



[2020] EWHC 3272 (Comm)

Case No: CL-2016-000235

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th November 2020

Before:

DEPUTY MASTER HILL QC

Between:

ALAN SHEARER

Judgment
Creditor

-and-

KEVIN GERARD NEAL

Judgment Debtor

Gerard McMeel QC (instructed by the Charles Russell Speechlys LLP) for the **Judgment Creditor**

Cleon Catsambis (instructed by Simon Burn Solicitors) for the **Judgment Debtor**

Hearing date: 5th October 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DEPUTY MASTER HILL QC:

Introduction

1. A CPR Part 71 examination of the judgment debtor in these proceedings took place before me on 5th October 2020. At the end of the examination I indicated that I intended to refer the matter to a High Court judge under CPR 71.8(1)(c) because there had been non-compliance with the order for examination. Pursuant to CPR PD 71, para 6 such a referral requires me to certify in writing the respects in which there has been non-compliance. I have received further written submissions on this issue and on costs. This is my judgment on both issues.

The factual and procedural background

2. The judgment creditor is a well-known former footballer and sports pundit. The judgment debtor, Kevin Neal, is his former financial advisor. Mr Neal indicates that he lives in Spain, but he appears to have business interests in England and Wales, Luxembourg, Dubai and elsewhere.
3. Mr Neal was the eponymous figure behind two successive financial advisory practices: Kevin Neal Associates Limited (“KNAL”) and Kevin Neal Associates Wealth Management LLP (“KNAWM”) which advised the judgment creditor. The firms appeared to target high net worth individuals and in particular professional sportspeople. They recommended investments which were supposedly secure and “uncorrelated” but were in fact unregulated collective investment schemes for the purposes of the Financial Services and Markets Act 2000. Both firms are now insolvent. Their insurers repudiated professional indemnity cover on the grounds of fraud and non-disclosure.
4. The judgment creditor brought proceedings for fraud and negligence against KNAL, KNAWM and Mr Neal personally. Claims were also brought against other parties for breach of statutory duty and negligence. On 15th June 2017 a trial commenced before Mr Justice Leggatt (as he then was). This resulted in a confidential compromise set out in a Tomlin order. As a result, on 23rd November 2018 and 13th December 2019 Mr Justice Teare and His Honour Judge Mark Pelling QC each entered public judgments against Mr Neal in respect of sums due under the Tomlin order for £100,000 each plus interest and costs. As at 14th September 2020 the total sum owing by Mr Neal to the judgment creditor was £232,262.20.
5. The first sum under the Tomlin order had fallen due in 2018. On 9th July 2018 Mr Neal had indicated that “...[t]he threat of a judgment is futile as you are fully aware I'm non resident UK and have no UK assets”.
6. On 5th February 2020 Mr Registrar Kay QC made an order that Mr Neal attend for examination under CPR Part 71 on 23rd March 2020. Mr Neal insisted on the order for examination being served on him personally. He appeared equivocal about his attendance at the examination saying that he “would need 4-6 months notice and not a chance before the tax year end”.

7. On 18th February 2020 Mr Neal's solicitors indicated that he was non-domiciled in the UK for tax purposes and was unable to attend court on 23rd March 2020 as he would not have any "spare" days.
8. The parties eventually agreed that the need for the Part 71 order to be served personally could be dispensed with and the order was deemed served on 10th February 2020. By consent the examination was adjourned to the first available date after 11th May 2020. A further order was made requiring Mr Neal to attend for examination on 15th June 2020.
9. The 15th June 2020 hearing was adjourned at Mr Neal's request based on his solicitor's assertion in a letter dated 8th June 2020 that he had suffered "*severe ligament damage to his 5th metatarsal*". The same letter also asserted that he was in Spain and was unable to arrange flights to the UK or would be restricted by the quarantine requirements if he was able to fly to the UK. He requested that the hearing be adjourned to the first available date after 1st September 2020. An order was made adjourning the examination again and requiring Mr Neal to attend for examination on 16th September 2020.
10. On 8th September 2020 Mr Neal's solicitors applied to adjourn the upcoming hearing. The application was supported by a witness statement from Mr Neal citing a mixture of business engagements and Covid-related restrictions which were said to prevent his attendance in person. Correspondence from Mr Neal's solicitors made clear that he would "*stand on the letter*" of the order and only provide documents at, rather than in advance of, the examination.
11. On 13th September 2020 I indicated that I was not minded to adjourn the examination but was prepared to conduct it by Microsoft Teams, so as to permit Mr Neal to be examined even though he was said to be restricted due to Covid from leaving Spain. Microsoft Teams has been used to facilitate the examination of at least one other debtor abroad during the time of the Covid restrictions. Mr Neal's solicitor indicated that there was a real possibility that he was in fact suffering from Covid and requested a hearing by Zoom. In the end the court itself set up a Teams hearing. The day before the hearing Mr Neal filed a notice that he would be acting in person.
12. I conducted the hearing on 16th September 2020. Mr Neal indicated that technical difficulties precluded him using the video function of Teams, although everybody else was able to join the hearing in that way. He was therefore only in attendance at the hearing through the audio link. This raised issues about the ability to have Mr Neal examined effectively because (i) it was not possible to ensure the proper administration of the oath or affirmation; and (ii) it would not have been possible to observe his demeanour during any examination. In any event the hearing could not proceed because Mr Neal had provided no financial documentation for it via any media. It is not clear whether any proper preparations for the provision of information or documentation had been made prior to his solicitors being disinstructed. The judgment creditor's position is that the ineffectiveness of the September hearing was "*entirely due to the cavalier approach of Mr Neal to his obligations to the Court*".

13. I adjourned the 13th September 2020 hearing to 5th October 2020 and made a specific direction that Mr Neal provide the necessary documentation about his finances by 2 pm on 28th September 2020. So as to make clear what documentation was required, the order referred back to the categories of material set out in previous orders and the list of additional questions provided by the judgment creditor and made clear that the documents necessary to complete the Form EX 140 record of examination were also required.
14. On 5th October 2020 the examination took place in court in person with appropriate social distancing arrangements.
15. At the outset of the hearing Mr Neal's counsel indicated that he wished to "*correct*" a detail included within Mr Neal's solicitor's letter of 8th June 2020. Mr Neal's counsel indicated that he wished to make clear that, contrary to the contents of the letter, the metatarsal injury had been sustained in Watford, such that Mr Neal had in fact been in the UK at the material time.
16. Mr Neal was examined at length about his means by counsel for the judgment creditor. It was also put to him that he had misled his solicitor into writing the letter of 8th June 2020. At the end of the hearing I heard submissions from both counsel and indicated that I intended to refer the matter to a High Court judge under CPR 71.8(1)(c) (although the transcript at page 85 incorrectly refers to both CPR 71.8(1)(b) and CPR 71.8(2)(c)). I made clear that my reasons for doing so related to the failure by Mr Neal to provide the documentation that was the subject of the previous orders.

The CPR 71.8(1)(c) issue

(a) The legal framework

17. CPR 71.8 provides that if a person against whom an order has been made under rule 71.2 (a) fails to attend court; (b) refuses at the hearing to take the oath or to answer any question; or (c) otherwise fails to comply with the order, the court will refer the matter to a High Court or Circuit judge. On such a referral, a judge may make a suspended committal order against the debtor.
18. Under PD 71, para 6 if a referral to a judge is made under CPR 71.8 it is necessary to certify in writing the respects in which a judgment debtor has failed to comply with the order.
19. In *Deutsche Bank AG v Sebastian Holdings Inc* [2015] EWHC 2773 (QB) at para [33] Cooke J held that the procedure under CPR 71 is intended to be a "*summary and straightforward process allowing the judgment creditor to obtain information from the judgment debtor for the purpose of being better able to decide which method or methods of enforcement to use whether sequentially or simultaneously*".
20. The reference to "*will refer*" in CPR 71.8 makes clear that if the conditions are met the referral to a judge is mandatory. This much is also apparent from the later judgment of *Deutsche Bank AG v Sebastian Holdings Inc (Nos 1 and 2)* [2019] WLR 1737, para [34], per Gross LJ.

21. The second *Deutsche Bank* case also considered the relationship between CPR 71.8 and the wider, but complementary, provisions regarding applications and proceedings relating to contempt of court in CPR 81. At paras [30]-[31] Gross LJ agreed with the judge whose order he was being invited to vary (Teare J) to the effect that the CPR 71 procedure is a “*simple and streamlined committal procedure...designed to address criticism that the more rigorous CPR Pt 81 committal procedure was too slow*” whereas in “*complex*” cases the judgment creditor might be required to proceed under CPR 81. At para [24] Gross LJ quoted Teare J’s view that the CPR 71.8 committal procedure might be appropriate where the alleged contempt was “*simple, such as a failure to attend court*” but that the CPR 81 procedure might be appropriate where the contempt alleged was “*more difficult to prove, such as a failure to answer questions honestly*”.

(b) The judgment creditor’s submissions

22. Counsel for the judgment creditor argued that I should certify that Mr Neal had failed to comply with the disclosure order in respect of (i) bank statements for the last two years in relation to any bank accounts he holds worldwide, in particular his Spanish bank account with Banco Sabadell and his English bank accounts with Starling Bank; and (ii) his remuneration as a self-employed business development manager, including in respect of his sole trader business (trading as Marlborough Consulting) and his provision of services to Bluefin Capital Management S.A.R.L. (“Bluefin”), Marlborough Securities, Marlborough Consulting Services Ltd and Marlborough Opportunities Ltd (formerly Marlborough Bridging Ltd).
23. He argued that a referral in respect of the evidence relating to the Spanish and English bank account statements and the provision of a complete copy of the undated “Sub-distribution Agreement” between Mr Neal and Bluefin was the “*very minimum*” because it was admitted that these documents existed, but they had not been provided. However his draft order made provision for the other categories because, it was argued, I was entitled to reject as lacking in credibility Mr Neal’s evidence that these other categories of documents simply did not exist.
24. Counsel made clear that consideration is being given to making a separate application for committal under CPR 81 because the case has arguably become a more “*complex*” case of the type described by Gross LJ in the second *Deutsche Bank* case. It was argued that “*the issues now go beyond the non-production of documents and involve non-disclosure, inconsistent evidence (at least in respect of the Dubai bank account issue) and false answers under oath (at least as to the non-existence of any documentary evidence as to Mr Neal’s self-employed business activities)*”.
25. Overall he submitted that Mr Neal was “*a witness whose testimony would not be regarded as credible, save where it could be corroborated by contemporaneous documentary evidence or more reliable witness evidence. He only volunteered as much information as he thought he had to, and put his own spin on events*”.

(d) The judgment debtor’s submissions

26. Counsel for Mr Neal submitted that he had provided a large volume of documents and been extensively questioned about his assets, income and affairs and had responded to every question posed.
27. He argued that the only clear breaches of the order related to Spanish and English bank statements and the Bluefin Sub-distribution Agreement. However he argued that these documents had not been made available for the hearing because they were either not understood to be required or were not physically accessible. He submitted that after the hearing, by letter dated 30th October 2020, all of this material has been provided, thus “*curing*” the breaches of the orders such that the referral under CPR 71.8(1)(c) is no longer necessary.
28. In relation to the other categories of material, counsel for Mr Neal submitted that the documents simply do not exist; it is mere speculation to suggest that they do; and that the non-production of non-existent documents cannot conceivably form the basis of a finding of non-compliance, especially given that the order where a referral is sought is accompanied by a penal notice.
29. Overall he submitted that Mr Neal presented as an “*honest witness who engaged fully and earnestly with the process...[who] provided direct and complete responses to every question posed. He did not hesitate. He did not evade. He did not obfuscate*”.

(e) Analysis and decision

30. I indicated at the end of the 5th October 2020 hearing that I had found that the terms of CPR 71.8(1)(c) had been satisfied, in that Mr Neal had failed to comply with the order that he provided documentation for the examination. On that basis referral to a High Court judge is mandatory: see paragraph 20 above.
31. As a matter of general principle, I do not consider it is now open to me to resile from that finding as Mr Neal’s counsel invites me to do in light of events since the hearing. In any event whether Mr Neal’s disclosure after the hearing has “*cured*” his breach is an issue on which I have not heard submissions from the judgment creditor. This issue will need to be addressed before the High Court judge.
32. I consider that the order should refer to Mr Neal being in breach by failing to provide the requisite statements from his Spanish and English bank accounts and the complete copy of the Bluefin Sub-distribution Agreement.
33. I am not persuaded that the order should be drafted more widely than these categories. I accept the submissions made on behalf of Mr Neal to the effect that I could only include further categories of documents if I was satisfied that those documents do exist. While I see the force in the submission from the judgment creditor that “*they must do*” I do not consider that I can find on the evidence that they did; or indeed that such a finding is appropriate in the CPR 78.1 procedure. Rather, the guidance from Gross LJ in the second *Deutsche Bank* case suggests that issues of this nature that turn very much on an assessment of honesty render these aspects “*complex*” and thus more suited to the CPR 81 procedure. Indeed, counsel for the judgment creditor appears to accept as much, in part at least: see paragraph 24 above.

34. To the extent that it provides any assistance to the High Court judge I can indicate that my assessment of Mr Neal's evidence and the manner in which he gave it was much closer to the characterisation offered by the judgment creditor's counsel than by his own (see the differing descriptions at paragraphs 25 and 29 above). I note in particular that the assertions made on his behalf in his solicitor's letter of 8th June 2020 can only be interpreted in one way – that he was in Spain at the time of the injury – and he later indicated that this was not correct. If I have understood matters correctly, it appears that this indication was only given after surveillance evidence appeared to show him in the UK on 26th June 2020 and 6th July 2020. I also noted that the evidence he gave as to having a bank in Dubai, provided in a formal witness statement supported by a statement of truth on 7th September 2020, was later entirely resiled from. These two factors, and his demeanour generally, adversely impacted on my assessment of his credibility.
35. I therefore intend to refer the case to a High Court judge under CPR 71.8(1)(c), certifying that Mr Neal was in breach by failing to provide the requisite statements from his Spanish and English bank accounts and the complete copy of the undated Sub-distribution Agreement between him and Bluefin.

Costs

(a) The parties' submissions

36. Counsel for the judgment creditor argued that he should be awarded his costs of the examination, in the sum of £55,843, on an indemnity basis. It was argued that all of these costs were reasonably incurred and reasonable in amount.
37. Counsel for Mr Neal referred me to CPR 45.8 and the very modest fixed costs regime which can apply when a CPR 71 examination occurs before a court officer and not a judge. He argued that this is a good indication of the level of costs envisaged in CPR 71 examinations. He relied on the principles set out in the first *Deutsche Bank* case to the effect that that a CPR 71 examination is intended to be a summary and straightforward process and noted that the underlying sum in issue in this case is "*not large*" by the standards of the Commercial Court. He questioned different items of the judgment creditor's legal team's work (in particular the reliance on Grade A and B fee earners and leading counsel) and argued that the figure of over £50,000 in costs claimed by the judgment creditor was, overall, "*astonishing*".

(b) Entitlement to costs and basis of assessment

38. I agree that the CPR 71 process is intended to be a summary and straightforward process. However, the general costs provisions under CPR 44 apply. I consider that the judgment creditor is entitled to his costs of the examination process.
39. An award of costs on an indemnity basis can only be made where there has been "*some conduct or some circumstance which takes the case out of the norm*" (Lord Woolf CJ in *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879 at [19]).
40. Applying that test, I consider that the following conduct by Mr Neal and/or consequential circumstances in the case merit an award of indemnity costs:

- (i) It is now clear that the second adjournment decision was taken on the basis of an incorrect factual scenario placed before the court by those acting for Mr Neal, no doubt on his instructions. Had it been appreciated by the Court that he was in fact in the UK the second adjournment may not have been granted and the examination might have proceeded on that occasion.
- (ii) The third adjournment was necessitated in large part by the fact that documentation was not available to the judgment creditor or the court when Mr Neal and his then solicitors had had many months to prepare.
- (iii) The need for further submissions since the examination has arisen due to concerns that Mr Neal has still not been sufficiently forthcoming with information about his means, at least some of which concerns are merited.

(c) Method of assessment

41. I consider that the costs should be summarily assessed: while this case has had a complex procedural history it has resulted in one short hearing and one half a day hearing. It is therefore analogous to the examples of where summary assessment is appropriate given in PD 44, para 9.2(b). The last hearing before me may well “dispose of” the examination element of the CPR 71 proceedings and so I consider it appropriate to “deal with the costs of the whole claim” within PD 44, para 9.2(b).

(d) The amount of costs

42. When assessing costs on an indemnity basis, under CPR 44.4(1)(b) regard must be had to “all the circumstances” in deciding whether costs were unreasonably incurred or unreasonable in amount.
43. CPR 44.3 sets out a series of other factors to which the court should have regard, namely
- (a) the conduct of all the parties, including in particular –
 - (i) conduct before, as well as during, the proceedings; and
 - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
 - (b) the amount or value of any money or property involved;
 - (c) the importance of the matter to all the parties;
 - (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
 - (e) the skill, effort, specialised knowledge and responsibility involved;
 - (f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget.

44. Of those factors, I consider the following relevant here: (i) Mr Neal's conduct, which has led to much additional work (see paragraph 40 above); and (ii) the complexity of Mr Neal's business arrangements and the need for some specialised knowledge to understand those arrangements, analyse the evidence and identify what was still allegedly missing.
45. Here, I had doubts about some elements of the costs incurred in the reliance on Grade A and B fee earners and on leading counsel. However in accordance with CPR 44.3(3) I resolve those doubts in favour of the judgment creditor as the receiving party. On that basis I consider that the order for costs in the judgment creditor's favour should be for the £55,843 claimed.