Maximum Custodial Sentence imposed for Contempt under new CPR 81

XL Insurance Company SE v IPORS Underwriting Ltd, Paul Alan Corcoran & Others [2021] EWHC 1407 (Comm)

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In one the first reported cases dealing with contempt under the new CPR 81 for serious breaches of a freezing order, Mrs Justice Cockerill DBE, the Judge in Charge of the Commercial Court, handed down an immediate maximum 2-year custodial sentence for multiple and persistent breaches of a freezing/proprietary injunction.

Background

The underlying proceedings concern claims by the Claimant insurer ("**XL**") for misappropriation of c.£10 million of its premium funds – funds that Mr Corcoran's coverholder company was contractually obliged to hold on trust for XL once received from insureds before remitting them to XL. XL's case is that the funds were instead transferred in large part to Mr Corcoran and expended for personal purposes.

In support of the proceedings, XL obtained a number of proprietary and freezing injunctions in 2017 (and disclosure orders) including against Mr Corcoran personally and the corporate defendants that he controlled.

In early 2021, XL brought an application for contempt of court against Mr Corcoran for breaches of the injunctions in relation to: (a) disposing of assets in breach of the prohibitions on doing so; and (b) his failures to comply with the disclosure obligations in the injunctions, including general asset disclosure, disclosure relating to XL's proprietary funds and for providing no affidavit in respect of those matters.

Grounds for Contempt and the Defendant's Response

The injunctions contained the standard provision prohibiting disposing, dealing with or diminishing assets held by or behalf or Mr Corcoran, subject to a maximum sum £4.5 million. The exceptions to the order, allowing Mr Corcoran to expend a reasonable sum on legal representation and £500 a week on ordinary living expenses, were subject to him first informing XL where the money was to come and stated that the monies could not be sourced from XL's proprietary funds (subject of course to Mr Corcoran's right to apply to vary the order to seek to use such funds).

Despite Mr Corcoran's lack of disclosure, disclosure obtained by XL from non-party banks showed that Mr Corcoran had expended funds from a number of accounts, including at Nationwide and Coutts, of which XL was not aware and which Mr Corcoran had failed to disclose. One had in fact been set up since the injunctions had been made against him and after his main account at NatWest, of which XL was aware, had been frozen.

The payments were spent on a variety of luxury expenditure without informing XL, including multiple payments at Selfridges and the Savoy Hotel, c.£30,000 on a hotel in Paris and c.£10,000 on Manchester United football tickets. XL relied on a large number of payments to support the counts of contempt but, to avoid any arguments about them being living expenses, selected payments only over the £500 limit in the injunctions for such spending.

XL also alleged contempt on the basis that Mr Corcoran had failed to provide any disclosure (nor claimed privilege against self-incrimination in relation to general asset disclosure) nor any disclosure affidavit in breach of the injunctions.

Mr Corcoran originally responded through solicitors to the application, who never came on the record, arguing that he needed to use proprietary funds to defend the contempt application and that XL were denying him access to justice. He also justified his alleged breaches of the injunctions on the same grounds. XL's response was that Mr Corcoran must first provide some asset disclosure to show that he could not source the funds from elsewhere, noting he had received and spent significant funds after the injunctions were made. Mr Corcoran also sought to argue that he was not aware that the injunctions applied to accounts created after the orders were made, as well as running a number of other points.

Decision

Proceeding in the Defendant's Absence

Mr Corcoran did not attend the substantive hearing. He did, however, send emails to the Court on the morning of the hearing and during the hearing. The Judge expressed reluctance to proceed in Mr Corcoran's absence especially if she was likely to hold him in contempt and issue an immediate custodial sentence. She considered that, if Mr Corcoran was in the jurisdiction, it may be appropriate to issue a bench warrant, noting that (unlike the previous CPR 81) the power do so is now expressly contained in CPR 81. She emphasised that commercial lawyers should be aware that it was unusual, in a criminal context, to proceed in the Defendant's absence.

The Judge was, however, ultimately persuaded by XL that it was right to proceed in Mr Corcoran's absence and that a bench warrant was unlikely to secure his attendance. The Judge found that XL had made considerable efforts to locate Mr Corcoran (when seeking to serve him with the application and then obtaining an order for alternative service of it), that he had been avoiding XL and that his whereabouts were unknown. The Judge provided a useful distillation of the relevant legal principles (which she had previously considered in detail in ***ICBC Standard Bank v Erdenet Mining Corp LLC*** [2017] EWHC 3135 (QB)), before carefully applying them to the facts of the present application.

Funding

The tests on varying an injunction to permit proprietary funds being used on the defendant's legal representation are well established. The Court cited Bryan J's recent summary in ***Danish Customs and Tax Administration v Barac & Others*** [2020] EHWC 377 (Comm.), namely that: (1) the defendant must have an arguable defence to the proprietary claims; (2) the defendant must satisfy the Court that it has no other funds for legal expenditure; and (3) the Court must then weigh up the balance of justice in allowing or refusing the payment. Against this backdrop, the case law shows that it may assist if a defendant undertakes to repay the funds or pledge security, for example.

It is though fair to say though that this test had not previously been considered in the context of funding a defence of a contempt application; and one could see how the seriousness of a contempt application could weigh heavily in factor (3) above. However, the Judge accepted XL's submissions that Corcoran had taken no steps for a considerable period to provide clarity, despite multiple requests from XL when he previously sought funding, on his asset position. He could not therefore show that he could not source funding from elsewhere. She further held that the delay was unlikely to result in any change of approach. He had also been reminded as required by CPR 81 that he could apply for Legal Aid and was sent information from COMBAR about potential pro bono representation, none of which he appeared to have explored.

As XL also pointed out, a defendant should not be able to denude itself of funds, in breach of the injunctions, and then seek to draw on proprietary funds for legal expenditure. Mr Corcoran had also recently hidden a further account at Monzo bank from XL (using an alias) and had been receiving rent there from a property in his name, listed as an asset in the injunctions. The Judge was unimpressed that Mr Corcoran did not provide even copies of bank statements of that account and agreed with XL that Mr Corcoran was a sophisticated businessman and being a litigant in person was not an excuse for providing no disclosure.

Acts of Contempt

The Judge summarised the key ingredients of contempt and drew on the recent Court of Appeal decision in ***Varma v Atkinson & Another*** [2020] EWCA Civ 1602 for confirmation of the proposition that, once knowledge of the order is proved, and once it is proved that the defendant knew what he was doing or omitting to do, then it was unnecessary for the defendant to know that his actions put him in breach of the order.

The Judge found that the expenditure was clearly in breach of the asset dissipation provisions of the injunctions. Despite his lack of the disclosure, the Judge appeared to find XL's evidence suggesting Mr Corcoran did not have more than the maximum sum when making the payments, to be necessary and persuasive. She had little difficulty finding that Mr

Corcoran had been served and was otherwise aware (including by his own emails and those from his solicitors) of the terms of the injunctions and had clearly made the expenditures from the accounts in his name and had not denied doing so.

She also found that he had provided no disclosure and rejected arguments to the contrary.

Ultimately, the Judge was "sure" to the criminal standard that Mr Corcoran had committed over 800 acts of contempt summarised in Counts 1 to 20 in the annex to the judgment.

Sentencing

The Judge heard argument on sentencing at the substantive hearing and, after handing down judgment on liability, handed down judgment on sentencing (in person, in open Court, in full robes).

She provided a useful summary of the principles that apply (showing, in doing so, that the sentencing case law remains unaffected by the changes to CPR 81 applicable since 1 October 2020). She had no difficulty based on the authorities in finding a custodial sentence was appropriate, noting that maximum two year sentences had been imposed by the Court of Appeal in cases concerning failure to comply with the disclosure provisions of injunctions alone.

She accepted XL's reasons for not suspending the sentence, including the length of time that had passed in respect of non-compliance, the nature and number of acts of contempt, the effect of the lack of disclosure especially on tracing XL's proprietary funds and the lack of attempts to comply with the injunctions or respond to the contempt application or to purge the acts of contempt.

The Judge also drew support for her decision not to suspend any sentence on the guidelines which apply to suspended sentencing in criminal cases (the Imposition of Community and Custodial Sentences Definitive Guidelines), which give history of poor compliance and achieving punishment only by immediate custody as relevant factors. She also accepted XL's submission that it would set a dangerous precedent if a defendant who ignored proceedings was automatically be given a second chance if he ignored the hearing for committal.

Whilst the Judge drew on much that was said about sentencing in the context of asset dissipation by Rose J (as she then was) in ***JSC Bank & Another v Pugachev*** [2016] EWHC 258 (Ch.), she did not accept the logic of imposing a maximum sentence on the basis that the Defendant could then apply purge his contempt and reduce his sentence thereafter. She held that she should not have regard to what might happen in the future in arriving at the appropriate sentence and must impose a sentence bearing in mind the facts relating to the acts of contempt established.

In terms of the key questions of culpability and harm for sentencing, as set out by Eder J in ***Otkrite v Gersamia*** [2015] EWHC 821 (Comm):

(a) The Judge found that culpability was very serious and persistent and that the breaches were deliberate, contumacious and involved proprietary funds, and that Mr Corcoran had taken deliberate steps to put funds out of XL's reach and hidden and used other accounts. She also regarded culpability for his total lack of disclosure as very high indeed.

(b) She found the harm "as about as high as it could well be", with Mr Corcoran's breaches undercutting the relief sought and causing XL considerable prejudice in not being able to recover or trace its proprietary funds, noting he was in effect the only person who could preserve and provide information in relation to such funds.

She found no mitigation by way of any admission of breach, an appreciation of the seriousness of any breaches or by any expression of genuine remorse by Mr Corcoran. She found that the emails sent by him to the Court in advance of the hearings continued to evince his unwilling to properly engage.

Although 22 months had been imposed for breaches of the disclosure and asset provisions in ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1411, the Judge noted that that case had involved some attempt at compliance with disclosure and that that was not a hard and fast rule for future sentencing. She held that a broadly similar approach to that of Rose J in Pugachev was appropriate on the facts here due to the multiple acts of contempt. She found that each of the disclosure

contempts would merit the maximum 2-year sentence alone, with the expenditure counts attracting 21-22 months. She sentenced the contempts concurrently such that the total sentence would require an upward adjustment for totality.

The Judge thus sentenced Mr Corcoran to an immediate custodial sentence of 24 months and said that the Court would issue a warrant for his arrest.

Conclusion

The case may be of interest not simply because of the immediate maximum sentence and as one of the first reported contempt cases for a commercial freezing injunction issued and determined under the new CPR 81. It also contains other useful points, on which there is not much previous authority, including the appropriateness of a bench warrant to secure the Defendant's attendance, when to proceed in the Defendant's absence, legal funding and the use of proprietary funds to do so for a contempt application, and guidance on sentencing for asset dissipation rather than in relation to just non-disclosure.

Joseph England, instructed by Andrew Hall, Raymond Koh and Arabella Ramage of XI Catlin Services, acted for the successful Claimant.

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"Very conscientious, hardworking and enthusiastic, he is good on his feet and should go far." (Legal 500, 2021)

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