Neutral Citation Number: [2020] EWCA Civ 695

Case No: A2/2019/3081 & A2/2019/3161

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE FREEDMAN (29 NOVEMBER 2019)
NICOL J (13 DECEMBER 2019)
[2019] EWHC 3874 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/06/2020

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE SIMLER

- -

Between:

MR LUKE MCKAY

Appellant

- and -

(1) THE ALL ENGLAND LAWN TENNIS CLUB (CHAMPIONSHIPS) LIMITED
(2) THE ALL ENGLAND LAWN TENNIS GROUND PLC

Respondents

-and-

THE SECRETARY OF STATE FOR JUSTICE

Interested Party

- -
- -

Mr Anton van Dellen (instructed by **OWN Solicitors**) for the **Appellant**
Mr Edward Rowntree and Mr Charles Raffin (instructed by **Kerman & Co**) for the **Respondents**
Ms Sasha Blackmore (instructed by the **Government Legal Department)** for the **Interested Party**

Hearing date: 23 April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 2 June 2020

Henderson LJ:

Introduction

1. The appellant, Mr Luke McKay, deals in tickets for sporting events on the unofficial and unregulated secondary market. In colloquial terms, he is a ticket tout. The tickets in question are usually subject to strict conditions which prohibit or restrict their transfer or onward sale, and typically provide that they will at all times remain the property of the issuing body. If such a ticket is sold on the black market in breach of the conditions, usually for a sum greatly in excess of its face value, the vendor is likely to incur various forms of civil liability in tort and/or contract. He may also expose himself to the risk of criminal proceedings, particularly if he has acted in concert with others. The purchaser of the ticket, meanwhile, has no valid right of entry to the event, his ticket is void and worthless in his hands, and he is at risk of being refused admission, or required to leave the premises, once the infringement has been detected.

2. In very general terms, that is the background to the present case, which comes before us on appeals by Mr McKay from two orders of the High Court in proceedings for civil contempt of court brought against him for his alleged refusal to comply with an order for the disclosure of information first made against him by Nicklin J on 9 July 2019, during the 2019 Wimbledon lawn tennis championships. The claimants, and respondents to the appeal, are The All England Lawn Tennis Club (Championships) Limited ("AELTC"), which conducts the annual lawn tennis championships ("the Championships") in the grounds at Church Road, Wimbledon, and The All England Lawn Tennis Ground PLC, which owns the grounds. I will refer to the respondents together as "Wimbledon".

3. The first order under appeal was made by His Honour Judge Freedman, sitting as a High Court judge in the Queen's Bench Division, on 29 November 2019 ("the Committal Order"). Mr McKay appeared in person on that occasion, although (as I shall relate) there had been earlier hearings of the committal proceedings at which he had been given every opportunity to obtain legal representation, and he had indeed instructed a firm of solicitors which initially acted for him, but shortly before the hearing found itself unable to continue doing so. The Committal Order recited that the judge was satisfied that Mr McKay was guilty of contempt of court in failing to comply with sub-paragraphs 3(c)(i), (ii) and (iii) of Nicklin J's order of 9 July 2019, and ordered him to be imprisoned for a term of 26 weeks. This sentence was, however, suspended until a further return date on 13 December 2019, in order to give Mr McKay a final opportunity to purge his contempt. The order expressly stated that, if he failed to purge his contempt, the suspension would be lifted on the return date.

4. At the subsequent hearing on 13 December 2019, which took place before Nicol J, Mr McKay had the benefit of representation on a pro bono basis by Mr Anton van Dellen and Mr Harry O'Sullivan of counsel. After hearing submissions, the judge was satisfied that Mr McKay had failed to purge his contempt and that the conditions for suspension of the Committal Order had not been observed. Nicol J therefore ordered that the suspension of the prison sentence should be lifted, but he also stayed the lifting of the suspension until 20 December 2019 when Mr McKay's time for filing a notice of appeal against the Committal Order would expire. The order went on to provide that if a notice of appeal was filed before that deadline, together with a request that this court should deal with the appeal on an expedited basis, there should then be a further stay of the lifting of the suspension

until the determination of the appeal, subject to any further order which this court might make.

5. That order, which I will call "the December Order", is the second order under appeal. Mr McKay duly filed his notice of appeal against the Committal Order on 13 December 2019, and by a second notice of appeal, filed on 31 December 2019, he also challenged the decision of Nicol J in the December Order to lift the suspension of the original sentence.

6. By virtue of CPR rule 52.3(1)(a)(i), no permission to appeal is required "where the appeal is against…a committal order". No doubt because the combined effect of both orders was to commit Mr McKay to prison for an immediate term of six months, subject only to the stay imposed by Nicol J pending the outcome of this appeal, no point has been taken that Mr McKay might arguably have required permission to appeal against either order viewed in isolation.

7. Mr McKay has the benefit of legal aid for the appeal, and Mr van Dellen now appears for him instructed by OWN Solicitors. Wimbledon appear, as they did below, by Mr Edward Rowntree and Mr Charles Raffin of counsel, instructed by Kerman & Co. In addition, the Secretary of State for Justice has been joined to the appeal, at a very late stage, as an interested party, in order to assist the court in relation to an application for a declaration of incompatibility under section 4 of the Human Rights Act 1998 raised for the first time on Mr McKay's behalf by an application notice dated 26 February 2020 but not sealed until 19 March 2020. As I shall explain, the declaration sought was that section 13 of the Fraud Act 2006 is inconsistent with Article 6 of the European Convention on Human Rights ("the ECHR"). The application was made at such a late stage, and with so little in the way of supporting argument, that the only realistic course, particularly in view of the grave difficulties occasioned by the Covid-19 pandemic, was to adjourn it to be heard together with the appeal, so that the Secretary of State for Justice would have sufficient time to consider and respond to it. In the event, Ms Sasha Blackmore of counsel was instructed by the Government Legal Department, and under considerable time pressure she was able to produce detailed written submissions in advance of the hearing. We are very grateful for her written and oral submissions, which made it abundantly clear that the application is wholly misconceived.

Background

8. The relevant background is set out in a witness statement of Lewis David Glasson, an associate solicitor at Kerman & Co, which he made on 8 July 2019 in support of Wimbledon's initial application to Nicklin J. This witness statement was later exhibited to the first affidavit in support of the committal application sworn on 5 September 2019 by Emma Elizabeth Shaw, who is also an associate solicitor at Kerman & Co. There is a helpful summary of the background in the skeleton argument of counsel for Wimbledon, upon which the following account draws.

9. The Championships are controlled, managed and promoted by AELTC. They are traditionally held over a period of two weeks in late June or early July. In 2019 the Championships ran from 1 to 14 July.

10. The Championships have never been run as a purely commercial venture with profit as the foremost motive. After the expenses of maintaining the premises have been defrayed, the financial surplus is used for the general benefit of British tennis. Tickets

available to the general public have always been priced at a reasonable level, and distributed through a carefully controlled ballot which is designed to offer equality of opportunity to purchase them. Other tickets are distributed to members, officials and various affiliated organisations, both at home and abroad.

11. Each year two types of tickets for the Championships are issued by AELTC. Debenture tickets do not show a price, and they are fully transferable without restriction. These tickets are issued to debenture holders of AELTC. All other tickets have since 1991 been issued at a face value shown on the ticket, and are subject to conditions of the general nature I have already indicated: they may not be purchased or obtained from or through any person other than AELTC or its authorised agents; they are strictly non-transferable; they remain the property of AELTC at all times; and any ticket obtained in violation of the restrictions is to be treated as void. These tickets are referred to in the evidence as Non-Transferable Wimbledon Tickets, or "NTWTs".

12. Despite these conditions, and despite the sustained efforts of AELTC to enforce them, every year there are individuals and organisations which acquire a number of NTWTs (either legitimately or from third parties) and seek to sell them on, usually at grossly inflated prices, either outside or near the grounds, or increasingly over the internet. Part of the work carried out by AELTC includes monitoring the internet for tickets to the Championships which are advertised for purchase or sale, and carrying out further investigation into such advertisements. Mr Glasson describes how, in July 2017, an agent acting on behalf of AELTC became aware that Mr McKay, using the alias Peter Raven, was operating a private group on Facebook for tickets to the 2017 Championships. The group was kept under observation, and at least two agents of AELTC were accepted as members of it. Mr McKay was seen to be advertising to buy and sell tickets for both the 2017 and the 2018 Championships.

13. In May 2019, Mr McKay changed the name of the group to "Wimbledon 2019 tennis ticket enquiries debentures".

14. On 3 July 2019, an agent who had infiltrated the group in 2018 under the pseudonym of "John Denning" offered for sale to Mr McKay two NTWTs for the Centre Court on 5 July 2019, that is to say the Friday of the first week of the Championships. Mr McKay replied saying "OK I'll buy them", without asking whether they were debenture tickets or NTWTs. The agent informed Mr McKay that the face value of each ticket was £108, and he suggested a price of £350 for the pair. At this point Mr McKay asked to see a picture of the tickets, which was duly supplied and from which it was apparent that the tickets were not debenture tickets. Mr McKay then raised this problem with the agent, and asked for a price reduction. After further negotiation, a price of £225 for the pair was accepted and arrangements were made for the parties to meet at a public house in Central London.

15. The rendezvous took place at around 2.30pm on 4 July. A second agent acting on behalf of AELTC was instructed to deliver the tickets to Mr McKay. After they had contacted and introduced each other, each using a false name, a discussion ensued in the course of which Mr McKay (calling himself "Luke") made repeated references to his "boss", and also made or received a call on his mobile phone which identified the other party to the call as "Greg Shep". For reasons which I need not elaborate, Wimbledon believes that this was a Mr Greg Shepherd, who had applied for tickets in the 2011 ballot using the same phone number.

16. The upshot of the discussions was that the second agent gave the tickets to Mr McKay in exchange for a cash payment of £250. On 5 July, two individuals were found to be in possession of the tickets within the grounds, and it eventually transpired that they had been purchased through a website controlled by a Spanish company which has been associated with many unauthorised sales of NTWTs over the years.

17. In the light of this evidence, it appeared plain to Wimbledon that Mr McKay was in the business of buying NTWTs for the Championships, that he was well aware of the different ticket types available, and that he can only have been purchasing them with a view to their onward transfer or sale.

Proceedings

18. On 9 July 2019 Wimbledon issued proceedings against Mr McKay and made an application without notice for urgent interim relief which was heard by Nicklin J. The application was supported, as I have said, by Mr Glasson's first witness statement, in which he identified the relevant causes of action as (a) procuring breaches of contract by those to whom the NTWTs are issued, (b) inducing those to whom such tickets are sold by Mr McKay to trespass on the premises, and (c) being party to an unlawful means conspiracy against Wimbledon. Orders were sought for delivery up of any NTWTs that Mr McKay might hold, and for the provision of information identifying those from whom Mr McKay had bought, or to whom he had sold, such tickets. Wimbledon were represented on the application by Mr Rowntree, who has much experience of applications of this type. Apart from Mr Glasson's evidence, the judge was also provided with a claim form and draft particulars of claim, which fleshed out the causes of action adumbrated by Mr Glasson in his statement, albeit in rather generic terms in the absence of specific information about other transactions in which Mr McKay had been involved.

19. The application was successful, and by his order ("the 9 July Order") Nicklin J granted an interim injunction restraining Mr McKay from offering or exposing for sale or otherwise trading in NTWTs for the 2019 Championships until a return date at 3pm on Thursday 11 July.

20. Paragraph 3 of the 9 July Order contained the provisions for disclosure of information of which Mr McKay was later found to be in breach, as well as an order for immediate delivery up of any NTWTs in his possession, custody, power or control.

21. By paragraph 3(c), Mr McKay was ordered by no later than 4.30 pm on 11 July (unless the court otherwise ordered) to make and serve on Wimbledon's solicitors a signed witness statement and exhibits thereto:

> "(i) Setting out so far as is practicable full details of every transaction or contract pursuant to which [*Mr McKay*] whether by himself, or through a third party company, individual or otherwise, has purported to buy or otherwise obtain [*NTWTs*] and/or associated hospitality, including but not limited to:
>
> (1) full details of the identity of the party with whom the transaction or contract was made including names and addresses and other contact details…;

> (2) full details of when and where any transaction in [*NTWTs*] took place, between whom on each side, what form it took, whether it was made orally or in writing, what tickets were bought under it, and all other terms of the transaction, exhibiting originals or copies of all [*relevant documents*] including bank statements for all accounts held by [*Mr McKay*] …;
>
> (ii) Setting out so far as is practicable full details of every transaction or contract pursuant to which [*Mr McKay*] whether by himself, or through a third party company, individual or otherwise has purported to sell or transfer [*NTWTs*] and/or associated hospitality, including but not limited to:
>
> [*full details in similar terms to those required under sub-paragraph (i)*];
>
> (iii) confirming [*his*] compliance with paragraphs 3(a) and (b) of this Order [*which related to delivery up of NTWTs, and certain notification requirements*]."

22. Importantly, paragraph 3(d) of the 9 July Order then stated that:

> "If the provision of any of this information is likely to incriminate [*Mr McKay*], he may be entitled to refuse to provide it, but must set this out fully in the witness statement. [*Mr McKay*] is recommended to take legal advice before refusing to provide any information referred to in this Order. Wrongful refusal to provide the information is contempt of court and may render [*him*] liable to be imprisoned, fined or have his assets seized."

23. Paragraph 4 then provided that the 9 July Order was to be served "as soon as practicable". The order was prefaced with a prominent penal notice in standard terms, although it contained a slight error about his address in Kent which was subsequently corrected following enquiry by service agents.

24. Efforts to effect personal service on Mr McKay on 10 July 2019 proved unsuccessful, although the statement of the process server leaves little (if any) room for doubt that Mr McKay was present at the relevant address and threatened the process server with violence if he refused to go away. Copies of the 9 July Order, the claim form, draft particulars of claim, Mr Glasson's witness statement, counsel's skeleton argument, an attendance note of the hearing, and other supporting documents were all posted through the letterbox at the property; and the process server deposed to his belief that the documents would thereupon have come to the immediate attention of Mr McKay, who was deliberately evading service.

25. On the return date, 11 July 2019, Mr McKay was neither present nor represented. The evidence before the court explained the efforts which had been made to effect personal service on him, and included the process server's statement which I have summarised. By his order of that date ("the Continuation Order"), the judge ordered that paragraphs 2 and 3 of the 9 July Order "shall continue in full force and effect until further order of the court". Mr McKay was also ordered to pay Wimbledon's costs of the applications on 9 and 11 July, summarily assessed in the sum of £15,000, by 4pm on 25 July 2019. The order also informed Mr McKay of his right to apply to set aside or vary the order, which had been made in his absence, but directed that any such application must be made by Friday 19 July 2019.

26. It appears that Nicklin J was invited by counsel to express a view on the question whether personal service had been effected on Mr McKay on 10 July, but the judge declined to be drawn on the question. No application was made either for substituted service of the 9 July Order, or for personal service of it to be dispensed with.

27. At 9 pm on 16 July 2019, Mr McKay was personally served at his home address, by the same process server who had attended on 10 July, after Mr McKay had verbally identified himself to the process server. The documents served were the same as those which had been posted through the letterbox on the previous occasion, together with the application notice for the return date hearing. The documents did not, however, include the Continuation Order itself, or any other documents relating to the hearing on 11 July.

28. During the rest of July and August 2019, various communications took place between Mr McKay and Kerman & Co. These are set out in Emma Shaw's first affidavit in the committal proceedings. The salient points which emerge from this evidence are:

> (a) Mr McKay was clearly well aware of his obligations under both the 9 July Order and the Continuation Order, although he seems to have misunderstood the deadline for payment of costs on 25 July in the latter order as implying that there would be a further court hearing on that date;
>
> (b) Mr McKay consulted the Personal Support Unit ("PSU") on 26 July, and with their assistance offered to settle the costs due under the Continuation Order by instalments. The PSU also helped him to prepare a letter, which he delivered by hand to Kerman & Co's offices, in which he explained various personal difficulties which he was facing and said (among other things) that he did not intend to sell tickets anymore;
>
> (c) Kerman & Co explained to Mr McKay on several occasions what he needed to do in order to comply with his obligations under the 9 July Order and recommended that he seek legal advice, helpfully pointing out various ways in which this might be obtained;
>
> (d) Mr McKay was given four extensions of time in correspondence to comply with his obligations under the 9 July Order, the last of which expired on 27 August 2019. Despite these opportunities, he failed to produce a witness statement, and on 27 August he wrote to Kerman & Co saying it was not in his interest to sign a statement of truth without legal representation. He said he was suffering from bereavement and depression, and also had a drug problem. He

> asked to be taken to court, where he would request legal aid because the situation was unfair and he needed someone to help him make the right decisions; and
>
> (e) It was made very clear to Mr McKay, on numerous occasions, that Wimbledon would seek to enforce the 9 July Order, in the event of continued non-compliance, by issuing an application to commit him to prison. During a conversation with Ms Shaw on 6 August, Mr McKay told her that he would do whatever "*time*" he was required to do, but that he was "*not going to grass up my friend Greg*". He said he would "*rather do 10 years or die in prison than grass someone up who is so close to me*". Mr McKay also said during this conversation that he had a ban from football, was depressed and had mental health problems. In a further conversation with Ms Shaw on 20 August, Mr McKay again said he was worried that he might incriminate himself if he provided something in writing without legal advice.

29. On 5 September 2019, Wimbledon issued the committal application. The application notice contained a prominent penal notice in the form set out in Annex 3 to the Practice Direction supplementing CPR Part 81. Mr McKay was then informed that the application was made in Wimbledon's claim against him, and the alleged contempt was formulated as follows:

> "The Claimants seek an order that the Defendant be committed to prison by reason of his contempt of Court. The Defendant is in contempt by failing to swear, file and serve on the Claimant's solicitors, a witness statement in compliance with paragraph 3(c)(i) and 3(c)(ii) and 3(c)(iii) of the Order of the Honourable Mr Justice Nicklin dated 9 July 2019."

The application was supported by the first affidavit of Ms Shaw, wrongly described in the application notice as "the attached witness statement". A draft order was also attached to the application. Notice was given that the application would be heard on 30 October 2019.

30. Although no point has been taken on Mr McKay's behalf about the form of the application notice, it was defective in a number of respects. First, the statement of the alleged contempt, which I have set out above, did not comply with CPR rule 81.10(3)(a), which says that it must:

> "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; …"

Apart from the absence of a separate numbered ground of committal, no indication is given of the date on which Mr McKay was alleged to have been in contempt by reason of his failure to comply with paragraph 3(c) of the 9 July Order. This is not a triviality, because Mr McKay could hardly have been alleged to be in contempt before the expiry of the last of the informal extensions for compliance agreed between him and Kerman & Co, on 27 August 2019. Furthermore, on a strict view, Mr McKay could not fairly be at risk of committal for failure to comply with the 9 July Order before the deadline of 4.30pm on 11 July contained in paragraph 3(c), because the order was not served

personally on Mr McKay until 16 July. By that date, the order of which Mr McKay was in breach was paragraph 1 of the Continuation Order, but that order was never served personally on Mr McKay, nor was any time ever fixed by the court for him to comply with it: see generally CPR rule 81.5(1) and 81.6 (the latter of which requires personal service of "copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act").

31. Secondly, the alleged contempt was that Mr McKay had failed to "swear" a witness statement, but there was no requirement in the 9 July Order for the relevant information to be provided by way of affidavit. The only formal requirement was that the witness statement should be verified by a statement of truth in the usual way.

32. Thirdly, it is perhaps unfortunate, although Kerman & Co cannot be blamed for this, that the form of penal notice in Annex 3 to PD 81 includes the statement "if you consider the allegations are not true, you must tell the court why". That wording does not sit easily with the long-established right of an alleged contemnor not to give evidence, and to require the alleged contempt to be proved against him to the criminal standard. Like the defendant in a criminal trial, a person accused of contempt has the right to remain silent: see Comet Products UK Limited v Hawkex Plastics Limited [1971] 2 QB 67 (CA). It is the duty of the court to ensure that the accused person is made aware of that right, and also of the risk that adverse inferences may be drawn from his silence: see Inplayer Limited v Thorogood [2013] EWCA Civ 1511, unreported, at [40], per Rupert Jackson LJ, noted in the White Book (2019 edition) at para 81.28.4.

33. On 24 September 2019, Wimbledon's application for judgment in default of acknowledgment of service under CPR rule 12.3(1) against Mr McKay was heard by Master Eastman. Mr McKay attended the hearing in person. Judgment was entered for Wimbledon on their claim, including a final injunction restraining Mr McKay from dealing in NTWTs, with liberty for Wimbledon to apply for an enquiry as to damages or an account of profits. Permission was also obtained from Master Eastman to serve Mr McKay with the committal application at court, and Ms Shaw then did so.

34. The first hearing of the committal application took place on 30 October 2019, before Chamberlain J. In a judgment of conspicuous clarity, which he delivered that afternoon, he described the history of the case to date and explained the problems which had arisen at the hearing, which Mr McKay did not attend. A friend of his had arrived, with a letter addressed "to whom it may concern" from a Dr D Patel of the Cator Medical Centre in Beckenham, Kent. This letter said of Mr McKay:

> "The above patient who is registered at our practice is under review with ongoing mental health issues of low mood, agoraphobia and panic. He is currently receiving medication for this and tells me that he finds it hard to leave the house and travel due to his symptoms. I would be grateful if you would take this into account with his upcoming court hearing."

Having read this letter, the judge adjourned the hearing until 2pm, inviting Kerman & Co to inform Mr McKay by telephone and email that his attendance was required, that the judge would consider issuing a bench warrant if he failed to do so, and that it was in his interest to attend because among the issues the judge wished to consider was

whether he should make a representation order to enable him to be represented. The judge also indicated that the medical evidence, as it stood, was insufficient to enable him to reach the view that it would be detrimental to Mr McKay's mental health to proceed with the hearing.

35. These steps were duly taken, but Mr McKay did not appear at 2pm. In deciding how to proceed, the judge reviewed recent authority which made it clear that criminal legal aid was available as of right to an alleged contemnor in civil contempt proceedings, but that there was considerable uncertainty whether such legal aid could be granted by the High Court (as Blake J had held, accepting submissions made to him on behalf of the Legal Aid Agency ("the LAA"), in King's Lynn and West Norfolk Borough Council v Bunning [2015] 1 WLR 531), or whether (as the LAA had submitted in a later case) it was the LAA, not the court, which had the power to do so. As the judge observed, at [28]:

> "… the authorities I have mentioned provide ample support for the proposition that even lawyers, never mind litigants in person, may find it difficult to understand how to go about obtaining legal aid in cases like this… The lack of clarity creates a real problem for individuals like the defendant who seek legal representation and for courts dealing with civil contempt cases. I consider that the issue needs to be determined and I am minded to give directions for a hearing, on notice to the Legal Aid Agency to determine it."

36. The second problem identified by the judge was that Mr McKay could only benefit from legal representation if he was prepared to engage with legal representatives and the court. The doctor's letter was deficient in a number of respects, and did not in any event satisfy the well-known guidance given by Norris J in Levy v Ellis-Carr [2012] EWHC 63 (Ch) at [36] and expressly approved by this court in Forresters Ketley v Brent and Another [2012] EWCA Civ 324 at [26]. As Norris J there said, of the evidence in that case:

> "In my judgment it falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

37. In order to accommodate and address the two problems which he had identified, Chamberlain J adjourned the application until Friday 8 November. He directed that the LAA be notified of the hearing, and he invited it to attend to make submissions on the question whether the court had power to make a legal aid determination in Mr McKay's favour. He also directed Mr McKay to attend the adjourned hearing, unless by 6 November he filed at court and served on Kerman & Co written evidence from a medical practitioner which complied with the requirements in Levy v Ellis-Carr. Mr McKay was warned that, if he failed to comply with that direction, it was likely that a bench warrant would be issued for his arrest.

38. On 7 November 2019, Kerman & Co received an email from Adam Tear, a solicitor at Hodge, Jones & Allen ("HJA"), stating that Mr Tear had been approached by Mr McKay, and that subject to a verification check the following week Mr Tear would apply to the LAA for funding.

39. At the adjourned hearing on 8 November 2019, Mr McKay attended in person. The court heard submissions from Mr Rimer of the LAA, and proceeded to deal in substance with the question whether the court or the LAA was the appropriate body to grant funding in civil contempt applications, deciding that the LAA was: see [2019] EWHC 3065 (QB). Mr Rimer informed the court that Mr McKay would be entitled to legal aid without any assessment of means or of the merits of the case, and that such applications were normally determined within 48 hours. Accordingly, once Mr Tear had met his client, he should make an application for criminal legal aid to be granted by sending an application to a designated email address.

40. On 11 November 2019, Mr Tear asked Kerman & Co for a copy of the papers in the committal proceedings in electronic format, so that he could obtain legal aid and go on the record. Kerman & Co provided a link to those materials on the same day.

41. On 18 November 2019, Jayesh Kunwardia, of HJA, informed Kerman & Co by email that he had taken over conduct of the matter from Mr Tear, and that Mr McKay had recently been granted legal aid. On 21 November, HJA requested an electronic copy of the bundles for the committal application, and on 26 November HJA informed Kerman & Co that they were in the process of taking instructions.

42. At the hearing on 8 November 2019, the committal application had been again adjourned until 29 November for Mr McKay to obtain legal aid. On 27 November, HJA sent a letter to the court which was copied to Kerman & Co. The covering email from HJA said that the letter was self-explanatory, and that HJA had no objection to Kerman & Co or counsel referring it to the court should the court fail to receive it. Counsel for Mr McKay initially objected to this court seeing the letter, on the ground that it was privileged. Since the letter had been addressed to the court, this was an unpromising contention; but it led Wimbledon to issue an application on 13 March 2020 seeking permission for it to be placed before the court. We adjourned this application to be heard with the appeal. In the event, we indicated that we could see no possible grounds upon which the letter might be privileged, as it did not refer to the content of any legal advice given to Mr McKay, and Mr van Dellen withdrew his objection.

43. The letter of 27 November 2019 said this:

> "We met with the Defendant in conference with counsel and assisted the Defendant to prepare a witness statement to use in these proceedings. We understand the Defendant will arrange for his witness statement to be filed at Court and to be served on the claimant's solicitor.
>
> Unfortunately, we are no longer able to assist the Defendant in these proceedings therefore we will no longer be attending the hearing on Friday 29 November 2019. We have been informed that the Defendant will be attending the hearing in person.
>
> As far as we are aware we are not on the Court record despite any references made by the Defendant of Hodge Jones & Allen Solicitors being on the record. For the avoidance of doubt, if we are on the Court record then we wish to be removed."

The hearing on 29 November 2019

44. This was the hearing at which the Committal Order was made, which is the subject of Mr McKay's first appeal. It took place before Judge Freedman, who had evidently received and read HJA's letter of 27 November. Mr McKay appeared in person. We have been provided with a full transcript of the hearing, as well as the approved transcript of the judgment.

45. In his judgment, the judge summarised the factual background and referred to the two judgments given by Chamberlain J. He continued, in a passage which I need to cite in full:

> "5. The defendant obtained legal aid. He tells me he has had the benefit of legal aid for about three weeks. In that time, he has consulted one firm of solicitors, Hodge, Jones & Allan. It was thought at one stage that a Mr Tear, who was then employed by that firm would represent the defendant. That has proved not to be the case. They have sent a letter dated 27 November 2019, where they have made it clear that they are not able to assist the defendant in these proceedings, although they did help him to prepare a witness statement. Mr McKay tells me today that he does not agree with the contents of the witness statement that has been prepared on his behalf and accordingly, he is not willing to show it to me.
>
> 6. This is the third application to commit and still there is no signed witness statement from Mr McKay. He accepts, as he must, that he has wilfully failed to comply with the order of the Court and he accepts that he is thereby in contempt of Court. He has also made it clear to me that he is unwilling to comply in the future with the order of the Court because, he says, he is not willing to identify a third party, who is involved in ticket touting. I apprehend that is Mr Shepherd. He says that he "would rather

> go to prison than be a grass". That is his choice but the order stands and he must obey it for, otherwise, he will indeed go to prison, as I have made abundantly plain to him. I am going to give him one final chance to purge his contempt but the sanction for contempt of Court will be a prison sentence, albeit that it will be suspended. Bearing in mind the nature of the activity which gave rise to the need for the claimants to obtain an injunction, fraudulent, dishonest action, at least on its face, this is a very serious contempt of Court.
>
> 7. Someone in the defendant's position must, when found out, cooperate for it is only through the cooperation of people like Mr McKay that the claimants can stamp out, or seek to stamp out ticket touting, it should be borne in mind that ticket touting is a detrimental activity, not just to the claimants but to other members of the public who want to go and watch tennis but cannot obtain tickets legitimately because they are in the hands of ticket touts. They are a non-profit making organisation and they have to zealously guard the proceeds of ticket sales. If ticket touts are able to abuse and exploit the Claimants' arrangements of sale and purchase of NTWTs, then that potentially causes serious harm.
>
> 8. As I say, what it is alleged the defendant has done, is serious. His failure to cooperate in such circumstances is also serious. It is also the fact that he has had, now, three separate opportunities to come before the Court and do that what is required of him and thereby purge his contempt. He has wilfully failed to do so and he tells me he will not do so in the future, so be it. There will be a prison sentence of six months duration. That will be suspended but suspended only for a period of 14 days and it is on terms that he complies, in full, with the order of Nicklin J, made on 11 July of this year.
>
> 9. He knows what he has to do. He knows what the outcome will be if he does not do what he is required to do. He has the benefit of legal aid. He should consult solicitors and then provide a witness statement with a statement of truth. If he does not, then the sentence of the Court will be activated and he will serve a term of six months' imprisonment."

46. It will be noted that the judge proceeded on the footing that Mr McKay had accepted, "as he must", that he had wilfully failed to comply with the order of the court, and that he was thereby in contempt of court. There is no indication in the judgment that the judge gave any consideration to imposing a non-custodial sentence, or that he gave Mr McKay any opportunity to make a plea in mitigation before he was sentenced. Moreover, the suspension was said by the judge to be on terms that Mr McKay complied, in full, with the order of Nicklin J made on 11 July 2019, i.e. the Continuation Order. However, the order of the court, as drawn, recorded that the court was satisfied

that Mr McKay was guilty of contempt in failing to comply with paragraphs 3(c)(i), 3(c)(ii) and 3(c)(iii) of the 9 July Order, and the purpose of the suspension was (by inference) to enable Mr McKay to purge the contempt of which he had been found guilty.

47. These criticisms may appear technical, but they are not assuaged by perusal of the transcript of the hearing, which began at 10.30 am and concluded after judgment had been delivered some 40 minutes later at 11.10 am. The hearing began with Mr Rowntree, for Wimbledon, introducing Mr McKay and referring to the bundles and skeleton arguments, all of which the judge said he had read. Mr Rowntree then explained the legal aid position, and referred to HJA's letter of 27 November. Mr Rowntree then said:

> "So, the position we are in this morning, My Lord, and before I make any detailed submissions, is that we are no further forward from the last hearing."

The judge agreed, and Mr Rowntree added that no witness statement had been filed by Mr McKay, unless the court had seen one.

48. The judge then addressed Mr McKay directly, and elicited that he had put together a draft witness statement with the assistance of HJA, but Mr McKay said he did not like it "so I'm not going to give it to you. I'm going to write a letter to you myself. I have got – I suffer from [inaudible] so if I stutter…" The judge then told Mr McKay not to worry about that, and explained that "I do not want a witness statement from you which is not your witness statement." Mr McKay then confirmed that he did not agree with any of his draft statement, to which the judge replied, "Well then, I am not interested in seeing it."

49. The exchange continued:

> "JUDGE: However, however Mr McKay, this is not a situation where you can start writing letters. An order was made as long ago as 9 July of this year, ordering you to produce a statement with a statement of truth.
>
> MR MCKAY: Yes.
>
> JUDGE: You have not done that, have you?
>
> MR MCKAY: No, … the reason I haven't done that is because to start off with I didn't have no legal representation so I did not know what to write… and they just want me to name one person that's on the phone and that's really what this is all about. And I'm not willing to name anyone.
>
> …"

50. The judge then put it to Mr McKay, rather in the manner of counsel cross-examining a recalcitrant witness, that an order had been made requiring Mr McKay to produce a

signed witness statement, on pain of imprisonment for contempt of court if he did not obey it. The judge said:

> "There is no scope for you to say to me, "I don't want to do that". If you refuse to do it, you go to prison. Is that understood?"

The judge added that he "would be perfectly justified in sending you to prison today", to which Mr McKay replied: "Yes. But that's what's going to have to happen then Sir, I'm sorry".

51. The judge then pressed Mr McKay to accept that he had not done what he had been ordered to do, and when Mr McKay objected that he had good reason for his failure, in the absence of legal advice, and it was only three weeks since he had been granted legal aid, the exchange continued:

> "JUDGE: Yes, you have had three weeks.
>
> MR MCKAY: And –
>
> JUDGE: And it takes –
>
> MR MCKAY: Sir.
>
> JUDGE: One appointment with a solicitor to put the statement together, that is all it is.
>
> MR MCKAY: Okay.
>
> JUDGE: I will ask you again, do you accept that you have not done what you were required to do?
>
> MR MCKAY: Yes, I accept it.
>
> …
>
> JUDGE: Do you accept that by not doing that, you are in contempt of Court?
>
> Mr MCKAY: Yes, I do yes.
>
> JUDGE: What are you going to do about your contempt of Court?
>
> MR MCKAY: I don't know how to change that, Sir.
>
> JUDGE: Well, what you have to do is to produce a witness statement in accordance with this order.
>
> MR MCKAY: Well, what it is Sir, the person who questioned me –
>
> JUDGE: I am not interested in any excuses.

> MR MCKAY: I am not willing to name friend, Sir.
>
> JUDGE: Well, Mr McKay, this is last chance saloon –
>
> MR MCKAY: Okay.
>
> JUDGE: I am going to make an order today, which will involve you having a prison sentence hang over your head.
>
> MR MCKAY: Okay, Sir –
>
> JUDGE: And if you do not comply with this order, to prison you will go.
>
> MR MCKAY: Okay, I accept that Sir.
>
> JUDGE: Right.
>
> MR MCKAY: I will have to take it on the chin.
>
> JUDGE: All right, so be it. But you need to understand exactly what you have to do if you are to avoid going to prison.
>
> MR MCKAY: I can't be named as a grass, Your Honour, I can't, I can't, I've got mental health problems as it is and I can't deal with that, I'm sorry."

52. After some further exchanges in a similar vein, Mr McKay said that he would like to show the judge his doctor's letter, to which the judge replied that he could do so, and he would look at it, but he had already seen a doctor's letter saying that Mr McKay had certain mental health issues, which would not exonerate him from being involved in ticket touting. The judge said he took into account that Mr McKay had a medical appointment, and that he had mental health issues, "but you are still able, and must, do what the Court has ordered". The judge asked if there was anything else Mr McKay wanted to say, to which Mr McKay said No, and the judge replied "That is all right. You sit down."

53. Turning to Mr Rowntree, the judge continued:

> "Well, Mr Rowntree, you have heard what I have had to say to Mr McKay. The time has come when the Court is going to deal with his committal. I can deal with it fairly shortly. I do not think I need you to even open the case, you set it all out in your very helpful skeleton arguments. I have made it very clear I am going to impose a suspended prison sentence. I am going to give him 14 days to comply with the order of Nicklin J and if he does not, then the matter will come back to Court and he knows what the consequences are."

54. There was then some discussion between Mr Rowntree and the judge about the need for a further hearing in the event of continued non-compliance by Mr McKay, followed by a brief discussion of the authorities on sentence for civil contempt which Mr Rowntree had included in the bundle and the judge said he had read. Reference was made to the recent decision of this court in Corrigan v Chelsea Football Club [2019] EWCA Civ 1964, [2019] Costs LR 2097, where Kerman & Co and Mr Rowntree had acted for Chelsea Football Club in a case with some similarities to the present one. The defendant in that case, Mr Corrigan, had arranged to sell to an agent of the football club a ticket with a face value of £23.50 for £125, payable in cash, for a home game that evening against West Ham United. The transaction took place near to the football club's ground at Stamford Bridge. After Mr Corrigan had been identified as the vendor, civil proceedings were commenced against him in the High Court, and on a without notice application by Chelsea, Stewart J granted wide ranging relief by way of negative injunctions and mandatory orders for disclosure. Mr Corrigan then failed to comply with the mandatory orders, and took no part in the proceedings. On the second occasion when he failed to appear, Murray J made an order committing him to prison for six months, suspended for a short period to give him a final opportunity to comply. He still did not do so, and on the return date Murray J lifted the suspension. At a further hearing, after Mr Corrigan had been arrested under a bench warrant, the immediate term of imprisonment was confirmed. Mr Corrigan appealed to this court, but his appeal was dismissed. The leading judgment was delivered by Davis LJ, with shorter concurring judgments by McCombe and Asplin LJJ.

55. After some discussion of the Corrigan case, Mr Rowntree observed that "in this case obviously we are many stages down the line from that", by which I understand him to have meant that, unlike Mr Corrigan, Mr McKay had been given every opportunity to seek legal representation, and had indeed obtained legal aid before he parted company with HJA shortly before the hearing. Mr Rowntree added, quite properly, that the length of sentence was a matter for the judge's discretion, and he would not seek to persuade the judge one way or the other. The judge then proceeded to deliver his judgment.

56. A number of concerns arise from the way in which the hearing was conducted by Judge Freedman, apart from those which I have already mentioned in connection with his judgment. This was the first fully effective hearing of the committal application, after an adjournment to enable Mr McKay to obtain legal aid; but he was still unrepresented, in circumstances where the solicitors whom he had instructed (HJA) had very recently said that they were no longer able to act for him. HJA's letter to the court of 27 November did not reveal the reason for the breakdown, presumably because they could not do so without revealing privileged information. However, the judge knew from the letter that HJA had helped Mr McKay to prepare a witness statement for use in the proceedings, and that he had attended a conference with counsel. Furthermore, the letter envisaged that the witness statement would be filed and served by Mr McKay so that he could rely upon it at the hearing, although if he chose to do so he would then be liable to cross-examination.

57. In those circumstances, a careful and cautious approach was clearly called for. Regrettably, however, the judge descended almost immediately into the arena by engaging in the lengthy dialogue with Mr McKay which I have recounted. At no stage was Mr McKay informed of his absolute right to silence, or of his privilege against self-incrimination. Nor did the judge seek to find out whether he was content to proceed

without legal representation, or whether he might wish to apply for a further adjournment. Instead, the judge proceeded, through the use of leading questions, to extract from Mr McKay admissions that he had not done what he was ordered to do, and that he was thereby in contempt of court. Furthermore, the judge seems to have treated it as a foregone conclusion that the appropriate penalty would be a sentence of imprisonment, albeit suspended in order to give Mr McKay one last opportunity to comply with the order. Mr McKay's concerns about grassing on his friend were brushed aside on the basis that the judge was "not interested in any excuses", and this was "last chance saloon". The judge was equally unimpressed by Mr McKay's mental health issues, saying they could not exonerate him from being involved in ticket touting.

58. I have no doubt that the judge was acting with the best of intentions in proceeding as he did. I also have no doubt that, as Mr Rowntree assured us when we raised our concerns with him, he would have intervened if he thought that there was any risk of unfairness or injustice to Mr McKay in the way the hearing was being conducted. Nevertheless, I am bound to say that in my view, as disclosed by the transcript, the conduct of the hearing fell far short of the high standards expected in an application for the committal of an unrepresented litigant in person. Where the liberty of the subject is at stake, procedural fairness is of cardinal importance; and if the defects in an application for committal are material, in the sense of rendering the process unfair or unjust, this court will have no option but to allow the appeal, regardless of the underlying merits, on the simple ground that the defendant was denied a fair trial. Whether the process is unfair or unjust is a quintessentially fact-specific question; and whether the process in this case was in fact unfair or unjust such that this appeal must be allowed is a question which has caused me much anxiety. I shall return to that issue (see paragraph 107 and following below); but before considering it I will complete the narrative of events and deal with the specific grounds of appeal which are advanced on Mr McKay's behalf.

The December hearing

59. In her second affidavit dated 11 December 2019, Emma Shaw confirmed that as of that date no witness statement from Mr McKay had been served on Kerman & Co. She also explained that, on 30 November 2019, she had received an unsolicited email from Mr van Dellen which offered to assist Mr McKay on a pro bono basis, and asked for his offer to be forwarded to Mr McKay. Ms Shaw duly did so, and on 3 December Mr van Dellen was instructed by Mr McKay. On 8 December, Mr van Dellen sent by post a notice of acting to Kerman & Co, which they received on 11 December. Meanwhile, Mr van Dellen had attempted without success to obtain the papers from HJA, and Ms Shaw had agreed to provide him with copies of the hearing bundles, which she did on 10 December.

60. As the hearing before Nicol J on 13 December, Mr van Dellen appeared with Harry O'Sullivan for Mr McKay and Mr Raffin appeared for Wimbledon. Mr van Dellen and his junior produced a skeleton argument for the hearing which took a number of points as to why Judge Freedman ought not to have found Mr McKay to be in contempt of the 9 July Order, but in argument Mr van Dellen accepted that most of those points could only be pursued in an appeal against the order of 29 November. No notice of appeal against that order had yet been filed, but time for doing so would not expire until 20 December. There were, however, two arguments which Mr van Dellen said he could properly pursue. The first argument was that Mr McKay could not be required to

incriminate himself, and that this principle would be violated if action were now taken against him because of his failure to make a witness statement in compliance with the condition of suspension of Judge Freedman's order. Nicol J rejected this submission, because once Mr McKay had been found to be in contempt of court, the privilege against self-incrimination was no longer relevant when the only issue was whether he had complied with the suspension condition. In so concluding, the judge referred in his judgment to the decision of this court in Phillips v Symes [2003] EWCA Civ 1769 at [50(7)] and [54 (iv)]: see [2019] EWHC 3874 (QB) at [4].

61. Mr van Dellen's second argument was that, having already been punished by Judge Freedman's order, Mr McKay would face double punishment if the suspension were now lifted. The judge had no difficulty in rejecting this submission, for the obvious reason that the purpose of the suspension had been to give Mr McKay a last opportunity to comply with the 9 July Order. As he said, at [6]:

> "In my judgment, this is not double punishment, this is simply bringing into effect the order of committal made by Judge Freedman and the condition of its suspension not having been observed."

62. In those circumstances, it being common ground that Mr McKay had still not filed a witness statement and that the suspension condition was therefore not satisfied, the judge made the order which I have already summarised: see [4] above. In short, the suspension was lifted, but the order lifting the suspension was itself stayed until 20 December 2019, to allow Mr McKay to file a notice of appeal against the committal order; and if such an appeal was lodged, a further stay was ordered until the determination of the appeal by this court.

63. Having set out the background, I can now turn to the grounds of appeal. I will begin with the appeal against Judge Freedman's order of 29 November 2019, since the appeal against the second order made on 13 December 2019 adds little of substance to Mr McKay's case.

Grounds of appeal against the order of 29 November 2019

64. Nine grounds of appeal were set out in Mr McKay's appellant's notice, but these were reduced to five in the skeleton argument of Mr van Dellen and Mr O'Sullivan in support of the first appeal. In summary, those grounds are as follows:

> (1) Ground 1: Mr McKay had a right not to self-incriminate and consequently should not have been found in contempt. The existence of that right in civil proceedings was affirmed by section 14(1) of the Civil Evidence Act 1968, and it was not implicitly repealed by section 13 of the Fraud Act 2006.
>
> (2) Ground 2: Wimbledon's evidence in support of the committal application was not all given by affidavit, as required by CPR rule 81.28(1) and 81PD paragraph 14.1, nor had Wimbledon applied for or been granted permission to dispense with that requirement.

> (3) Ground 3: Personal service of the 9 July Order was not effected on Mr McKay before the initial deadline for compliance with it on 11 July 2019; nor did any subsequent order fix a further date by which Mr McKay was obliged to comply with it. Again, Wimbledon never applied for, nor were they granted, dispensation from the requirement of personal service of the 9 July Order before the time fixed for compliance with it had expired.
>
> (4) Ground 4: Wimbledon relied on hearsay evidence which was inadmissible in civil contempt proceedings.
>
> (5) Ground 5: The committal hearing was procedurally unfair because Mr McKay's mental health conditions, which the judge explicitly recognised, meant that he was potentially unable to participate fully and fairly in the hearing on 29 November 2019.

65. In his oral submissions, Mr van Dellen chose to deal with these grounds in reverse order, so I will do likewise.

Ground 5: Health issues

66. An initial question arises as to what evidence of Mr McKay's mental health issues was before Judge Freedman at the November hearing. I have already referred to the short letter of 29 October 2019 from NHS Bromley, which Chamberlain J rightly regarded as inadequate at the first hearing before him on 30 October 2019: see [34] and [36] above. It is unclear, on the available evidence, whether Judge Freedman also had sight of a longer letter which exists in two apparently identical versions, dated respectively 1 November and 27 November 2019. The former of these was in the possession of HJA, but there is no evidence that it was ever supplied to the court by HJA, or that it was sent by them to Kerman & Co. The latter version was eventually provided to Kerman & Co on 7 January 2020, but it was presumably unknown to both Kerman & Co and Mr Rowntree at the hearing on 29 November. It seems reasonable to infer that the letter was obtained by Mr McKay on 1 November in an effort to comply with the directions given by Chamberlain J on 30 October 2019, but, if so, it still fell considerably short of the guidance in Levy v Ellis-Carr. Without opposition from Wimbledon, we agreed to look at the letter for what it was worth.

67. The writer, a general practitioner at the Cator Medical Centre, said that he had known Mr McKay for only one month, but Mr McKay had been registered with the practice since 2012. His main diagnosis was of drug dependency, for which a drug treatment programme had been prescribed and Mr McKay was now subject to "a slowly weaning programme". The letter continued:

> "My feeling however is that Mr McKay is using drugs, both illicit and prescription, to medicate chronic generalised anxiety disorder, agoraphobia and some deep-seated personality defects that leave him unable to cope with the usual demands of life. He does need further help with his mental health, but we are in a difficult position regarding this as he is not at this time willing to re-engage with drug services, and our secondary care mental health team is not willing to look after his general mental health until he tackles his drug misuse.

> As he barely leaves his house at this time, I cannot honestly see him being fit to participate in the trial process at any point… I do not of course fully understand the legal situation, but wonder if a trial does need to go ahead, whether it could be held *in absentia*."

68. Mr van Dellen submits that if (as it should have been) this letter had been before Judge Freedman, he ought to have concluded that Mr McKay was under a disability which potentially rendered him unfit to participate fully and fairly in the committal proceedings, and the judge should have gone on either to hold a "ground rules hearing" or to consider whether his participation could have been improved by the instruction of an intermediary, by analogy with the procedure under sections 33BA and 33BB of the Youth Justice and Criminal Evidence Act 1999. The judge's failure to do this had the potential to produce injustice, and the finding of contempt should therefore be set aside.

69. Wimbledon submit that (a) there was insufficient material before the court to allow the judge to conclude that Mr McKay was not in a position to participate fully and fairly in the hearing; (b) the shorter medical letter of 29 October 2019 had already been considered in detail by Chamberlain J on 30 October 2019; (c) the decision whether or not to proceed with the hearing on 29 November 2019 was a matter for the judge's discretion; and (d) the provisions of sections 33BA and 33BB of the 1999 Act are irrelevant, because they are not yet in force, and in any event they apply only to specified criminal proceedings.

70. I am willing to assume in Mr McKay's favour that this further medical evidence either was, or should have been, before the court on 29 November, and that the finding of contempt might be unsafe if it was, or would have been, unfair for the judge to proceed with the hearing without taking any steps to address Mr McKay's mental health issues. Even making those assumptions, however, the medical evidence seems to me to fall far short of establishing any real risk of unfairness to Mr McKay. Although the medical letter of 1 November 2019 was fuller than its predecessor of 29 October, it still lacked the requisite particularity to justify an adjournment or the taking of any other measures to accommodate Mr McKay's mental health difficulties. Moreover, it was wholly unclear what an adjournment might be expected to achieve, given Mr McKay's refusal to engage with his drug misuse and the lack of any concrete prognosis.

71. It is also relevant to bear in mind that the only ground of contempt alleged against Mr McKay was his refusal to produce a witness statement in compliance with the 9 July Order, and on any view he had failed to do so. There might be legal arguments to justify his refusal, but as to the fact of his failure to comply there could be no doubt. Thus, the outcome of the committal application was likely to turn on legal arguments, not on a factual enquiry into whether Mr McKay had produced a witness statement. Even if the judge had not seen the 1 November 2019 letter, I do not accept that his decision would or should have been any different if he had seen it. In those circumstances, I cannot accept that the judge's exercise of his discretion to proceed with the hearing was in any material respect unfair to Mr McKay because of his mental health issues.

72. Furthermore, Mr Rowntree makes the valid point that, if there was any merit in this argument, the right time to have taken it would have been at the hearing on 13

December 2019, when Mr McKay was represented by two counsel, but no adjournment was then sought in order to obtain proper medical evidence.

73. For these reasons, I would dismiss this ground of appeal.

Ground 4: hearsay evidence

74. Mr McKay's argument under this head is that the hearsay evidence of the unnamed agents referred to in Ms Shaw's first affidavit, and in the first witness statement of Mr Glasson exhibited to her affidavit, should not have been admitted by the court, because such evidence is insufficient to ground committal proceedings, and (in particular) Mr McKay was deprived of the opportunity to cross-examine those agents. It is said that the hearsay evidence of the first agent, who went under the name of John Denning, was the sole or at least the determinative evidence against Mr McKay, and that fairness required his evidence to be adduced in the form of an affidavit upon which he could be cross-examined.

75. As to the use of hearsay evidence generally in civil committal proceedings, we are bound, as was Judge Freedman, by the decision of this court in Daltel Europe Limited v Makki [2006] EWCA Civ 94, [2006] 1 WLR 2704, in which the leading judgment was delivered by Lloyd LJ with whom Wilson and Auld LJJ agreed. It was there held that civil contempt proceedings brought in the High Court were not criminal proceedings for the purposes of admitting hearsay evidence under sections 23 to 26 of the Criminal Justice Act 1988, but were instead to be classified as civil proceedings governed by the Civil Evidence Act 1995 and the Civil Procedure Rules (including, in particular, the provisions of RSC Order 52 as amended and appended to Schedule 1 of the CPR; those provisions are now incorporated in Part 81 of the CPR). The court went on to hold that, although civil contempt proceedings are subject to article 6 of the ECHR, the jurisprudence of the European Court of Human Rights shows that a flexible approach to the admission of hearsay evidence is appropriate, rather than its exclusion on principle, and that in a committal application the decision is one for the judge, giving reasons for the admission or rejection of the evidence: see the discussion in the judgment of Lloyd LJ at [52] to [59].

76. I can deal with this argument briefly, because Mr Rowntree was in my judgment right to submit that it is directed at the wrong target. The evidence of the anonymous agents who were employed by Wimbledon to sell and deliver the tickets to Mr McKay was relevant only to the underlying claim against Mr McKay, and to the making of the 9 July Order and the Continuation Order by Nicklin J. Those were purely civil proceedings and they have resulted in a default judgment against Mr McKay from which he has not appealed. The committal application, by contrast, was based exclusively upon his failure to comply with the disclosure orders made by Nicklin J. The evidence of the agents is completely irrelevant to the question whether Mr McKay had complied with those orders, and its only relevance is as part of the general background which led to the making of the orders in the first place. On no view could it be said that the evidence of the agents was the sole or decisive evidence against Mr McKay *in the committal application.* Mr van Dellen had no answer to this simple objection, and in my view there is none. Furthermore, in the absence of any appeal against the 9 July and Continuation Orders, it is clearly not open to Mr McKay to mount a collateral challenge to the evidence which led Nicklin J to make those orders, by way of a defence to the committal application. The general rule is that court orders must be

obeyed, unless and until they are set aside; but no attempt has been made by Mr McKay to set aside the orders, or indeed the default judgment.

77. I would therefore dismiss this ground of appeal.

Ground 3: Personal service of the 9 July Order

78. It is common ground that the 9 July Order was not personally served on Mr McKay before the time fixed by paragraph 3(c) for the making and service of the requisite witness statement by Mr McKay. As I have explained, personal service of the 9 July Order was not effected until 16 July, although the evidence of the process server leaves no real room for doubt that the relevant documents were inserted through the letter box of Mr McKay's home address at 10.35am on 10 July 2019. It is also important to note that the Continuation Order was never personally served on Mr McKay, even though that order was the source of his continuing obligation after 11 July 2019 to make and serve the witness statement.

79. Mr Rowntree accepts that no application was made for an order for alternative service of the 9 July Order under CPR rule 81.8(2)(b). He also accepts that, in the case of a mandatory order, a committal order may only be made where there has been a refusal or neglect to do something within the time fixed by the judgment or order of the court: see rule 81.4(1)(a) and (2), and Temporal v Temporal [1990] 2 FLR 98 (CA) at 101, per Dillon LJ. He submits, however, that a time may be "fixed" for the purposes of rule 81.4 without a specific calendar date for compliance being specified, if the order has an immediate and continuing effect. He then submits that the Continuation Order was an order of that character, so it does not matter that no further order was made, after the extensions of time granted by Wimbledon, setting a fresh deadline for compliance by Mr McKay.

80. In support of this submission, Mr Rowntree relies on the decision of Peter Jackson J (as he then was) in SK v HD [2013] EWHC 796 (Fam), [2014] Fam. Law 22, where he held that in the context of wardship proceedings in the High Court, a location order which placed an obligation on the relevant family members to "inform the tipstaff of the whereabouts of the child, if such are known to him or her", and also in any event to "inform the tipstaff of all matters within his or her knowledge or understanding which might reasonably assist him in locating the child", gave rise to an obligation of both an immediate and continuing effect which satisfied the requirement in CPR rule 81.4 that a time must be fixed for a mandatory order to be enforceable by committal: see his judgment at [36] to [40]. That decision is not binding on us, but it is cited in the notes to rule 81.4 in the White Book, and I would not wish to cast doubt on it, particularly in a case such as the present one where a specific time for compliance is fixed by an order made without notice on an urgent application, and the order is then continued (in the absence of compliance) on the return date. As a practical matter, any defendant who is personally served with both the original order and the continuation order made on the return date can be under no misapprehension about the need for him to comply immediately with the relevant requirement, subject only to any extensions of time for compliance which he may be able to agree with the claimant or obtain from the court. That was in substance the position in the present case, in which Mr McKay clearly understood that he had a continuing obligation to make a witness statement in accordance with the order originally made by Nicklin J on 9 July 2019 and continued by him on 11 July – hence the extension of time for compliance sought by him, and

agreed by Wimbledon. I do not think it was necessary for Wimbledon to go back to the court to get a further order fixing a specific future date for compliance before it could found committal proceedings on Mr McKay's continued failure to produce such a statement.

81. Nevertheless, the problem still remains for Wimbledon that personal service of the Continuation Order was never effected on Mr McKay before the committal application was brought, nor was any order for substituted service of either order sought by Wimbledon or made by the court. Nor was the court asked to dispense with personal service under rule 81.8(2)(a), and I am certainly not prepared to infer that Judge Freedman intended to make such a dispensation in the absence of the slightest indication that he gave any consideration to questions of service at the hearing on 29 November. I am therefore satisfied that there was a breach of the requirement for personal service of the Continuation Order.

82. Since the judge did not address the point, we have an unfettered discretion to dispense with personal service if we think it just to do so under rule 81.8(2)(a). I have no hesitation in concluding that we should do so, since it is clear from the evidence that Mr McKay knew perfectly well what he had been ordered to do. His defence has always been that he did not wish to incriminate his boss or other third parties with whom he had dealings, not that he was in any doubt about the terms of the 9 July Order or its continuation on 11 July. Furthermore, it is clear beyond reasonable doubt that he had notice of the terms of the 9 July Order when it was inserted in his letter box on 10 July, even if strictly speaking that did not constitute personal service. I am therefore satisfied that granting the necessary dispensation would occasion no unfairness or injustice to Mr McKay.

83. I should add, for completeness, that I would if necessary be willing to adopt a similar approach to other possible technical defects of a procedural nature relating to the formulation of the single ground of committal in the application notice. As I have pointed out, the notice did not fully comply with rule 81.10(3)(a), because there was no separate numbered ground setting out the alleged act of contempt and the date on which Mr McKay was said to have committed it, having regard to the extensions of time agreed between him and Wimbledon. Moreover, the ground in the application notice failed to refer to the Continuation Order. In a context where accuracy and clarity should be at a premium, these breaches evidence an unfortunate degree of carelessness by Wimbledon and their legal advisers in complying with the requirements of CPR Part 81, even though these particular points have not been relied on as grounds of appeal. Nevertheless, I am satisfied that in the context of the present case they may be classified as technical breaches which caused no unfairness or injustice to Mr McKay. It is therefore appropriate to waive them pursuant to 81PD paragraph 16.2, which provides that:

> "The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect."

84. For these reasons, I would also dismiss the third ground of appeal.

Ground 2: Affidavit evidence

85. Mr McKay has two main complaints under this heading. First, material evidence relied upon by Wimbledon in support of the committal application was not given by affidavit, as required by CPR rule 81.10(3)(b) and PD81 paragraph 14.1, because most of the relevant background was set out in the first witness statement of Mr Glasson dated 8 July 2019. Secondly, the affidavit evidence was defective because it did not name the agent who sold the test tickets to Mr McKay, in breach of CPR rule 32.16, which requires an affidavit to comply with the requirements of PD32, and paragraph 4.2 of that Practice Direction, which says that an affidavit must indicate:

> "(1) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief, and
>
> (2) the source for any matters of information or belief."

86. In my judgment, there is no substance to either of these objections.

87. As to the first objection, the evidence contained in Mr Glasson's first statement was exhibited by Ms Shaw to her affidavit in support of the committal application. The evidence was therefore adduced by affidavit, albeit as hearsay evidence contained in an exhibit to the affidavit. I do not consider that to be objectionable, in circumstances where Mr Glasson's evidence described the factual background to Wimbledon's claim against Mr McKay, and was not directly relevant to the alleged contempt of court, which (as I have already pointed out) consisted of his failure to comply with the disclosure obligations in the 9 July Order. The primary evidence in support of that allegation was duly contained in the body of Ms Shaw's first affidavit.

88. As to the second objection, Ms Shaw's summary of Mr Glasson's evidence made it clear that the test tickets were offered for sale by "an agent acting on behalf of" Wimbledon, and the fuller account in Mr Glasson's statement explained that the agent used the adopted name of John Denning. Where Mr Glasson relied for his information on "John Denning", he said so: see, for example, paragraphs 44 to 50 of his statement. Similarly, where Mr Glasson relied on evidence from the second agent who met Mr McKay at the Monument public house, this was also explained by him. On analysis, therefore, the real complaint is not that Ms Shaw and Mr Glasson failed to disclose the source of their information, but rather that they maintained the anonymity of their sources. This was in my view acceptable, and did not lead to any risk of unfairness, where the evidence in question did not go to the contempt of which Mr McKay was accused, but rather to the general background which led to the making of the 9 July Order. I would therefore dismiss this ground of appeal.

Ground 1: the privilege against self-incrimination

89. There can be no doubt that Mr McKay was in principle entitled, both at common law and under article 6 of the ECHR, to invoke the privilege against self-incrimination in his defence to the committal application. I am also willing to assume, without deciding, that his conduct may arguably have exposed him to potential criminal liability. Mr van Dellen gave as examples of such criminal conduct: common law conspiracy to defraud, fraud by false representation under section 2 of the Fraud Act 2006, possession of

articles for use in fraud under section 6 of that Act, and statutory conspiracy under section 1 of the Criminal Law Act 1977 in relation to those underlying offences.

90. The first point which needs to be made, however, is that paragraph 3(d) of the 9 July Order expressly recognises the existence of the privilege, and makes provision for what is to happen if Mr McKay wishes to invoke it. He "must set this out fully in the witness statement", and "is recommended to take legal advice before refusing to provide any information referred to in" the order. He is also warned that "[w]rongful refusal to provide the information is contempt of court". It is implicit in these provisions that the nature and grounds of the claim to the privilege must be fully set out in the witness statement, with the purpose of enabling the court (if necessary) to rule on the question whether it has been validly claimed. If it has, the privilege prevails, and Mr McKay cannot be compelled to disclose the relevant information; but if the claim fails, and he still refuses to provide the information required, he will be in contempt of court. What Mr McKay is not entitled to do is to refuse to engage with the machinery of paragraph 3(d) at all. The requirement for him to set out the claim fully in his witness statement is mandatory, and forms part of a court order which has never been appealed or set aside.

91. In essence, however, that is the stance which Mr McKay has chosen to adopt. At the beginning of the hearing before us, Mr van Dellen confirmed, in answer to a question from the court, that his client's position was still one of complete refusal to produce a witness statement. But that is not an option open to him under the 9 July Order or the Continuation Order, and on the face of it his refusal to engage with the machinery of paragraph 3(d) is itself a contempt of court, and (perhaps more importantly) also renders his continuing refusal to provide the information required by paragraph 3(c) of the 9 July Order (as continued) a contempt of court.

92. It also needs to be stressed that paragraph 3(d) is a standard form provision of a type commonly found in court orders for the disclosure of information ancillary to the grant of an injunction, particularly where the order is made on an urgent without notice application by the claimant. That form of order lawfully caters for any plea of self-incrimination, and is often appropriate. If compliance with such orders were to become optional, not only would the authority of the court be flouted, but the crucial role of such orders in combatting fraud would be gravely impaired. The necessary protection for the defendant lies in the express recognition of his ability to claim the privilege against self-incrimination, but he must do so, not by merely making an assertion of the risk of self-incrimination, but by setting out in a witness statement backed by a statement of truth a full account of the circumstances and the nature of his claim in respect of that risk, so that it may be considered by the claimant and the court can (if necessary) rule upon it.

93. A further problem which confronts Mr McKay in this context is section 13 of the Fraud Act 2006. The section provides:

> "13 **Evidence**
>
> (1) A person is not to be excused from -
>
> (a) answering any question put to him in proceedings relating to property, or

> (b) complying with any order made in proceedings relating to property,
>
> on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related offence.
>
> (2) But, in proceedings for an offence under this Act or a related offence, a statement or admission made by the person in -
>
> (a) answering such a question, or
>
> (b) complying with such an order,
>
> is not admissible in evidence against him or (unless they married or became civil partners after the making of the statement or admission) his spouse or civil partner.
>
> (3) "*Proceedings relating to property*" means any proceedings for -
>
> (a) the recovery or administration of any property,
>
> (b) the execution of a trust, or
>
> (c) an account of any property or dealings with property,
>
> and "*property*" means money or other property whether real or personal (including things in action and other intangible property).
>
> (4) "*Related offence*" means -
>
> (a) conspiracy to defraud;
>
> (b) any other offence involving any form of fraudulent conduct or purpose."

94. In general terms, therefore, the effect of section 13 is to recognise the existence of the privilege against self-incrimination, and to extend its potential scope to incrimination of a spouse or civil partner, but then to remove the privilege in answering questions, or complying with orders, made in "proceedings relating to property" (as defined). The removal of the privilege is confined to incrimination of offences of fraud under the 2006 Act or related offences of a kindred nature, including conspiracy to defraud. Protection for the defendant is provided, however, by subsection (2), which states without qualification that any statement or admission made by him in answering such a question, or complying with such an order, is not admissible in evidence against him (or his spouse or civil partner) for an offence under the Act or a related offence. In other words, a balance is struck. The defendant is no longer to be excused from (relevantly) complying with any order made in proceedings relating to property on the ground that doing so may incriminate him, but no statement or admission made by him in complying with the order is admissible in evidence against him in criminal fraud proceedings.

95. As Lord Neuberger of Abbotsbury MR explained in Gray v News Group Newspapers Ltd [2012] EWCA Civ 48, [2012] 2 WLR 848, at [14] to [18], the privilege against self-incrimination (or "PSI") is "a very long and established feature of the common law", but it has been cut down by Parliament in "a number of disparate statutory provisions", including section 13 of the Fraud Act 2006, which remove the right to claim PSI in particular contexts, but all contain "prohibitions on any evidence thereby disclosed being used in any subsequent criminal proceedings." At [18], Lord Neuberger expressed his "support for the view that PSI has had its day in civil proceedings, provided that its removal is made subject to a provision along the [*above*] lines". Nevertheless, "PSI remains part of the common law, and… it is for the legislature, not the judiciary, to remove it, or to cut it down": ibid.

96. Lord Neuberger went on, at [72] to [77], to consider and dismiss the argument that the similar provision in issue in that case (section 72 of the Senior Courts Act 1981, dealing with civil proceedings for various forms of infringement of intellectual property rights) was incompatible with the ECHR because it infringed article 6. Lord Neuberger said, at [73]:

> "In my opinion, this argument is wrong. If there is any unfairness such that article 6 would be infringed, it would be in relation to any criminal proceedings which may or may not be brought against Mr Mulcaire in the future. It is only if such proceedings were brought and if the information which he provided was used in the criminal trial against him (or, possibly, if the information had been used to assist the prosecuting authorities in formulating or pursuing criminal charges against him) that his article 6 argument could come into play."

97. Lord Neuberger then analysed the Strasbourg jurisprudence, finding no support in it for the contention that article 6 "carries with it in effect an absolute PSI": see [74]. Moreover, it is not even the case "that every statutory provision which requires a party to furnish evidence which may then be used against him in criminal proceedings will fall foul of article 6": see [75], referring to the decisions of the Grand Chamber of the Strasbourg court in O'Halloran v United Kingdom (2007) 46 EHRR 397 and of the House of Lords in Brown v Stott [2003] 1 AC 681, upholding the validity of section 172 of the Road Traffic Act 1988, which required the registered owner of a vehicle to identify the driver to the police.

98. Lord Neuberger's judgment in Gray was in effect the judgment of the court, because the other two members of the court (Lord Judge CJ and Maurice Kay LJ) simply agreed with it. The judgment establishes, with force and clarity, that statutory enactments in the general form of section 13 of the Fraud Act 2006 are fully compatible with article 6, and that the question of self-incrimination would in any event only arise at the stage of any future criminal proceedings. It follows, in my judgment, that Mr McKay cannot in the present case rely on either the privilege against self-incrimination or his rights under article 6 to excuse him from providing the information required by the 9 July Order. The proceedings brought against him by Wimbledon are clearly "proceedings relating to property" within the meaning of section 13, because the tickets sold to Mr McKay were and remained the property of Wimbledon. If, therefore, Mr McKay were to provide a witness statement, as ordered, but sought to take advantage of paragraph 3(d) by claiming the privilege against self-incrimination, I find it hard (as presently

advised) to see how the claim could have any chance of success, for the reasons so clearly stated by Lord Neuberger in Gray. However, that stage has not even been reached. Mr McKay's stance, maintained down to and including the hearing before us, has been that the privilege and his article 6 rights make it unnecessary for him to comply with the 9 July Order at all.

99. That is in my judgment an untenable position, for the reasons I have already given. The 9 July Order contained its own machinery for invoking the privilege, and Mr McKay has deliberately chosen not to comply with it. Obedience to court orders is not a matter of individual choice, and if Mr McKay wishes to claim the privilege, he must do so in the manner stipulated by paragraph 3(d).

100. In their initial written submissions in support of the appeal, counsel for Mr McKay argued that the privilege against self-incrimination recognised in section 14(1) of the Civil Evidence Act 1968 has the status of a constitutional statute, and (as such) could not be implicitly repealed by section 13 of the Fraud Act 2006, having regard to the well-known principles stated by Laws LJ in Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151. Giving the judgment of the Divisional Court (with which Crane J agreed), Laws LJ said at [63]:

> "Ordinary statutes may be impliedly repealed. Constitutional statutes may not… A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute."

101. This argument was in my view misconceived. The provisions of section 13 of the 2006 Act were clearly and unambiguously intended by Parliament to remove the privilege against self-incrimination in the types of proceedings covered by the section, but to provide the defendant with the corresponding protection in subsection (2). There is accordingly no scope for the principle stated by Laws LJ in Thoburn to operate. Furthermore, as I have explained, section 13 of the 2006 Act is fully compliant with article 6. It is unfortunate that no reference was made by counsel for Mr McKay to Gray in their written submissions, because it provides a complete answer to his legal arguments on this part of the case.

102. It is even more regrettable, in my judgment, that this misconceived argument was supplemented by the very late application for a declaration of incompatibility under section 4 of the Human Rights Act 1998 which I have already described. The application appears to have been made almost as an afterthought, because there was no elaboration of it in the application notice which merely averred that section 13 of the Fraud Act 2006 was "inconsistent with Article 6 (the right of an individual suspected of a criminal offence not to self-incriminate)". Nor was any application made to amend the grounds of appeal. The short supplementary skeleton argument which Mr van Dellen eventually provided on 15 April 2020 did finally acknowledge the difficulties posed for the argument by section 13(2), but again made no reference to Gray, and sought instead to introduce for the first time an argument which had nothing but novelty to recommend it, namely that Mr McKay has the right under article 6 not to incriminate *others*. It is enough to say that, despite repeated requests, Mr van Dellen has been unable to provide any authority for this supposed extension of the reach of article 6, nor does

it find any support in domestic statutes or case law (apart from the limited extension of the privilege to incrimination of spouses or civil partners). The lateness of the application also had the unfortunate consequence that, at a time of national emergency, the Secretary of State for Justice was obliged to instruct counsel at very short notice, and devote resources to a claim for a declaration of incompatibility which should never have seen the light of day.

103. In his oral submissions to us, Mr van Dellen changed his ground yet again and sought to argue that the right of Mr McKay's which was protected by article 6 was not the privilege against self-incrimination, but rather an overarching right to silence which fell outside the scope of paragraph 3(d) of the 9 July Order. It is unnecessary for me to deal with this argument in any detail, because the short and conclusive answer to it is that Mr McKay's right to silence, as a defendant to the committal application, was a right to silence in relation to the alleged act of contempt, namely his failure to comply with paragraph 3(c) of the 9 July Order. Mr McKay had admitted his failure to comply with that order at the hearing on 29 November 2019, and he maintained that refusal in the instructions which he gave to his lawyers for the hearing before us. I return to the simple point that Mr McKay has chosen to defy a court order, and it is that defiance which constitutes the alleged contempt, not his refusal to incriminate third parties.

104. In the course of argument, the court was severely critical of the nature and timing of the application for a declaration of incompatibility. Mr van Dellen assured the court that there had been no intention to act irresponsibly, and he offered an apology if one was needed. For my part, I fully accept that assurance, and on balance I do not consider that an apology was needed, although I think Mr van Dellen was quite right to offer one. He was also right to accept that the matter should have been raised at a much earlier stage, and that it would have been preferable to deal with it by an application to amend the grounds of appeal. In those circumstances, permission to amend would doubtless have been refused without the need to involve the Secretary of State, and in good time before the onset of the current coronavirus crisis.

105. I readily accept that it is the duty of counsel to be fearless in raising tenable arguments on behalf of their client, particularly where the liberty of the subject is at stake. Nothing that I have said detracts in any way from that salutary principle. But if there is a criticism to be made, it is that those acting for Mr McKay seem not to have realised sufficiently, or in good time, that an application for a declaration of incompatibility under the 1998 Act is inevitably a matter of constitutional importance, which requires full and careful consideration before it is undertaken, and (if it is pursued) must be supported by detailed legal argument which draws attention to all the relevant authorities.

106. For these reasons, I would also dismiss the first ground of appeal.

The conduct of the hearing on 29 November 2019

107. It remains to consider whether the shortcomings which I have identified in the conduct of the hearing on 29 November 2019 should lead to the conclusion that Mr McKay's first appeal must be allowed, even though I would dismiss his grounds of appeal as formulated. As I have already indicated, the transcript of the hearing on 29 November has caused me much anxiety. The failure of the judge to remind Mr McKay of his absolute right to silence, and of his privilege against self-incrimination, combined with the judge's readiness to descend into the arena and extract admissions from Mr McKay,

certainly had the potential to cause real injustice; and if I were satisfied that there was any significant risk of such an injustice having occurred, it would in my view be our duty to allow the appeal on that basis, whether or not the deficiencies were reflected in the grounds of appeal. But the fact that, with the benefit of legal representation, Mr McKay has chosen not to take these points in his grounds of appeal should give us pause for thought. It may well be the case, for example, that Mr McKay was well aware, from his attendance at the second hearing before Chamberlain J (of which we do not have a transcript) and/or from legal advice given to him by HJA, of his right to silence, and the need for the alleged contempt to be proved to the criminal standard. Furthermore, the substance of the privilege against self-incrimination lies at the heart of Mr McKay's grounds of appeal, even if the judge's failure to remind him of it does not feature as a separate ground.

108. Again, the judge's well-intentioned enthusiasm to question Mr McKay and elicit his failure to comply with the 9 July Order must be seen in the context of the very limited nature of the alleged contempt, namely Mr McKay's failure to produce a witness statement in compliance with paragraph 3(c) of the 9 July Order. The general nature of that obligation was clearly well understood by Mr McKay, as the narrative in Ms Shaw's first affidavit shows. Once the judge had elicited that Mr McKay did not wish to file or rely upon the witness statement prepared for him by HJA, following a conference with counsel, the fact of Mr McKay's continued non-compliance with the 9 July Order all but spoke for itself. Furthermore, in the absence of a witness statement, it was clear that Mr McKay had not taken advantage of the machinery for making a claim to privilege provided by paragraph 3(d) of the 9 July Order. Thus, although in my respectful opinion the judge ought not to have pressed Mr McKay to admit that he was in breach of the 9 July Order and thus in contempt of court as he did, a hearing conducted with appropriate caution and circumspection could not realistically have led to a different outcome.

109. I have also been concerned by the judge's apparent failure to give consideration to any sentence falling short of a suspended term of imprisonment, combined with his failure to give Mr McKay an opportunity to make a plea in mitigation. In many contexts, these failures could have been productive of real injustice; and the importance of procedural safeguards for a person accused of contempt of court must not be whittled away, even if he admits his guilt. But there is no separate appeal against sentence, and the courts have often emphasised that a deliberate and sustained refusal to comply with a court order will normally merit a custodial sentence, particularly if it is suspended to allow a final opportunity for compliance. Furthermore, the judge was well aware of the recent case of Corrigan, in which a similar sentence in not dissimilar circumstances had been upheld by this court. Moreover, although the judge was in my view wrong to extract from Mr McKay what was, in effect, a guilty plea as he did, any potential injustice thus caused has been removed by the opportunity for Mr McKay to advance the grounds of appeal which we have considered, and to have them determined by us, before the sentence imposed by the judge is activated. That consideration has shown that this defect in the procedure before the judge was not material.

110. In the end, and not without some hesitation, I have come to the conclusion that the procedural and other defects in the conduct of the hearing on 29 November are not, on the particular facts of the present case, of so grave a nature that they require this court, of its own motion, to allow the appeal in order to prevent injustice. I remind myself of

what Hickinbottom LJ aptly said, with the agreement of Patten LJ, in Fort Locks Self Storage Limited v Deakin [2017] EWCA Civ 404, at [31]:

> "… whilst compliance with the relevant procedures is important given the liberty of the subject is at stake, procedural deficiencies will not result in a committal order being set aside unless, and only in so far as, the interests of justice require; and the interests of justice will not require such an order to be set aside where there is no prejudice to the subject or respondent of the order (see Nicols v Nicols [1997] 1 WLR 314 at page 327, per Lord Woolf MR). That is expressly recognised in the CPR. Paragraph 16.3 of CPR PD 81 gives the court power to waive any procedural defect in the commencement of conduct of a committal application, if satisfied that no injustice has been caused to the respondent by the defect."

I am satisfied that the procedural and other defects which I have identified, looked at individually or in aggregate, have resulted in no unfairness or injustice to Mr McKay; nor, as a result of such defects, do the interests of justice require the committal order to be set aside.

111. It follows, if the other members of the court agree, that Mr McKay's first appeal, against the order made on 29 November 2019, will be dismissed.

The second appeal: Nicol J's order of 13 December 2019

112. I can deal with the second appeal very briefly.

113. The first ground of appeal, as formulated in the skeleton argument of counsel for Mr McKay dated 9 January 2020, is that even though a committal order had been made on 29 November 2019, Mr McKay retained his ongoing right against self-incrimination on 13 December 2019, with the alleged consequence that the suspension of the sentence should not have been lifted by the judge. This ground is supported by the same substantive arguments as those which I have already considered and rejected in relation to the first appeal. Moreover, the question for the court on 13 December was simply whether Mr McKay had complied with the condition upon which the sentence imposed by Judge Freedman had been suspended. It was clear beyond argument that he had not so complied, because no witness statement had been forthcoming. As Waller LJ explained, giving the judgment of this court in Phillips v Symes, *loc. cit.*, at [51(iv)]:

> "Whatever the position in relation to the privilege of self-incrimination in proceedings alleging further contempt, there can be no such privilege in proceedings concerned with whether or not the conditions of suspension have been complied with. The relevant contempt has already been proved and the only question is implementation of a sentence already imposed. The right time to worry about whether committal is the right order is when the committal order is made. Thereafter, it would not be right to ignore the fact that the committal order has been made and treat any subsequent application in relation to it as a fresh application to commit."

114. The second ground of appeal raises the same question of personal service as ground 3 in the first appeal, and it must therefore fail for the same reasons.

115. It follows that in substance the second appeal adds nothing to the first appeal, and I would therefore dismiss it.

Disposal

116. If the other members of the court agree, Mr McKay's appeals will both be dismissed. In the circumstances, I would ask the parties to consider, and if possible agree, the appropriate mechanism for the activation of Mr McKay's sentence of imprisonment having regard to the practicalities in the ongoing coronavirus crisis. Consideration should also be given to incorporating in the order a final short opportunity, of no more than fourteen days in length, for Mr McKay to reconsider his position in the light of our judgments and to purge his contempt by producing a witness statement which complies with sub-paragraphs 3(c)(i) to (iii) of the 9 July Order (as continued by the Continuation Order), including any claim to privilege against self-incrimination which he may wish to make under paragraph 3(d). I provisionally envisage that the order should then provide for the expeditious determination of any such claim by a High Court judge of the Queen's Bench Division, with a further stay of the activation of the sentence pending such determination. In the event of disagreement about the terms of the order, the parties are invited to make written submissions in the usual way before our judgments are handed down.

Hickinbottom LJ:

117. For the comprehensive reasons given by Henderson LJ, I agree that these appeals should be dismissed, with the disposal he proposes.

118. In my view, this appeal is essentially straightforward.

119. By an Order of 9 July 2019, continued on 11 July 2019, Mr McKay was required to give disclosure of (amongst other things) those with whom he had unlawfully traded Wimbledon Championship tickets, in the form of a signed statement supported by a statement of truth. In making that statement, his right not to self-incriminate was expressly catered for in the order. He has been aware of that obligation since 10 July 2019, and certainly since he was personally served with the 9 July 2019 Order on 16 July 2019. It is a continuing obligation which he himself acknowledged when he sought extensions of time in which to comply with it.

120. The obligation to make that statement was lawfully imposed by way of order of the High Court. Despite being given every opportunity, Mr McKay has steadfastly refused to comply with that order and, even before this court, made clear that he has no current intention of complying. Although the procedural deficiencies below identified by Henderson LJ are unfortunate, in the event, they clearly gave rise to no unfairness or injustice to Mr McKay.

121. In those circumstances, Mr McKay cannot sensibly complain that he has been committed to prison for contempt.

Simler LJ:

122. I agree with both judgments.