Neutral Citation Number: **[2020] EWHC 2796 Ch)**

Case No: HC-2015-001647

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

Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: **19 October 2020**

Before :

Lord Justice Nugee

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Between :

Kea Investments Ltd	**Applicant**
- and -	
Eric John Watson	**Respondent**

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- -

Elizabeth Jones QC, Justin Higgo QC and **Zahler Bryan** (instructed by **Farrer & Co LLP**) for the **Applicant**
Thomas Grant QC and **Andrew McLeod** (instructed by **Ashfords**) for the **Respondent**

Hearing date: **19 October 2020**

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APPROVED JUDGMENT

Lord Justice Nugee **Monday, 19 October 2020**
(**4:04** pm)

Judgment and Ruling by **LORD JUSTICE NUGEE**

Sentencing Judgment

1. On 2 October 2020 I handed down judgment on this application, which is an application to commit the respondent, Mr Eric Watson, for contempt of court. The neutral citation of my judgment is [2020] EWHC 2599 (Ch).

2. This is no substitute for the full findings which I made in that judgment, but in short summary, I found Mr Watson to have been in breach of a number of provisions of the April Order, but none of them to have been contumacious. I did find him guilty of one contumacious breach of the November order, that is Count 4, in failing to disclose, and give bank statements for, a bank account in his mother's name which I found, in fact, to have been money that was at his disposal, either in total or, at any rate the vast bulk of it. I am now asked to deal with sentencing.

3. I am grateful to both counsel for the careful and thorough way in which they have addressed me, to Ms Jones for having quite properly brought to my attention the authorities on the legal principles applicable and such matters of fact as might be thought relevant to sentencing, and to Mr Grant for a most eloquent and thorough mitigation on behalf of Mr Watson.

4. I was taken by Ms Jones on a tour of the authorities. I do not propose in this short judgment to recite them all. I did not understand Mr Grant to dispute the principles that are applicable. I will, however, mention some of the principles to be drawn from the authorities.

5. I can start with the judgment of Jackson LJ in *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241, where at [45] he said that the sentence for a civil contempt:

> "... performs a number of functions. First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances, it provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question."

Both counsel accepted that this is an example of the first type of case. This is not a case where the purpose of sentencing is to provide an incentive for belated compliance.

6. The procedural framework for committals found in Part 81 of the Civil Procedure Rules has very recently, with effect from 1 October, been replaced by a new Part 81, and technically that applies to this hearing, but neither counsel suggested that there was anything in the new rules which affected the principles by which sentencing was to be carried out, and I was shown a very recent judgment of Nicklin J, *Oliver v Shaikh* [2020] EWHC 2658 (QB) in which he said precisely that: see at [14].

7. In the Court of Appeal's decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392 at [58] they gave the following guidance (this is the judgment of the Court):

> "It is therefore appropriate for the court dealing with this form of contempt to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or

> likely to be caused by the contempt of court. Having in that way determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest."

8. In a further decision of the Court of Appeal, *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, having referred to the *Liverpool Victoria* case, which was a case of contempt of court involving a false statement verified by a statement of truth, the Court said at [39]:

> "We consider that a similar approach should be adopted when – as in this case – a court is sentencing for contempt of court of the kind which involves one or more breaches of an order of the court. The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of those identified by Popplewell J in the *Asia Islamic Trade Finance Fund* case. Having considered the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest."

9. The first question, therefore, is the degree of culpability and the degree of harm, those being matters which go to the seriousness of the contempt. The Court of Appeal continue in *FCA v McKendrick* at [40]:

> "Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the *Solodchenko* case as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court."

10. That is a reference to what Lord Justice Jackson had said in *Solodchenko*. At [51], having referred to there having been many cases involving breaches of freezing orders, he said:

> "I shall not attempt to catalogue all those first instance decisions. What they show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year."

11. In his submissions, Mr Grant submitted that the present contempt could not accurately be described as falling within Jackson LJ's words as being a breach of the disclosure provisions of a freezing order. Two points were made. The first is that the September Consent Order (and where I use terms defined in my committal judgment they have the same meaning as there), which contained undertakings by Mr Watson in the form of what has come to be called a notification undertaking, was not to be equated with a freezing order. That is a submission which at one stage I might have had some sympathy with, but since the Court of Appeal's decision in *Holyoake v Candy* [2017] EWCA Civ 92, it is impossible to regard a notification injunction or, as in this case, a notification undertaking, as anything other than a species of freezing order or freezing undertaking.

12. Secondly, Mr Grant said that the disclosure provisions in the September Order (and a fortiori, I suspect he would have said the disclosure provisions in the November Order) were deliberately divorced from the notification undertaking and therefore could not be said to be disclosure provisions of a freezing order. Technically, no doubt, he is right, but I do not think that that is a

point of any substance. The purpose of the many disclosure obligations which have been imposed on Mr Watson since judgment was entered against him has been to enable Kea to have full visibility of his assets with a view to enforcing the judgment. I do not see any difference in principle between a disclosure order contained in a freezing injunction, whether before or after judgment, and the disclosure orders in this case, including the November order, breach of which I have found to be a contempt of court, which were made in support of Kea's attempts to enforce its judgment, a necessary first stage being for Kea to understand what Mr Watson's assets consisted of.

13. A question was also raised as to whether a breach of orders of this type is or is not more serious when made after judgment rather than before judgment. Ms Jones quite properly drew my attention to two cases in the same litigation, one in relation to a Mr Stepanov, *JSC BTA Bank v Stepanov* [2010] EWHC 794 (Ch), a decision of Roth J, and the other in relation to a Mr Shalabayev, *JSC BTA Bank v Solodchenko* [2011] EWHC 2908 (Ch), a decision of Briggs J, as he then was. Among the factors which Roth J took into account when sentencing Mr Stepanov for wholesale breaches of the orders in that case was this (at [23]):

> "thirdly, this is a case where there has been judgment for very significant sums of money against this defendant, and the orders in question were in support of a claimant's rights resulting from that judgment."

And one of the matters which Briggs J referred to when sentencing Mr Shalabayev was that he was going to impose a sentence of only 18 months as compared with 2 years imposed on Mr Stepanov for these reasons (see page 6 of the transcript):

> "I have not imposed the full two year sentence available only because of the distinction which I have described between this case and that of Mr Stepanov, namely that there has yet to be a judgment against Mr Shalabayev in relation to which his continued flagrant non-compliance with the contempt order would provide the added prejudice to the claimants, namely an inability to find assets against which to enforce a judgment against him."

14. I accept Mr Grant's submission that those were very different cases in which the respective contemnors had acted in flagrant and wholesale disregard of court orders, as reflected in the length of the sentences to which Roth J and Briggs J respectively sentenced Mr Stepanov and Mr Shalabayev, but they do, I think, bear out Ms Jones' submission that it is more serious when orders made post-judgment in order to enable a judgment creditor to enforce their judgment are disobeyed than (which is in any event serious) when there is disobedience to an order made pre-judgment designed to preserve assets pending judgment.

15. I will set out the principles which seem to me to be applicable then proceed to apply them to this case, so I will come back to the question of seriousness, but there is one matter which it is convenient to deal with now, and that is the question of harm. As we have seen from the authorities, the fact or likelihood of harm is relevant, just as it is in criminal cases, to an assessment of seriousness. In this case, what Kea rely on is that had Mr Watson disclosed the Rainy Day account in his mother's name when he should have done, there would have been some NZ$400,000-odd still in the account, and his failure to do that meant that Kea lost the opportunity to take steps to secure it towards its judgment.

16. Mr Grant made the point that Mr Graham's evidence, which says that, does not go on to say that Kea would have taken such steps, let alone provide evidence whether such steps would have been

successful. That, he submitted, would have required proceedings, no doubt against Mrs Pollock herself, no doubt in New Zealand, and there was no evidence of New Zealand law, nor any attempt to explain or explore how likely it is that such action would have been successful. He did not, however dissent from the part of my judgment at [264], where I said this:

> "That [that is the non-provision of bank statements] plainly suited Mr Watson as if he had disclosed the bank statements for the Rainy Day account on 21 December 2018 as he had been ordered to do, it would have revealed that there was still $481,873.52 in the account, and Kea would have been in a position to take steps to secure that. Mr Grant suggested that that would not have been easy, necessitating proceedings in New Zealand against Mrs Pollock, but I think Mr Watson had every reason to think that Kea would attempt to do just that, with at least some likelihood of success."

17. Not only do I think that Mr Watson had every reason to think that Kea would attempt to do that, I have absolutely no doubt that Kea would have explored the question whether it was possible and appropriate to seek to secure that money. The long history of attempts by Kea to locate and obtain judgment from any assets towards its judgment speaks for itself, and I do not read Mr Graham's statement in his affidavit that Mr Watson's non-disclosure deprived Kea of the opportunity to do that as casting any doubt on Kea's willingness and appetite to seize that opportunity had it been presented to them.

18. It is not necessary for me to decide, nor do I seek to do so, how likely it is that such action would have been successful. As I said in my judgment, there was at least some likelihood of success and on the basis that New Zealand law is similar to English law (and no one has suggested to the contrary), I remain of that view.

19. In any event, the harm is to be measured not only by whether Kea would have been successful in taking such an opportunity, but by the mere fact that Kea has been deprived of the opportunity of deciding that for itself and putting it before a New Zealand court had it sought to do so. And in circumstances where I am satisfied that that was Mr Watson's motivation – that is, not to give Kea that opportunity – it seems to me that I should proceed on the basis that this has caused real prejudice to Kea, not because I am in a position to conclude, or do conclude, that they would have succeeded in such an action, but because the mere deprivation of the opportunity has deprived them of something of value.

20. Once one has assessed the culpability and harm of the offence, the authorities show that one should also take account of aggravating or mitigating factors, which partly go to seriousness and partly go to sentence.

21. A number of lists have been provided of various factors, not all of which are applicable. I was shown by Ms Jones a list produced by Lawrence Collins J, as he then was, in *Crystal Mews v Metterick* [2006] EWHC 3087 (Ch) at [13] as follows:

> "First, whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated."

22. That list was expanded by Lewison J, as he then was, in *Aspect Capital Limited v Christensen* [2010] EWHC 744 (Ch) in which he said at [52] that he would add to this list of factors the following:

> "(1) Whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made, the more credit is entitled to be given;
>
> (2) But again, by analogy with sentencing in criminal cases, if a contested *Newton* hearing is held and the court decides the disputed facts adversely to the contemnor, he is liable to forfeit some of the credit to which he would otherwise be entitled;
>
> (3) Whether the contemnor has made a sincere apology for his contempt;
>
> (4) Whether the contemnor has been frank with the court in admitting his contempt;
>
> (5) In a criminal court the sentencer would also take into account a defendant's character and relevant antecedents. I think these are relevant to sentence for a civil contempt too."

23. And finally in a case called *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Comm), Popplewell J, as he then was, added his own factor to the *Crystal Mews* list as follows:

> "Whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

And, as I referred to earlier, that list has been referred to with approval by the Court of Appeal.

24. In addition to those aggravating and mitigating factors, there are matters of personal mitigation, but they seem to me to come into the calculus at a later stage, the first question being whether the custody threshold is crossed. Once one has decided that question, if the custody threshold is crossed, there is then a question of the length of term, and at that stage, personal mitigation can be significant, and then there is finally the question of suspension. Again, guidance has been given by the Court of Appeal in the *Liverpool Victoria* case where at [65] they say:

> "In determining what is the least period of committal which properly reflects the seriousness of the contempt of court, the court must of course give due weight to matters of mitigation"

and they set out various matters there. In [66] they say:

> "The court must also give due weight to the impact of committal on persons other than the contemnor"

and:

> "In a case in which nothing less than an order for committal can be justified, the impact on others may provide a compelling reason to suspend its operation.

Then they say:

> "Having reached a conclusion that a term of committal is inevitable, and having decided the appropriate length of that term, the court must consider what reduction should be made to reflect any admission of the contempt."

Then at [69] they say this:

> "The court must, finally, consider whether the term of committal can properly be suspended. In this regard, both principle and the case law to which we were referred lead to a conclusion that in the case of an expert witness, the appropriate term will usually have to be served immediately, and that one or more powerful factors justifying suspension will have to be shown if the term is to be suspended."

That is obviously addressed to the particular circumstances of that case. Then they say:

> "Usually, however, the court in deciding the length of the term will already have given full weight to the mitigation, with the result that there is no powerful factor making it appropriate to suspend the term. If the immediate imprisonment of the contemnor will have a serious adverse affect on others, for example where the contemnor is the sole or principal carer of children or of vulnerable adults, that may make it appropriate for the term to be suspended; but even then, as the *Bashir* case [2012] ACD 69 shows, an immediate term – greatly shortened to reflect the personal mitigation – may well be necessary."

25. Finally in relation to the principles, I was referred on this question of suspension to the case of *Templeton Insurance Ltd v Thomas*, another decision of the Court of Appeal [2013] EWCA Civ 35. In that case the Court of Appeal allowed an appeal to the extent of suspending the prison sentences imposed by the judge. At [49] Rix LJ said:

> "It is not only for the purpose of encouraging or rewarding the purging or remedying of contempt that the option of suspending sentence exists, and if the judge thought it was, in my respectful opinion, he erred."

And one can see from the decision that what caused the Court of Appeal to allow the appeal to the extent of suspending the prison sentence was what was described by Rix LJ as the considerable personal mitigation in the particular case: see at [45].

26. That, I think, is all I need or wish to say about the principles. At this point, Mr Watson, I am going to ask you to stand up.

27. I have found that you have committed a contempt of court in deliberately not disclosing the existence of, and providing the bank statements for, the Rainy Day account in your mother's name, which, as I have found, you knew was money that was at your disposal.

28. I take on board the point made by Mr Grant on your behalf that in the end I only found one of the many counts to which you were subject to have been committed contumaciously such as to engage the court's powers of committal, but I am satisfied that this was a serious contempt, deliberate and contumacious, and designed to conceal from Kea an asset which they were entitled to know about.

29. In terms of culpability, you were personally responsible for these decisions. In terms of harm to Kea, I have already explained why, in my judgment, there was real harm to Kea.

30. The authorities establish that deliberate breaches of court orders are always serious because they have a tendency to undermine the administration of justice. As I have said before, the entire system of the administration of justice depends upon persons who are ordered to do things by courts actually doing them.

31. I propose to address the factors listed by the judges in the cases to which I have referred, starting with the *Crystal Mews* factors. First, whether the claimant has been prejudiced: I have already addressed that. Second, the extent to which the contemnor has acted under pressure: Mr Grant has not suggested on your behalf that you acted under pressure. Third, whether the breach of the order was deliberate or unintentional: I have found that it was deliberate. Fourth, the degree of culpability: I have found that you were personally responsible for these breaches. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others: that has not been suggested. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach: I will come back to that when dealing with some of the other factors. Seventh, whether the contemnor has cooperated: I accept, as Mr Grant so eloquently expressed it on your behalf, that you have not sought to shirk this hearing or disrupt this hearing, as many litigants in your position might have sought to do. The COVID pandemic has made the holding of these hearings more difficult. Your personal circumstances, including the fact that, as I have seen, you have tested positive for COVID, have made them doubly difficult, and I accept that you have not sought to run away from this case but to stand up and face it, nor have you sought to put it off when the time came for it to be finally listed. I do not think that that was quite the cooperation that Lawrence Collins J had in mind. He was more concerned, as Ms Jones submitted, with cooperation in remedying the breaches, but I accept that the fact that you have not run away from this hearing is a matter to be taken into account to your credit.

32. So far as Lewison J's additions to the list in *Aspect Capital* are concerned, whether the contemnor has admitted his contempt: the answer to that is no, you did not admit it. The second only applies if an admission has been made. Whether the contemnor has made a sincere apology for his contempt: I accept, as Mr Grant submitted, that you have apologised out of respect to the Court but, as I suggested to him, and he did not dissent, that was in circumstances where you have the right, to and intend to exercise the right, to appeal my decision on the basis that I was wrong. In those circumstances it was not an acceptance, and there is no reason why you should be obliged to accept, that you were in contempt, and so I do not give you any credit for a genuine remorse. Your position, which as I say you are entitled to take, is that I was wrong in my findings, but I do accept that you have apologised formally to the court.

33. Whether the contemnor has been frank with the court in admitting his contempt: I have already said that this is not a case of admission. Character and relevant antecedents: I bear in mind the matters advanced by Mr Grant on your behalf that you are a man with no criminal convictions, but that he cannot put you forward as a man of unblemished character, in the light of the findings I made both in the main judgment after trial and in my judgment on this application.

34. Finally, as to the addition made by Popplewell J in the *Asia Islamic* case, whether there has been any acceptance, responsibility, apology, remorse or reasonable excuse put forward, and the answer to that I have already effectively given.

35. If I pause at this stage and ask whether the custody threshold has been crossed, I regard myself as obliged in the light of the authorities, and in particular the clear guidance given by the Court of Appeal in the cases to which I have referred, to regard a breach of an order of this type as sufficiently serious that only a custodial sentence can be regarded as appropriate.

36. I pass to the questions of personal mitigation. Again, I would like to pay tribute to Mr Grant's submissions, which have laid out carefully and fully the matters of personal mitigation to which I can have regard. It will all appear on the transcript. I have taken account of everything that he

has said. It can be grouped, in summary, under three heads: the stresses and strains of the application, in which, as he pointed out, only in the event one count was proved to have been committed contumaciously, although on some other counts, as I have referred to, Kea were successful in establishing that there had been breaches, albeit not contumacious. I add the comment, as I did in my judgment on this application, that a large part of the time and complexity of the application was attributable to the complexity of your financial affairs, but I accept that facing this application in these circumstances has been a very difficult, stressful experience for you which, in itself, has been a form of punishment.

37. Secondly, there is the impact of COVID-19 both on you personally and on the prison system, and I have been taken by Mr Grant to some very recent reports of the impact of COVID-19 on prisons, all of which I have taken into account.

38. And, thirdly, your personal circumstances, both in terms of your relationship with Ms Henrekson, and in relation to your children, and I have in mind particularly the matters referred to in both your and Ms Henrekson's affidavits, which Mr Grant referred to and which I do not need to repeat in open court.

39. Having taken account of all those matters of mitigation, I remain of the view that a custodial sentence is necessary, but I am willing to reduce the sentence from what it would otherwise have been to make it as short as possible. Had it not been for those matters of personal mitigation, I would have sentenced you to a period of six months or more. As it is, I am reducing the period to a sentence of four months, balancing the seriousness of the conduct I have found with the consequences for you and your family.

40. The final question is whether that sentence should be served immediately or whether it should be suspended. This, as I have said before, is not a case where the purpose of the sentence is to encourage belated compliance, but that, as shown by *Templeton v Thomas*, is not the only ground on which a sentence of imprisonment can be suspended, and it is undoubtedly possible for the court to take into account matters of personal mitigation to justify the suspension of a sentence.

41. Nevertheless, as the Court of Appeal said in *Liverpool Victoria v Khan*, usually matters of personal mitigation will already have been taken account of in shortening the period of imprisonment. In this case it seems to me, consistent with the authorities to which I have been referred, that having taken account of those matters of personal mitigation in relation to the period of imprisonment, it is neither necessary nor appropriate to suspend the sentence and I therefore will sentence you to a period of four months' imprisonment, to be served immediately.

42. As you have heard, the law is that you will in fact only serve half that sentence. I am obliged by the rules of court to tell you formally, although I am sure that you are well aware of this and will have been told already, you have the right to appeal and you do not need anyone's permission to do that. The time limit for appealing is 21 days, running from today, which I think will expire on Monday, 9 November, and the court before which any appeal must be brought is the Court of Appeal of England and Wales.

43. Thank you very much. Sit down now.

Ruling on stay

1. I am asked to stay the sentence of imprisonment which I have handed down on the basis that Mr Watson has a right to go to the Court of Appeal, as he does, and does not need permission for that, and that it would render his appeal rights nugatory if the sentence were not stayed in the meantime. I am satisfied that I have the jurisdiction to do it both under the inherent jurisdiction of the court and under the CPR.

2. I do not read, although I am grateful to Ms Jones for bringing this to my attention, CPR r 81.9(2), which provides that an order for committal has immediate effect unless the court decides to suspend execution of the order, as referring to suspension of the sentence of imprisonment, and the court can in my judgment suspend execution of the order by way, effectively, of stay pending appeal.

3. Nevertheless, it seems to me that although Mr Watson has a right to appeal to the Court of Appeal without seeking my permission, I should approach this question by asking whether I think there is a realistic prospect of such an appeal succeeding.

4. Despite the way in which Mr Grant has developed the grounds in his skeleton for this hearing, for which I am very grateful, I do not think that there is a real prospect of the Court of Appeal allowing an appeal, given the findings of fact which I made and the construction of the order which I adopted. I may, of course, prove to be wrong, but it seems to me that Mr Grant should approach the Court of Appeal, which he can do in short order, for a stay and temporary release pending appeal if he can persuade the Court of Appeal, rather than me, that there is sufficient merit in his proposed appeal.

5. As to Mr Grant's other fear that even if he were successful in such an appeal, Ms Jones might be successful in a cross-appeal, I have not yet heard the application for permission to cross-appeal, but it seems to me that the question of what would in those circumstances be an appropriate sentence, had Mr Watson served one week, or indeed two months, in Pentonville, is better addressed by the court dealing with the decision after the appeal and any cross-appeal has been heard, and I therefore do not intend to stay this order for committal, despite the authorities which Mr Grant put before me which show that in other cases other judges have thought it appropriate in the circumstances of those cases to do so. In the circumstances of this case I am not persuaded that it would be appropriate.