

Neutral Citation Number: [2019] EWHC 1366 (Ch)

Case No: BL-2019-000480

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 1 May 2019

BEFORE:

MR JUSTICE BIRSS

BETWEEN:

EDWARD HANSON AND OTHERS

Claimants

- and -

NICHOLAS CARLINO AND ANOTHER

Defendants

MR T GRANT QC and MR J BALLANCE (instructed by Harbottle & Lewis LLP)
appeared on behalf of the Claimants

JUDGMENT
(Approved)

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1. MR JUSTICE BIRSS: This is an application brought by the claimants in proceedings which commenced in March this year, concerning a dispute about investments relating to properties. The defendant was supposed to be or was the director of special purpose vehicles, that is to say companies, which were set up in order to facilitate the investments in property. The claimants' case is that the defendant has stolen money that was invested and has misappropriated that money and other things.
2. Essentially, what is said to have happened is that in 2015, the first and second claimants entered into a number of joint ventures with the first defendant, Mr Carlino, for the first three developments and subsequent resale of properties in London. The structure was, as I have said, through three special purpose vehicle companies, which are the third, fourth and fifth claimants. The properties were to be purchased by those companies, redeveloped as appropriate and then resold. Mr Carlino was to manage those companies as the director and be responsible for managing the refurbishment and subsequent sale, and there was an arrangement for shareholder profits, which would be two-thirds to the claimants and one-third for Mr Carlino.
3. The allegation is that Mr Carlino has now stolen or misappropriated in excess of £2 million arising out of that transaction. The proceedings were issued and on 18 March, Mann J made a proprietary order over various sums of money to the tune of a total of about £2 million in favour of the claimants and against the defendants, that is Mr Carlino and his company Avenell Road Develco Limited. The order also required provision of various sorts of information and matters of that kind.
4. On 22 March, following allegations by Mr Carlino that the order had not been served, Mann J made an order for substituted service relating to an email address which was said to be associated with Mr Carlino and also at what was understood to be Mr Carlino's residential address, which was at a house called Fairlawn in Kingston upon Thames.
5. The claimants contend, and I have seen the evidence and in my judgment they are right to say so, that Mr Carlino has not engaged in these proceedings and has made statements which are untrue about his knowledge of them.

6. On 8 April, Mr Justice Fancourt made an order that unless the defendant fully complied with various parts of the order of Mann J, that is the information requirement in particular, that he attend court on 3 May to be cross-examined. The cross-examination would be in relation to the issues in a schedule to the order which relate to location of the various sums of money and other matters arising from this claim.
7. The claimants were very concerned, given the history of non-compliance and non-engagement with proceedings, that Mr Carlino would not attend on 3 May. Among things that have been said, it was said on Mr Carlino's behalf that he did not live at Fairlawn, which as far as I could see on the evidence, he plainly does. That was one example of what had taken place. Accordingly, last week the claimants issued an application for the court to issue a bench warrant to secure Mr Carlino's attendance at the hearing on 3 May.
8. The defendants recognise that the step of issuing a bench warrant is an extreme step, but they submitted this was an appropriate case for it, and Mr Grant's skeleton deals with the matter in some detail. I do not need to go through it all.
9. Mr Grant's skeleton contains a close analysis of the authorities, which I will refer to briefly. The cases are: *Zakharov v White* [2003] EWHC 2463 (Ch); *Re B* [1994] FLR 479; a decision of my own when I was in the Patents County Court in *Westwood v Knight* [2012] EWPC 14; *DS Rendite Funds v Mehrotra* [2018] EWHC 1610 (Comm); *Lexi Holdings v Luqman* [2009] EWHC 496 (Ch); and *Law Society v McPhail* (11 February 2011, Norris J).
10. Mr Grant submitted that one can summarise conclusions to be drawn from the authorities as follows: the court has an inherent power supplemental to its other powers to secure compliance with its orders, which includes a power to issue a bench warrant and the arrest of an individual to whom the order has been addressed and where there appears to be non-compliance. The power exists to ensure compliance with the court's orders and to control its procedures. It is not necessary for there to have been a finding of contempt by the person to be arrested or an existing breach of the order in question, provided the power is properly exercised to secure compliance with the court's orders. The purpose of the bench warrant is exhausted once the respondent is brought before

the court, but the court has the power of detention, either (a) to secure the respondent's attendance at the next hearing where proceedings are ongoing and his or her voluntary attendance is unlikely, or (b) where the respondent has not provided all the information the court requires and which he or she can provide. And finally, the issue of a bench warrant will result in a temporary deprivation of the respondent's liberty, and accordingly the court's discretion will only be exercised where necessary.

11. I am satisfied that this summary of the principles from the cases is correct. The important and fundamental point from the summary is that the court's power to issue bench warrant is not limited to circumstances where there has been a finding of contempt but can a proper case be used to ensure compliance with court orders. This is said to be a case of that kind in that it is submitted that it is necessary and right that I should issue a bench warrant, recognising that it is an extreme remedy. But in principle, what is applied for is a bench warrant in order to secure compliance with the court orders, there not having been a finding of contempt by Mr Carlino.
12. The most recent events of the last 48 hours reinforce the broad submission made by Mr Grant on behalf of his clients about Mr Carlino's behaviour and non-engagement with these proceedings. Because of that, I will not go into any further detail into the previous history of this matter.
13. When the application for the bench warrant was issued it was served by email and by post in accordance with Mann J's order upon Mr Carlino. After that an email was received on Monday from a new firm of solicitors, LCL, who have been instructed by Mr Carlino in relation to this matter.
14. In the email, the solicitor, no doubt of course on instructions from Mr Carlino, asserted that the paperwork, that is to say the application notice, appeared to have come to one of Mr Carlino's properties which had been rented out. The court envelope was ripped. This led to an attempt, I think supposedly by the tenant, to contact Mr Carlino and pass the paperwork on. The solicitors explained that they were advised by Mr Carlino that Mr Carlino had not received anything prior to the envelope, a copy of the contents of which was attached to the email. They explained that Mr Carlino was available to

attend court on 3 May, (that is for the cross-examination), and therefore a bench warrant was unnecessary.

15. However the claimant's solicitors Harbottle & Lewis have demonstrated the falsehood of Mr Carlino's instructions to that firm. In fact the attachment in LCL's email was plainly something that was in the email to Mr Carlino in the first place and was not something which had been in an envelope, contrary to the story which Mr Carlino had given his solicitors.
16. This was pointed out to LCL, among other matters. There then followed some chasing emails from Harbottle & Lewis, to which there was no response. There was an email yesterday at 2 o'clock, serving some further evidence on LCL, who I should say are not on the record. Then at 22.58 last night, the solicitor at LCL sent an email to Harbottle & Lewis. This message did not engage at all with the material which has illustrated the falsehood of Mr Carlino's instructions, but stated that they had to advise Harbottle & Lewis that they had been unable to secure a retainer in time in respect of the hearing tomorrow (that is to say the hearing before me now) and to have sufficient time to finalise instructions. As such, they were not going to go on the record. The message then stated:

"Mr Carlino will be attending the hearing as a litigant in person."

17. The hearing referred to here is clear this hearing concerning the bench warrant. The message also explains:

"We intend to be on the record in the position to represent Mr Carlino at the next hearing, which we anticipate will be 3 May."

18. To complete the story, this morning Mr Carlino sent two text messages to Mr Hanson, the first claimant. Mr Hanson had been in communication with him. Mr Carlino's messages queried what was going on, but stated that he would be in attendance at court -- although to be fair it I think he meant 3 May rather than today -- then asks: "Can you confirm why the hearing today is going ahead when there is another hearing

on 3 May" and asks to have a discussion. He was told to communicate with Harbottle & Lewis.

19. Then I gather from Mr Grant, on instructions from the solicitor, Mr Leverton, that Mr Carlino did speak to Mr Leverton this morning. These instructions were subsequently confirmed the witness statement from Mr Leverton. Mr Carlino told Mr Leverton that he had been approaching this matter all wrong and that he (Mr Carlino) was working to prepare for Friday. He also said he was having difficulties getting into London. I bear in mind that he lives in Kingston upon Thames.
20. This morning, when the matter was called on, and despite the email from LCL stating that Mr Carlino would be attending this hearing as a litigant in person, Mr Carlino is not here. The claimants contend that this is just confirmation of the pattern of behaviour by Mr Carlino and it reinforces their concern that without a bench warrant, Mr Carlino simply will not attend on 3 May. His strategy so far in these proceedings has been to avoid engaging, to make statements to his solicitors which are demonstrably untrue (see above), and the court should have no confidence at all that, absent a bench warrant, Mr Carlino will attend court. It is also submitted that the engagement which Mr Carlino has had with the claimants in the last few days is only really happening at all because of the threat of the bench warrant in the first place.
21. In my judgment, that is a fair analysis of the position. Looking overall, I bear in mind the issue of a bench warrant is an extreme remedy. Nevertheless I am quite satisfied that, judging Mr Carlino by his actions and by the words that were advanced in writing on his behalf which are demonstrably untrue, there is a strong case that he is not engaging with these proceedings. I have no confidence that Mr Carlino will attend on Friday unless a bench warrant is issued.
22. However, since today is Wednesday, I am concerned that if I issue a bench warrant today, there is a real possibility that Mr Carlino could be arrested today and therefore could end up spending two nights in prison before the hearing on Friday. That seems to me to be potentially disproportionate and unnecessary. I propose to adopt an alternative course.

23. I will make the order requiring that a bench warrant be issued, but I will also require that it not be executed until tomorrow. That has two significant advantages. First, it means that once it is executed tomorrow, the worst that will be for Mr Carlino is that he may have to spend a night in prison. That is an inevitability in the circumstances as they are. However, the other dimension, which seems to me to be an important point, is that Mr Carlino can be told now that the court has made this order and that a bench warrant will be executed tomorrow. That will give him a final chance to credibly demonstrate that he will attend court on Friday, and it may be in those circumstances not necessary to execute the bench warrant. It would require, as I have said, a credible demonstration by Mr Carlino that that is the case. I am not going to prejudge how that might be done. Frankly in the circumstances as they appear to be, it might be very difficult for Mr Carlino to make such a credible demonstration, but I do not believe it is impossible, and he should be given that chance.
24. So in all the circumstances, what I will do is exercise the court's power to issue a bench warrant to secure compliance with the court's order that Mr Carlino attends court on Friday, 3 May to be cross-examined in relation to the information sought in the order of Mr Justice Fancourt. That is what I order.

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This transcript has been approved by the Judge