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IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
[2021] EWHC 3513 (Ch)



No. BL-2020-000115

Rolls Building  
Fetter Lane  
London, EC4A 1NL

Tuesday, 26 January 2021

Before:

MRS JUSTICE BACON DBE

B E T W E E N :

NEIL CHARLES MONEY

Claimant

- and -

BARRY DELANEY

Defendants

MR K. HAMER (instructed by Freeths LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

**J U D G M E N T**  
(via Microsoft Teams)

## **MRS JUSTICE BACON:**

- 1 This is an application for an order for the committal of the defendant on the basis that the defendant is in continued breach of all of the provisions of orders made by Deputy Master Hansen on 15 April 2020 and Master Teverson of 2 October 2020.
- 2 The hearing is being conducted remotely by Microsoft Teams in the circumstances of the current COVID pandemic, but it is being publicised in the court list with an opportunity for any interested person to access the hearing. It is accordingly a public hearing in conformity with CPR rule 81.8(1).

## **Background**

- 3 The background to the present application is set out in the affidavit of Ms Jade Flint, a managing associate at Freeths, the solicitors for the claimant, dated 10 January 2021. The claimant is a registered insolvency practitioner who specialises in dealing in insolvent estates and advising corporations and individuals in insolvency. The defendant was and remains a solicitor, and acted for the claimant in various insolvency matters in which the claimant was the liquidator, including for present purposes the liquidations of CSL Global Solutions Limited and David Dyett Limited.
- 4 The defendant terminated his retainer with the claimant in circumstances where those two matters were outstanding, but he then refused to provide the files that he retained for those cases. The claimant made an application to the court for delivery up of the files. The defendant did not acknowledge service of the claim form. Nor did he file evidence in response. Nor did he attend the hearing, though he did send a letter to the court asking that his attendance be excused, which Deputy Master Hansen interpreted as a request that the hearing proceed with account taken of his inability to attend.
- 5 The Deputy Master, therefore, proceeded to hear the claimant's application on 15 April 2020 and found in favour of the claimant. His order, which was sealed on 20 April 2020, provided that:
  - (a) The defendant should deliver up to the claimant's solicitors all of the files, papers and other documents in his possession, custody or control relating to the cases of CSL Global Solutions and David Dyett, by 4pm on 13 May 2020.
  - (b) The defendant should also deliver up, by the same date, copies of all financial ledgers showing all monies received by the defendant relating to those cases and how the same had been used or applied, and pay or deliver up the balance of any monies held by the defendant.
  - (c) The defendant should pay costs summarily assessed in the sum of £14,348.30, by the same date.
- 6 As set out in the affidavit of Ms Flint, what then happened was that over the course of the next three months the defendant repeatedly promised to make the files available for collection and then cancelled the arrangement with a series of excuses as to why they were not ready. By 17 July, which was the last time that the defendant made contact with Freeths on this point, the defendant still had not complied with any of the three parts of the order of Deputy Master Hansen.
- 7 The claimant then obtained a writ of delivery in relation to the files specifying the defendant's business address. That turned out to be a virtual office. When the High Court enforcement

officer subsequently attempted to execute the writ at the defendant's residential address on 1 September 2020, the person inside (who was assumed to be the defendant) refused to open the door.

- 8 Given the defendant's continued lack of cooperation, the claimant sought a further order from the court on exactly the same terms as the original order from the Deputy Master, but with a date for compliance of 16 October 2020 and with a prominent penal notice. That order was made by Master Teverson on 2 October 2020. It was sealed on 6 October 2020 and personally served on the defendant on 7 October.
- 9 The deadline of 16 October 2020 came and went without any compliance from the defendant. As at the date of Ms Flint's affidavit, the defendant had still not complied with any of the three separate orders made in the orders of Deputy Master Hansen and Master Teverson. Those are the circumstances in which the present application for committal has been made. The application is dated 21 October 2020, and was issued on 22 October 2020.

### **Service of the contempt application**

- 10 The first issue that I have to deal with in today's application is whether the contempt application was properly served on the defendant.
- 11 CPR Part 81.4(1) provides that, unless and to the extent that the court directs otherwise, the contempt application must be supported by written evidence given by affidavit or affirmation. CPR 81.4(2) then sets out a number of statements that must be included in the application. CPR 81.5(1) provides that, unless the court directs otherwise and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
- 12 On 9 November 2020, a sealed copy of the contempt application plus the witness statement of Ms Flint and exhibits were served personally on the defendant. Ms Flint then swore her affidavit on 10 January 2021, and attempts were made to serve that on the defendant at his home on 11 and 12 January 2021 without success. It appears that, at that time, the defendant was no longer living at that address and had, whether permanently or temporarily, departed for another address. On 13 January 2021, therefore, the affidavit and exhibit were served on the defendant by e-mail. In those circumstances, I am satisfied that the contempt application was validly served, and I also note in passing that it contained the statements required by CPR 81.4(2). But the affidavit was not personally served and the court has not dispensed with personal service.
- 13 I can direct under CPR 6.15(1) and (2) that service is permitted to take place by an alternative method or that steps already taken to bring the affidavit to the attention of the defendant by an alternative method are good service. In this case, as I have said, the witness statement of Ms Flint with the application was served personally on the defendant. The affidavit itself was served by e-mail on 13 January. In that connection, I note that the defendant had said in an e-mail on 16 June 2020 that he would accept service of enforcement proceedings by e-mail. Indeed, he said he would *only* accept service of proceedings by e-mail and not at his home or business address.
- 14 In the case of *ICBC v Erdenet* [2017] EWHC 3135 (QB), Cockerill J noted that an application for contempt and evidence had not been served personally on the defendant, but had been served on his solicitors, who had been acting for the defendant throughout. She considered that, on the facts, it would be artificial to say that the defendant did not know of the proceedings, and she ordered in those circumstances that the court should dispense with personal service of the application notice.

- 15 In reaching that decision, she referred to the judgment of Mostyn J in *Al-Baker v Al-Baker* [2015] EWHC 3229 (Fam), where the judge considered the application of r.37.10 in the Family Procedure Rules which requires personal service of an application to commit for contempt of court in that regime unless the court dispenses with service or makes an order for service by an alternative method. Mostyn J said in that regard at §7 that the application notice had not been personally served, but had been sent by e-mail to the respondent's e-mail address and to his lawyers, who had been communicating with the court in relation to other aspects of the proceedings. In those circumstances, he considered that it was plain beyond any doubt that the respondent was fully aware of the proceedings and, therefore, made an order dispensing with personal service.
- 16 In this case, as Mr Hamer has explained, the content of the witness statement of Ms Flint and her subsequent affidavit is almost identical, save for certain immaterial points towards the end of both documents. The exhibits to the witness statement and the affidavit are identical with no exceptions.
- 17 Given that the witness statement and its exhibit and the application notice have all been personally served on the defendant, and given that the defendant has subsequently communicated with the court as to his availability for today's hearing, there can be no doubt that the defendant is fully aware of the proceedings and the basis on which they are brought. So the only defect, insofar as there is one, is a technical one that the affidavit subsequently sworn by Ms Flint effectively to replace the witness statement and to encapsulate the content of the witness statement has itself not been able to be personally served on the defendant. However, it has been served by e-mail in circumstances where the defendant himself positively asked to be served by email.
- 18 In those circumstances, I do not consider that there is any possible prejudice to the defendant by not having been served personally. Mr Hamer submits that it is in the interests of justice for the court to dispense with personal service in these circumstances and, having carefully considered his submissions, I agree. I will, therefore, make an order dispensing with personal service of the affidavit and exhibits of Ms Flint, which have already been served in witness statement format together with the application personally on the defendant.

### **Whether to proceed in the absence of the defendant**

- 19 The next question I have to decide is whether it is appropriate for this court to proceed to a hearing on the merits of the contempt application, that is the substantive question of whether there was a contempt, in the absence of the defendant.
- 20 Mr Hamer has drawn my attention to the judgment of Roth J in the case of *Andrew Joseph Frejek v Stephen Robert Frejek* [2020] EWHC 1181 (Ch), where Roth J considered the same question applying the checklist of matters originally set out by Cobb J in *Sanchez v Oboz* [2015] EWHC 235 (Fam) and more recently applied by Warren J in *Taylor v Van Dutch Marine Holdings* [2016] EWHC 2201 (Ch). I consider that it is appropriate to consider the same factors in this case.
- 21 The first question is whether the defendant has been served with the relevant documents, including the notice of this hearing. I have already dealt with that question, and I am satisfied that notice has been given to the defendant, and I have dispensed with the requirement for personal service of the affidavit of Ms Flint in the circumstances that I have just set out. I also bear in mind that the defendant has engaged with the court and had said that he was available

to attend a hearing on this date. So there is no possible doubt that he was aware of the present hearing, but, for reasons that are entirely unknown to anybody, has failed to attend.

- 22 The second is the question of whether the defendant has had sufficient notice to enable him to prepare for the hearing. As I have already said, the order of Master Teverson was personally served on the defendant on 7 October 2020, and the sealed copy of the contempt application plus the witness statement of Ms Flint and exhibits were served personally on 9 November. That has given the defendant ample time for him to prepare for the present hearing, and indeed, as I have just said, the defendant himself said that he would be available for a hearing on today's date.
- 23 The third question is whether any reason has been advanced for the defendant's nonappearance. No reason has been given whatsoever and, as in the *Frejek* case, this is a case where there is a history of non-engagement with the court and non-attendance at hearings.
- 24 The fourth question is whether, by reference to the nature and the circumstances, the defendant has waived his right to be present. In the present circumstances, Mr Delaney would obviously have realised that, if he fails to participate in this hearing, the court might hear the application in his absence, and indeed that was spelled out to the defendant in the contempt application that was served on him, page 3 of which stated in terms that, if he did not attend the hearing, the court may proceed in his absence.
- 25 The fifth question is whether an adjournment would be likely to secure the attendance of the defendant or facilitate his representation. In this case, the defendant has not asked for an adjournment, and there is some doubt as to whether an adjournment would secure his attendance. He has had ample opportunity to arrange his participation, and has not given any reason for not participating today.
- 26 The sixth question is the extent of the disadvantage to the defendant of him not being able to present his account of events. As in the *Frejek* case, I consider that the defendant has had ample opportunity to do so and has also had ample opportunity to comply with the two orders against him, which date back some time and which indeed I note that initially the defendant indicated he was willing to comply with. But, for reasons which are unexplained, the defendant has failed to comply with any of those orders.
- 27 The next question is whether undue prejudice would be caused to the claimant by any delay. As Mr Hamer has explained to me, the claimant has suffered prejudice through his inability, as the liquidator of the two companies for which the files remain outstanding, to complete the liquidation of those companies. As set out in the witness statement of Mr Money dated 20 January 2020, since May 2019 the claimant has been entirely unable to establish the status of the defendant's work in relation to the two outstanding liquidations, leading to the real concern in both cases that the defendant has not done the work that he was instructed to do.
- 28 The problem is, therefore, that the two outstanding matters have been outstanding for nearly two years and, absent the files requested, the claimant is unable to ascertain what further needs to be done or indeed what already has been done, if anything, by the defendant in relation to those two cases. Mr Hamer emphasises the need to proceed with expedition, particularly in this kind of matter. Given the delay that has already been caused by the defendant's conduct, I consider that the claimant would be prejudiced by further delay.

- 29 The next question is whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of the defendant. Given the defendant's opportunities to both comply with the orders and to explain his position and to come along to today's hearing, which was listed for a date in which he said that he was available, I do not consider that there is any such prejudice.
- 30 Finally, the terms of the overriding objective requiring cases to be dealt with justly, expeditiously and fairly indicate in the present case that it is clearly fair to proceed in the absence of the defendant. The defendant, as I have said, has had every opportunity to attend. He has neither attended today, nor has given any explanation for his failure to do so, nor engaged with the court in any way in relation to this hearing. I consider that it is fair and just to proceed in his absence in those circumstances.
- 31 As a final point, in that regard, I note that the defendant is not a lay litigant in person, but is himself a solicitor, so one can expect that he would be informed of the nature of the court proceedings and would be more aware of the consequences of his non-attendance than a lay litigant in person might be. But, as I said, that is merely an additional consideration. Even without taking that point into account, I would be content to make an order to proceed in the absence of the defendant.

### **Liability for contempt of court**

- 32 I now turn to the question of whether, on the substance, there has been the contempt that is the subject of the present application. There are two allegations of contempt by the defendant.
- 33 The first is that the defendant has failed to comply with §1 of the order of Master Teverson dated 2 October and sealed on 6 October, which provides that he should deliver up to the claimant's solicitors all files, papers and other documents in his possession, custody or control relating to the cases of CSL Global Solutions and David Dyett.
- 34 The second allegation is that the defendant has failed to comply with §2 of the order of Master Teverson of the same date, which provides that he shall deliver up to the claimant's solicitors copies of all financial ledgers showing all monies received by the defendant relating to the cases of CSL Global Solutions and David Dyett and how the same have been used or applied, and pay or deliver up the balance of any monies held by the defendant. The claimant does not seek to allege that non-payment of the order for costs is a contempt of court.
- 35 In both cases, the deadline for compliance was 4pm on 16 October 2020.
- 36 I remind myself that I am applying the criminal standard of proof. I am entirely satisfied on the evidence before me that the defendant has not in any way whatsoever complied with either of those two orders. He has not handed over any files or papers or any documents relating to those two cases. Nor has he handed over any financial ledgers or any explanation of monies received. Nor has he paid or delivered up the balance of any money held by him. There has been, therefore, no compliance whatsoever with either of those two paragraphs of the order of Master Teverson. Indeed, as I have already said, the order of Master Teverson simply repeated the contents of the order of Deputy Master Hansen which was made on 15 April 2020 and sealed on 20 April 2020.
- 37 The defendant has not offered any explanation as to why he has failed to comply with those orders. Furthermore, the defendant not only knew what he had to do to comply, but, in a series of communications earlier in the year had claimed that he was in the process of complying with

those orders and reported that he would be able to comply with them at various dates. Unfortunately, as I have described, those turned out to be a series of excuses, and ultimately the defendant did not comply with any of the orders, whether in the summer or since the order of Master Teverson.

38 The order of Master Teverson was served on the defendant personally at his home. There can be no doubt, therefore, that the defendant was aware of the order that had been made against him for a second time with a penal notice attached. I have also mentioned the attempts prior and since the service of the order to engage with the defendant, which have met with no response, including the attempts to serve the affidavit at the defendant's home and the attempts to execute a writ of delivery as an alternative means of obtaining the files in question, all of which have been unsuccessful.

39 My attention has been drawn to the case of *Varma v Atkinson* [2020] EWCH Civ 1602, para.54, in which (having referred to the case of *Irtelli v Squatriti*) Rose LJ said at §54 as follows:

“In my judgment, *Irtelli v Squatriti* cannot stand in the light of the many earlier and later cases which establish that once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach.”

40 Applying that in the present case, there is no doubt that the defendant knew of the terms of both of the orders and knew that he was omitting to comply with those orders. I am, therefore, satisfied that the defendant is in contempt on the two grounds on which the application is made, and I am satisfied in both cases that the breach is made out to the criminal standard of proof.

### **Relief and costs**

41 The final question is the question of relief. The first order sought is a direction that the residential address of the defendant be added to the court file in order that the writ of delivery previously obtained by the claimant can be executed at that address. As the writ of delivery previously specified the defendant's business address, I consider that it is appropriate to direct that the residential address be added to the court file, so that a writ of delivery can be executed at that address, and I so direct.

42 The second aspect of relief is the question of a bench warrant to secure the defendant's attendance at a sentencing hearing. The claimant, rightly in my view, does not seek an outright order for committal at this hearing, but suggests that the appropriate course would be to direct the issue of a bench warrant, so that the defendant may be brought before the court for sentencing at a future date. That is what I will do.

43 Provisionally, I direct that the defendant should be brought before the court on Tuesday, 2 February. If, however, the defendant cannot be located in time for that hearing, then that hearing will have to be adjourned and relisted for a later date, and a bench warrant will, therefore, be issued after the conclusion of this hearing. Either way, the hearing will be in public in the Royal Courts of Justice.

44 I will make an order for summary assessment of your costs in the sum of £9,000, which is just a little under 90 per cent of the costs, which I think is a reasonable percentage of the costs. I consider that those are not excessive costs for the important nature of a hearing of this nature,

given that this was set down for a half-day hearing and also bearing in mind the amount of work that has been done to prepare for this hearing.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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