed by **JMW Solicitors LLP**) for the **Claimant**

THE DEFENDANT did not appear and was not represented

- -

APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE DAVIES:

1. The claimant, the applicant in the current proceedings, is Bond Turner Limited, a firm of solicitors. The respondent is the first defendant, Mr Patrick Maginn.

2. The application before the court is dated 25 April 2024 and seeks the committal of Mr Maginn for breach of a court order. It is supported by the third witness statement of Ms Rachelle Louise Green, a solicitor with the claimant's solicitors, JMW Solicitors of Manchester, her witness statement being made on 25 April 2024.

3. I should say at the outset that being a witness statement rather than an affidavit the form of the evidence in support did not comply with the requirements of CPR rule 81.4, sub-paragraph (1). However, that sub-paragraph does give the court power to "direct otherwise", in other words to permit the evidence in support to be given other than by way of affidavit. Ms Green has given oral evidence in court today. She has confirmed the truth of the witness statement and also confirmed that it would not have been any different had it been in the form of an affidavit rather than a witness statement.

4. Since I am satisfied that this mistake was an honest and genuine mistake and that there is no conceivable prejudice to Mr Maginn in proceeding on the basis of that evidence I will make a direction in accordance with CPR rule 81.4(1) that the application can and should proceed before me today notwithstanding the absence of an affidavit.

5. I should also deal with the question of service. This is a case where the claimant was faced with an absent defendant in the form of Mr Maginn at the hearing before His Honour Judge Cawson KC, sitting as a High Court Judge, on 14 December 2023 when he made the order which is alleged to have been breached ("the Cawson order").

6. It is clear from the evidence contained in the second witness statement of Ms Green made in support of an application made to the court on 28 February 2024 for personal service of the order to be dispensed with and for permission to serve an application for committal on him by an alternative method, that following the making of that order the claimant has made a number of efforts and attempts to serve the order on Mr Maginn but without success, in circumstances which give rise to a well-founded suspicion that Mr Maginn has been seeking to evade service.

7. That application was dealt with by His Honour Judge Pearce, sitting as a judge of the High Court, in his order of 29 February 2024, when he considered and determined the application in the absence of any response from Mr Maginn to it. He ordered ("the Pearce order") that personal service of the Cawson order on Mr Maginn should be dispensed with pursuant to CPR rule 6.28 and he also ordered that the claimant should be permitted, pursuant to CPR rule 6.27, to serve the committal application on Mr Maginn by alternative means, namely by serving it by first class post at his last known address, which was specified in the order, by WhatsApp message to his mobile telephone number, again specified in the order, and by email, to an address also specified in the order.

8. The application was indeed served by those means. I have received in evidence a copy of the communications from JMW Solicitors to Mr Maginn showing service of the application hearing notice for today and witness statement in support and exhibit by those three means on 9 May 2024. Ms Green has also confirmed in her oral evidence to the court, she being responsible for service, that in relation to all three there has been no evidence that the correspondence has not come to Mr Maginn's attention, in particular the letter sent by post has not been returned marked undelivered, the email

has not been returned marked undelivered and the WhatsApp message shows, by having two grey ticks against it, that it was sent and received, albeit it cannot positively be said that it was opened or read by Mr Maginn.

9. In all of those circumstances I am satisfied that service of the application has been properly effected and, as Ms Green has confirmed, there has been no response, formal or informal, by the defendant to the application prior to this hearing. He has not attended court nor has he communicated with the court in any way to explain why he has not attended.

10. Furthermore, in terms of the requisite formalities, the requirements of CPR rule 81.4, sub-paragraph (2), which sets out the statements which a contempt application must include, have all been included in the application unless and to the extent that they are wholly inapplicable, which they are in this case only insofar as the Cawson order was an order rather than an acceptance of undertakings. In particular, it is clear that Mr Maginn was made aware of the importance of these committal proceedings and his right to seek legal advice.

11. I am therefore satisfied that it is reasonable and proper to proceed in the absence of Mr Maginn and that is what I have done.

12. I have heard oral submissions from Mr Vickers of counsel who appears for the applicant who has referred me to his detailed and careful written submissions, to various of the authorities in the authorities bundle which have been provided, and to various of the documents in the documents bundle which has been provided. I should also say that both of these bundles and his written submissions have also been sent to Mr Maginn by email and not returned.

13. Turning then to the substance of the committal application, as Mr Vickers has reminded me, the decision of the Court of Appeal in the case of *L-W (Children) (Enforcement and Committal: Contact)* [2010] EWCA Civ 1253 contains a useful summary in paragraph 34 of the court's function on a committal application. As is recorded:

> "The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law.
>
> The [second task] for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language, Could he do it? Was he able to do it? These are questions of fact.
>
> [Third] the burden of proof lies throughout on the applicant: it is for the applicant to establish it *was* within the [defendant's] power…to do what the order required, *not* for the defendant to establish that it was not within his power to do it.
>
> [Fourth] the standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure that the defendant has not done what he was required to do *and* that it was within the power of the defendant to do it.
>
> [Fifthly and finally] if the judge finds the defendant guilty the judgment must set out plainly and clearly the judge's finding of what it is that the defendant has failed to do and the judge's finding that he had the ability to do it."

14. And I proceed on that basis.

15. As Mr Vickers has submitted, the Cawson order was in clear and specific terms. In order to explain the order and why it was made it is necessary to summarise the history of the matter.

16. As I have said, the claimant is a law firm which specialises in, amongst other things, housing disrepair claims UK wide.

17. In June 2023 the defendant commenced employment with the claimant as a fee earner in that department, responsible for a caseload of approximately 100 housing disrepair claims. He was supervised by a qualified legal executive, he did not occupy any senior management or supervisory role. He did enter into a contract of employment which contained relevant clauses in relation to intellectual property, confidential information and use of the claimant's property. His employment ceased on 10 November 2023 and he subsequently took up employment with a competitor firm in the housing disrepair sector, the former second defendant, McDermott Smith Law Limited.

18. The claimant subsequently discovered that in the days before his employment ceased Mr Maginn had sent a series of 50 blank emails with attachments to his personal email account (which is the same account which Judge Pearce directed could be used for alternative service) on 8 and 9 November. Attached to those emails the claimant discovered, during the course of a subsequent routine check, was a significant amount of its confidential and proprietary information. It subsequently became clear that Mr Maginn had emailed a significant number, over 80 per cent of the documents he had sent to his personal email address, to his email account with his new employers and that, as their investigations revealed, he had subsequently used some of those documents on six files of his new employers that he had worked on. When the new employers were made aware of what had happened they summarily dismissed the defendant.

19. It is convenient at this stage to summarise the position as it now is in terms of what is known as to the harm suffered by the claimant as a result of what appears – and I emphasise appears because there has been no final determination as between the claimant and Mr Maginn - of his conduct. The documents in question, as explained in the witness statement of Ms Wong of the claimant in support of the application made

on 11 December 2023, reflect the fact that the claimant had standardised procedures; in particular it had standardised workflow guidance to assist fee earners such as the claimant to perform their task more effectively, including templates and procedures, documents and training materials. Those were the majority of the documents which were sent. There were also some client details, including some ongoing client cases.

20. Before the proceedings were issued the claimant's then solicitors corresponded with Mr Maginn seeking relevant undertakings. There were at least two telephone conversations between those solicitors and Mr Maginn in the course of which he claimed, although he never provided proof, that those emails had been deleted. He also enquired as to the costs of complying with the undertakings requested of him from which one may discern, perhaps not surprisingly, that he may not have had the access to liquid funds to do so.

21. In terms of the extent of his use there is no evidence either way as to whether or not he has used the relevant documents in any other way other than in the course of his employment with the second defendant which, as I have said, quickly came to an end on discovery of what he had allegedly done. The case brought by the claimant against the second defendant, McDermott Smith Law Limited, has been settled on terms satisfactory to both. There is no evidence that the defendant has obtained employment with anyone else. Certainly it is not said, for example, that he has sought a reference from the claimant company, although one could well understand why he would not have done so, and nor has it come to their attention, so far as I have been made aware, that he has found alternative employment with any other competitor firm. It is, therefore, a matter of speculation as to whether or not he has continued to make use of any information or whether it has been deleted. Presumably one might infer that if he had

intended to transfer work on ongoing files to another firm that might be something which might have come to the claimant's attention.

22. Going, then, from that summary of the evidence to the Cawson order, it contained a penal notice as against Mr Maginn; it contained notice that it was an important order which contained prohibitions and required positive steps; it advised him to consult a solicitor promptly; and it explained that he had the right to apply to vary or discharge the orders.

23. It contained the following positive requirements. Firstly, by paragraph 3 by 12 January 2024 he was required to deliver up to JMW Solicitors any property or documents belonging to the claimant, including any confidential information as defined, which was in his possession or under his control, and to provide information about them if they existed only in computer readable form. By paragraph 5 he was required by the same date to file and serve an affidavit confirming compliance with paragraph 3. By paragraph 6 he was required in the same affidavit to give information as to his use or disclosure of any of the applicant's property, documents or confidential information and in paragraph 8 he was required to deliver up the computers or other devices which he used to receive emails sent from his claimant's email address to an independent computer organisation to enable mirror disk images of the relevant drives of those computers or devices to be obtained, then for them to be returned as quickly as possible to him and held by him pending further order of the court.

24. Although it is fair to say that those clauses were expressed in detailed legal terms, so that they would not have been necessarily immediately understandable by someone who was not a commercial litigation lawyer, they were nonetheless clear from a careful and

sensible reading, especially with legal advice if taken, in terms of Mr Maginn knowing what he had to do. He also had a reasonably generous time in which to do it.

25. As the evidence makes clear, Mr Maginn made no attempt whatsoever to comply with any of those orders and did not communicate in any way with the claimant to provide any explanation as to why he had not done so or to explain, for example, that there were circumstances preventing him from doing so. Instead, as I have said, the evidence shows that he has been taking steps to ensure that he was not personally served with the Cawson order.

26. It is not necessary for me to make a positive finding one way or another for the purposes of this committal application as to whether or not he has deliberately avoided personal service of the Cawson order. What I need to do, as I have said, is to enquire whether or not the claimant has satisfied me to the criminal standard that the defendant has not done what he was required to do and that it was within his power to do so. In this case, as I have already said, it is clear what the order required him to do. It is also clear that he has not done so. There is no basis whatsoever for any conclusion that he was unable to do so, instead it is clear is that he could have done so and that he has not done so and that no reason has been advanced by him or otherwise is suggested, even as a realistic possibility on the evidence before the court, that he was unable to do so.

27. In the circumstances I am satisfied to the criminal standard that he has committed the breaches alleged by the claimant in the application notice and, hence, I find the allegations of contempt proved.

28. The next step is to consider the appropriate sanction. In a case such as this, where the defendant has not attended, it may sometimes be appropriate for the court to not proceed to sentence immediately but to adjourn to enable the defendant to be notified of the

finding of contempt and to see whether or not that provokes him into engaging with the proceedings, in obtaining legal advice and being able to take steps to deal with his defaults and to raise appropriate mitigation before the court so as to enable the court to sentence with full knowledge of what he has done upon becoming aware of the finding of contempt. The disadvantage of such a course, in a case where the defendant has thus far shown no keenness or willingness to engage, is that it delays the process and involves the claimant in further cost.

29. Mr Vickers has drawn my attention to the relevant authorities in terms of sanctions and, whilst correctly recognising of course that it is not for the applicant in a committal application to invite the court to make any particular order, has drawn my attention to the consequences to the claimant of the non-compliance, including the fact that it still does not know what the claimant may have done with all of the information which, on its case, he took. He also submits that the court should take non-compliance with one of its orders extremely seriously and should be considering whether or not to impose an immediate custodial sentence. There has also been some discussion between Mr Vickers and the court as to whether or not it would be appropriate to suspend any such sentence on the basis of a condition in the absence of the defendant.

30. I have reflected on all of those points. The starting point, however, is for me to direct myself in accordance with the relevant authorities as to the correct approach to sanction. There is a recent helpful decision of the Court of Appeal in relation to sentencing for committal in civil commercial cases in the case of *Isbilen v Turk* [2024] EWCA Civ 568 where the judgment was given on 22 May 2024. That is particularly relevant as to the consideration as to whether and, if so, it might be appropriate to suspend a custodial sentence. It also refers back to the first instance judgment on sentence of Sir Anthony

Mann, sitting as a judge of the Chancery Division, reported at [2024] EWHC 565 (Ch). At paragraph 7 he helpfully sets out the relevant guidance from the authorities, in particular referring to the decision of the Court of Appeal in *Liverpool Victoria Insurance v Khan* [2019] 1 WLR 3833 at [57] through to [71], which guidance was approved and summarised by the Supreme Court in *Attorney General v Crosland* [2021] 4 WLR 103 at [44]. He set out that guidance in his judgment, so that I do not need to refer to it here, but I take it into account and seek to apply it here.

31. There is also further helpful guidance to which Sir Anthony Mann refers at paragraphs 11 and 13, in particular the decision of Leech J in *Solicitors Regulation Authority v Khan* [2022] EWHC 45 (Ch) in relation to questions such as suspension of orders. At paragraph 14 he identifies other relevant factors.

32. Applying this guidance, it is clear in this case that these are serious breaches of the Cawson order which Mr Maginn must have known he had to comply with unless he made an application to vary or discharge the order and that if he did not he was at risk of committal, including a risk of a sentence of imprisonment. As I have already said, he made no attempt to comply. He has not engaged in any way with the claimant at any time over this process so as to seek to provide any explanation, or to seek belatedly to comply, or to communicate with or to come to the court to provide a proper explanation for what has happened and why, or to seek to comply belatedly or to apologise. On the face of it, therefore, his conduct is clearly of a serious nature with no apparent mitigation advanced.

33. All that can be said, in fairness to him on the evidence before him, is that before the proceedings were commenced and the order was made he clearly took some steps to seek to engage. In particular he said that the files had been deleted, which has not been

shown to be false, and he also made some enquiry as to the cost and practicability of compliance. It may very well be that the recognition of what has happened, what the consequences would be and his financial position have together led him to put his head in the sand and seek to avoid dealing with these difficult problems which he has brought on his own head now by his failure to comply with the Cawson order.

34. In terms of impact upon the claimant, as I have said one simply does not know for sure but, for the reasons I have given, it would appear that through their own timely action and the impact of the discovery of what had happened the defendant's opportunity to further damage any interests of the claimant would appear to have been limited. So far as the defendant is concerned, to my knowledge he is a relatively young man, he does not have any previous relevant criminal convictions, nor does he have any previous findings against him of committal or otherwise in the civil courts of which I have been made aware. I have no information as to his personal circumstances, as to his means, as to whether or not he has any caring responsibilities or the like.

35. In all of those circumstances it seems to me that this is a case where the seriousness of the case means that only a custodial sentence can be justified. This is not a case where justice can be done by means of a fine or any other non-custodial sentence. The court's authority to make orders which must be complied with in cases such as this depends upon them being treated seriously and people knowing that if they are not treated seriously there will be an appropriate sanction.

36. The questions which I have to decide are, firstly, the question of length and, secondly, the question of suspension. This is, in all of the circumstances, not a case of anything like the highest seriousness in terms of default and repetition. The maximum sentence, as is well known, is one of two years imprisonment. Whilst there is little by way of

mitigation in the current circumstances, equally there is little by way of exacerbation. It seems to me that in those circumstances the appropriate length of sentence would be one of four months' imprisonment.

37. The next question is then of suspension. In *Isbilen v Turk* the Court of Appeal recorded, at paragraph 158 what Rix LJ had said in *Templeton Insurance* and *Asia Islamic Trade* and *Discovery Land* [2013] EWCA Civ 35 at paragraph 44 in relation to whether or not the sentence should be served in the form of immediate custody:

> "It is not only for the purpose of encouraging or rewarding the purging or remedying of contempt that the option of suspending sentence exists, and if the judge thought it was, in my respectful opinion, he erred."

38. In paragraph 44 he said that in that case the merciful conclusion was to suspend the sentence even in the absence of any apology or public regret. In *Isbilen v Turk* the Court of Appeal in the *Turk* did likewise, whilst making clear that it was necessary to impose a proper condition on the suspension so as to ensure that it was not, effectively, a sentence without teeth.

39. In my judgement, that is also the appropriate course to take in this case. This is a case where the court must be satisfied that in substance the defendant has complied with what he should have done under the Cawson order.

40. It would therefore be perfectly possible for me to suspend the sentence on condition that Mr Maginn should, within a specified period of time, do exactly what he should have done under the Cawson order.

41. However, in my judgment, that would not be the appropriate course in this case, for the following two reasons. Firstly, events have moved on significantly since then. As I have said, the case has been compromised as against the other defendant and, moreover,

no evidence has emerged of any further or extended wrongdoing by the defendant. It therefore does not seem to me that it is necessary or appropriate to require the same full compliance by the defendant as was rightly recognised as necessary in December 2023. Secondly, given that on current evidence the defendant is not legally represented and may not be legally represented when this order is served upon him and he is required to comply, as I have said the orders made are not immediately easy for a litigant in person to understand or to perform without the benefit of extensive reading and, preferably, legal assistance.

42. It also does not seem to me that the need for an extensive and expensive imaging order is justified at this stage.

43. Overall, in my view so long as the claimant can have confidence that the defendant has not further misused any restricted information and has deleted the information which he did have, that would be sufficient to justify the order being suspended.

44. What I am therefore going to do is make an order in these terms. That the defendant is sentenced to four months' imprisonment suspended for six months on condition that by 5 pm on a date 28 days after service of this order upon him he produces and sends to the claimant's solicitors by email to the claimant's solicitors, copied to the court, a witness statement which (a) explains what he did with the attachments to the emails sent from his Bond Turner email account to his personal email account on 8 and 9 November 2023 and (b) verifies, if this is the case, that (i) he has deleted them and any paper copies from all electronic devices and email accounts in his control, and (ii) has not dealt with them other than to forward them to his work email account at McDermott Smith Law Limited and to use one or more of them in the course of his employment with that firm.

45. The order will provide that in default of compliance with the above condition the claimant may make an application to the court for a warrant of committal, that such application shall be served on the defendant by the means specified below and shall state that the defendant shall have the opportunity to serve any response on the claimant's solicitors by email to the claimant's solicitors within two working days of receipt. The claimant's solicitors shall file and serve any reply or alternatively confirmation that no reply has been received, whereupon the application shall be placed before His Honour Judge Stephen Davies for his determination on the papers - or at an oral hearing if justice so requires - to decide whether or not a warrant of committal should be issued.

46. The order will also provide that the order as made today should be permitted to be served by the claimant on the defendant by the same means as specified in the order of His Honour Judge Pearce made on 29 February 2024, which will therefore, as is justified by the evidence to which I have already referred, avoid the need for personal service of this order.

47. Finally, the order will deal with the costs of the application, on which I will invite Mr Vickers to address me.

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