IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Neutral Citation No: [2012] EWHC 4305 (Comm)

Case No: 2010 Folio 1499

Before:

Judgment Date: 18 December 2012

MR JUSTICE BURTON

B E T W E E N:

(1) CAVENDISH SQUARE HOLDINGS B.V.
(2) TEAM Y&R HOLDINGS HONG KONG LIMITED

Claimants

-and-

TALAL EL MAKDESSI

Defendant

A N D B E T W E E N:

TALAL MAKDESSI

Part 20 Claimant

-and-

(1) CAVENDISH SQUARE HOLDINGS B.V.
(2) WPP 2005 LIMITED
(3) TEAM Y&R HOLDINGS HONG KONG LIMITED

Part 20 Defendants

Counsel for Claimants/Part 20 Defendants: **Joanna Smith QC and Richard Leiper**
Counsel for Defendant/Part 20 Claimant: **Michael Bloch QC and Camilla Bingham**

Hearing Dates: 17, 18 December 2012

MR JUSTICE BURTON:

1. One of the consequential matters arising following after judgment in this action, to which judgment dated 14 December 2012 I refer, is the outstanding application by the Claimants for permission to issue committal proceedings against the Defendant for contempt. This arises out of the circumstances that, as I discussed in paragraph 6 of my judgment, the Defendant only abandoned in October the case that he was making that consisted of a denial of breach of fiduciary duty owed to the Second Claimant, and consequently conceded, subject to his case that the covenants were not enforceable, that he was in breach of those covenants with the First Claimant. This meant that

   i) the trial which had been fixed for four to five weeks was reduced, days before it started, to four to five days.

   ii) the Claimant had however fully prepared for a trial of liability. The Claimants had prepared statements of some 6 witnesses, ready to be served, and had considered some 8 million documents by way of disclosure.

   iii) some £1.3 million is said to have been incurred in costs by the Claimants (and a similar amount by the Defendant) in relation to a case which could, and the Claimants assert should, have only ever been a dispute as to an issue of law which would need to resolve the disputes as to enforceability of the covenants but always dependent on undisputed fact, apart from issues of damages.

   iv) the original index for the proposed trial bundle, running to 125 pages by way of index alone, was, as was a great deal else, wasted effort.

2. The First Claimant seeks costs on an indemnity basis in respect of its costs of the action up to 10 October 2012, which is an issue which remains unresolved. I have already concluded that the First Claimant should have its costs up to that date on a standard basis, subject to that reserved issue.

3. When the Defendant abandoned its case as to liability, as discussed above, he had not yet served any witness statements, but had, of course, served the Defence and Counterclaim, subsequently amended, and after the abandonment reamended, supported by a Statement of Truth by him. The Claimants' solicitors' immediate reaction was set out in their letter of 12 October 2012:

> "*The principal change is that your client now admits that in and following July 2007 he engaged in conduct which falls within the definition of Defaulting Shareholder. You client has until this Wednesday denied that this was the case.*
>
> *As you will appreciate, the question of whether or not your client has engaged in conduct which falls within the definition of Defaulting Shareholder is an issue which has involved a very substantial amount of work by us and our clients, with respect to disclosure, the preparation of witness evidence and*

preparation for trial. A trial, which had originally been listed for 4-5 weeks to accommodate evidence from numerous witnesses, you now propose listing for 5 days to deal largely with legal argument only.

Had your client made his present admission, as he clearly should and could have done, when he first served his Defence (in February 2011) all of this work would have been unnecessary and your clients would not have incurred the very substantial costs of carrying it out - which, as you are aware, are in excess of £1 million. We do not see how your client could possibly maintain that he was not in a position to make his admission at the time of service of his Defence; indeed we now have very serious concerns about the Statement of Truth that he signed at that time.

You currently appear to be suggesting that the costs that have been incurred by our clients in seeking to establish that your client was a Defaulting Shareholder should be costs in the case. However, this position is untenable. Had your client made his admission at the appropriate time, these costs would not have been incurred by our clients.

We therefore invite you once again to provide us with your proposals as to the payment of the Claimants' costs unnecessarily incurred in this way."

It is apparent that the solicitors were not only making their point in relation to costs, but were also laying down a marker in relation to the Statement of Truth confirming the Defence.

4. The Claimants' solicitors then took instructions and thereafter sent a letter dated 31 October 2012:

"*Following the service on Monday afternoon of your client's Re-Amended Defence and Part 20 Claim verified by a Statement of Truth signed by your client, our clients now intend to apply for an Order for Committal against your client.*

Accordingly, we enclose our clients' Application in draft together with a copy of the Affidavit sworn by Paul Anthony Oxnard in this matter today …

As you will know, CPR Rule 81.14(2) states that the Application for Permission must be served personally upon your client unless the Court otherwise directs. For the reasons set out in Mr Oxnard's affidavit, personal service upon your

client is impractical. We trust that your client will consent to a direction that service upon your firm will suffice.

Upon receipt of such confirmation, we will arrange for the Application to be issued (together with a Consent Order relating to alternative service, for the Court's approval) and served on your firm.

Our current proposal, subject of course to the Court's direction, is that the Application for Permission to Apply for the Committal of your client would be heard at the conclusion of the Trial of this action which is due to commence on 12 November 2012.

We invite you to confirm by 4pm on 1 November 2012 that your firm will accept service of the Application on behalf of your client. If you do not do so, then we will seek to move the Court on Monday for permission to service the Application Notice upon your firm."

5. The application was, as Mr Oxnard of the Claimants' solicitors, in his affidavit served for the purposes of this application, explains, served in draft because it was hoped by the Claimant that, by doing so, it would avoid the need to obtain an order for alternative or substituted service on the Defendant's solicitors. No consent to that course was given and so an application was necessary to be made for such order, which was opposed by the Defendant, and I made the order on November 8. That application, both for alternative service and for permission for the application for committal, was supported by the affidavit of Mr Oxnard. I ordered that the application would be heard after the conclusion of the trial and as part of the consequential directions after judgment, as has occurred. I made an order for a timetable of evidence which has led to a witness statement from the Defendant in opposition to the application, supported by the witness statement of his solicitor, Mr Acratopulo. An affidavit has been served in reply by Mr Oxnard.

6. A number of procedural issues arose:

   i) The Defendant served two witness statements. The Claimants submit that they ought, by virtue of the provisions of Part 81, to have been affidavits and not least because there had been a challenge to the Statements of Truth attached to the Defence. Rule 81 PD 14.1 of the relevant Practice Direction reads as follows:

      "*Written evidence in support of or in opposition to a committal application must be given by affidavit.*"

There is an issue, however, as to whether this applies to the application for permission as well as to the application itself. This issue has been more or less resolved by the Claimants' acceptance that I can and should read the witness statements and, if I allow

the application, then the contents of the witness statements can be re-served or supplemented as affidavits.

ii) In those witness statements, the Defendant revealed the existence of without prejudice negotiations between the parties. The Claimants objected, and have not withdrawn their objection, but it has been agreed that I read the evidence as I have done. This evidence does not disclose the detailed content of such correspondence, but only the Defendant's account as to its general nature and its timing. I was not invited to strike it out. I do not however accept the submissions of Mr Bloch QC that by not dealing with it in response, in order not further to waive the privilege, the Claimant has in any way accepted the accuracy of what was said about it.

iii) Mr Bloch points out that there is no provision in the Rules for a reply affidavit by the Claimant, for which I made provision in an order, and indeed further none for any reply submissions orally by Ms Smith QC at the hearing before me. I did, in the event, give the last word orally to Mr Bloch, but I do not agree that, provided that I appreciate where the burden lies on these applications, the court should exclude any reply evidence or submissions in support of the Claimant's application.

iv) There has been a live dispute by Mr Bloch as to the content of the evidence upon which the Claimant is entitled to rely. In opening her case, Ms Smith relied not only upon the content of Mr Oxnard's affidavits but also upon the content of the pleadings in the case and in particular the Further Information of the Particulars of Claim Pursuant to the Defendant's Request, served on 28 April 2011, to which was annexed a considerable number of documents said to support the Claimants' case, mainly emails.

7. Mr Oxnard in his first affidavit stated as follows, in paragraph 3:

> "*There are now produced and shown to me marked 'PAO1' and 'PAO2' bundles of true copy documents. PAO1 contains various documents referred to below. PAO2 contains the body of two witness statements served in these proceedings on behalf of the Claimants, Sara Hussein Assaf dated 28 September 2012 and Assaad Douaihy dated 12 June 2012. I was responsible for proofing these witnesses and for arranging for them to sign the statements of truth to those statements, having explained to them the consequences of doing so, and I believe that they accurately set out their true accounts of the matters they describe. PAO3 is a true copy which I have had made of an audio and video recording (originally made on an iPhone by Assaad Douaihy) which I describe more fully below. The pleadings and Orders and the Claimants' other witness statements and exhibits that I refer to in this Affidavit will be made available to the Court separately on the hearing of the Claimant's applications.*"

8. Mr Bloch relies upon Part 81.14(1) to submit that the Claimant is not entitled to rely upon the pleadings or in particular the documents annexed to the pleadings to which Mr Oxnard thus made reference. Rule 81.14(1) reads as follows:

> "*81.14.—(1) The application for permission to make a committal application must be made by a Part 8 claim form which must include or be accompanied by—*
>
> *(a)a detailed statement of the applicant's grounds for bringing the committal application; and*
>
> *(b)an affidavit setting out the facts and exhibiting all documents relied upon.*"

I shall return to this later.

9. Part 81 is new, incorporated into the CPR on October 1, 2012, but Rule 81.12 now regulates committal applications in relation to interference with the due administration of justice in connection with proceedings in the High Court and Rule 81.13 provides that an application is to be made to a single judge of the High Court, plainly most appropriately the trial judge, for permission to issue such an application.

10. There is a body of jurisprudence which has built up in relation to such applications for permission. I shall revert to this in due course in more detail, but the clearest summary is that of Hooper LJ in **A Barnes t/a Poole Motors v Seabrook** [2010] EWHC 1849 (Admin); [2010] CP Rep 42, at paragraph 41, drawing upon two earlier decisions by Cox J in **Kirk v Walton** [2009] 1 AER 257 and by the Court of Appeal, and in particular per Moore-Bick LJ, in **KJM Superbikes Ltd v Hinton** [2009] 1 WLR 2406, which itself approved dicta of Sir Richard Scott VC in **Malgar Ltd v RE Leach (Engineering) Ltd** [2000] FSR 393.

11. In paragraph 41 of Hooper LJ's judgment he sets out the following proposition in law:

> "*i) A person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it.*
>
> *ii) It must be in the public interest for proceedings to be brought. In deciding whether it is the public interest, the following factors are relevant:*
>
> > *a) The case against the alleged contemnor must be a strong case (there is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance);*

b) The false statements must have been significant in the proceedings;

c) The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings;

d) The pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality.

iii) The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings;

iv) Only limited weight should be attached to the likely penalty;

v) A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account."

12. I have already indicated that, for the purposes of this judgment, I shall not repeat but assume that the reader has knowledge of the contents of my judgment of 14 December 2012.

13. The Claimant's case, in support of its perm ission application, relies upon what have been described as "three statements" in the Defence and Counterclaim, which was the subject of the Defendant's statement of truth.

14. The first was contained in pa ragraphs 15(j) and (k) and 16 of that pleading, and it reads as follows:

"*(j) Following 26 March 2008 the Defendant's only involvement in the business of Carat was to assist in finding a replacement CEO and, pending his appointment, to sign cheques on behalf of the business.*

"(k) In the event in 2008, Aegis appointed a Mr Harvist to replace the Defendant as chief executive officer at Carat, who was later replaced by a Mr Boulas.

"(16) In the premises, save as set out in paragraph 15(j) above, from no later than 28 April 2008 the Defendant ceased to carry on or be engaged, concerned or interested, whether in competition with the Group or at all, in any activities of Carat

and by that date had fully complied with the provisions of Clause 7(5) of the agreement."

15. I shall call this, as did the parties to this application, the "First Statement". It relates to the Defendant's pleaded case as to what he did in relation to Carat after the entry into of the agreement of 28 February 2008, which contained both the covenants against competition in clause 11.2 and the obligation in relation to the cessation of his involvement with Carat in clause 7.5, which I called the "Carat Clause" in my judgment.

16. These paragraphs were wholly replaced in October 2012 so as to contain instead an admission that the Defendant's involvement in Carat constituted breach of fiduciary duty to the Second Claimant and, subject to the legal argument, breach of covenant with the First Claimant, now clarified by the recent further amendment, which I allowed on Friday after the judgment, to be limited to the period after July 2008.

17. The "Second Statement" was contained in paragraph 23(b) of the Defence and Counterclaim, which reads:

> "*The Defendant has not diverted or sought to divert any media buying business to Carat whether at the expense of MEC or at all.*"

This was entirely deleted in the reamendment. MEC is part of the group of which the Claimants now form part.

18. The "Third Statement" was contained in paragraph 28(b)(vi) of the Defence and Counterclaim. It was in response to a plea in paragraph 15(b)(i) of the Particulars of Claim, which reads, in part, as follows:

> "*Hisham Maksoudian set up a new agency in Beirut, namely Adrenalin SARL ("Adrenalin") providing advertising, communications, public relations and/or media buying services in competition with the group. The Defendant's holding in Adrenalin is held beneficially on his behalf by his nephew, Elias El Makdessi. In a meeting in September 2009 between the Defendant and the Regional Creative Director of Intermarkets, Assaad Douaihy ... the Defendant revealed his intention to put his shares in the name of the nephew.*"

The Third Statement reads:

> "*At no stage did the Defendant inform Douaihy that he intended to put shares in Adrenalin in the name of his nephew or any third party.*"

19. I did not call upon Mr Bloch in relation to the Second and Third Statements for the following reasons:

i) As to the Second Statement, the evidence upon which the Claimants sought to rely was that the Defendant was involved in seeking to procure that business, which Carat had but might have lost to MEC, and which MEC was keen to obtain, was retained by Carat. The witness statement of Sara Assaf, which is exhibited to Mr Oxnard's first affidavit, upon which the Claimants rely, records that in April 2008 she was determined to obtain the Laziza media buying business for MEC, and that the Defendant was involved in making sure that it stayed with Carat and did not go to MEC. That appears to me not to show, of itself, and there is no other evidence relied upon, that the Defendant was diverting business to Carat. It may well constitute a breach of fiduciary duty, or indeed be in breach of clause 11.2 but it does not, in my judgment, constitute a case for the Claimant of diversion of business to Carat at the expense of MEC.

ii) As to the Third Statement, that does not relate to Carat, but to another area of the Defendant's alleged competition with the Claimant. Mr Douaihy taped a conversation which he had with the Defendant, which was exhibited by Mr Oxnard, and which read, in material part, as follows, purporting to record the voice of the Defendant:

> "*I only have one problem, my shares ... in whose name shall I put them? ... because I was going to put them in Wissam's name or maybe in Amal's name, now I will put my shares in the name of my nephew*."

20. The Defendant says he does not and did not remember that conversation, and that, if he said it, it was not true, or was only said in anger, if at all. I am not satisfied that there is a strong case of a deliberately false statement by the Defendant when he came to make his Statement of Truth some time later.

21. I turn to the First Statement. The Defendant's English is good. I make allowance however for the fact that this is a pleading and not a witness statement. Nevertheless, it seems to me to be clear that the Defendant was stating, by confirming the accuracy of the pleading, which I have set out above, that

i) he assisted in finding a replacement CEO for Carat and pending that appointment he signed cheques on behalf of the business; and

ii) this continued after 26 March 2008, but only until June 2008 when Mr Harnist was appointed;

iii) what he did on behalf of Carat, namely as above, was his only involvement in the business of Carat after 26 March 2008, such that, from 28 April 2008, he was not concerned at all in any activities of Carat, and certainly not involved in any activities of Carat which were competitive with the Claimants or MEC.

22. I do not conclude that the presence of the words "in the prem ises" or "at all" in any way causes me to doubt that the Defendant was confirming the statements I have set out above.

23. The Defendant's evidence on this a pplication in this rega rd is prim arily contained, although set into a good deal of historical and contextual background, in paragraphs 61 and following of his witness statement:

> "*In March 2008 I told Mark Jamison of Aegis that I wanted to resign my position and by letter dated 26 March 2008 he accepted my resignation on the basis that I was required to give three months' notice to expire at the end of June 2008.*
>
> *62. Unfortunately the recruitment of a replacement CEO did not prove straightforward and although after June 2008 I received no further salary from Carat, I continued to approve expenditure, sign cheques for the Beirut branch and answer queries directed to me for the simple reason that there was no one else around to do it and because it is in my nature to try to help people...*
>
> *63. As to Aegis executives, the reality was that I had been running Carat without significant input from Aegis ever since I set up the Beirut branch in 2003. Aegis has a presence in many different countries but it could not simply re-locate an existing employee from Europe or America. What was needed was an individual who was conversant with the Middle Eastern market. On a practical level, in Lebanon only Lebanese nationals can act as signatories on bank accounts so the appointment of a foreigner would not have advanced matters.*
>
> *64. As a result I continued to respond to the day to day operational needs of the business well after June 2008.*"

24. Ms Smith relied, in addition to the evidence of the Defendant set out above, which of course forms part of the evidence before m e on this application, which I m ust take into account and do, upon the following:

    i) the evidence referred to above as to the Laziza business. This took place subsequent to 26 March, but prio r to 28 April 2008. Although the First Statement is som ewhat ambiguous in th e sense of only firm ly stating what happened after 28 April, it seem s to me that I cannot be satisfied that the Claimants can rely on what is now said to have occurred before 28 April, albeit subsequent to 26 March, as constituting any clear evidence that the First Statement, which I have set out, was false or knowingly false.

ii) events in February 2009, when he opened a Carat bank account: see his email of 12 February 2009 exhibited by Mr Oxnard. The e mail reads, in material part, as follows:

> "*I have opened a Carat Middle East account in Lebanon at BBAC Bank ... totally independent from Beirut operation accounts which are at our Mawarid Bank ... the BBAC account is like a holding account where we keep the extra cash available from UAE and Saudi operation and we enjoy more than 5 per cent interest. So Saudi did transfer all their profits until 31/12/2007 and wrote it as dividends instead of cash at the BBAC Bank.*
>
> *The lawyers ... agreed a resolution to pay dividends up to 31/12/2007 ... shall I pay from this saving account? We have enough cash to do so ... who should we coordinate financially with in the future? Hope all is now clear.*"

In March 2009, according to the same series of documents relied upon by Ms Smith, the Defendant was involved in the reorganisation of Carat and was informed about, and wished luck to, a pitch by Carat for Procter & Gamble's business. Mr Harnist informed him of the proposed meeting with Procter & Gamble in Geneva on 17 March and he hoped that the Defendant would be able to be there. The Defendant responded on the same day, 12 March, wishing Mr Harnist luck and making it clear that, through an apparent clash of meetings, he would not be able to be there. In addition, there is included a contract of employment for an employee of Carat Middle East, in relation to which it seems that the Defendant was involved in March 2009, by reference to emails attached, and which was, like others, seemingly signed or intended to be signed by him as "President and Chief Executive" of Carat. Mr Oxnard in paragraph 39 of his first witness statement said as follows:

> "*Finally, I would add that when the Claimants gave disclosure on 20 January 2012, this included the disclosure of some 540 emails evidencing the Defendant's involvement in the activities of Carat. By way of example, the Claimants' disclosure included emails ... that showed the Defendant to have opened a bank account on behalf of Carat Middle East in Lebanon in or around February 2009, to have convened a meeting in Beirut on 19 March 2009 to discuss the reorganisation of Carat in the Middle East and to have been asked in March 2009 to sign (as the 'President and Chief Executive Officer' of Carat Middle East) employment contracts for staff of Carat in Dubai. It must have been obvious to everyone who viewed the Claimants' disclosure including the Defendant that what the Defendant had said in paragraph 16 of his Defence was patently untrue.*"

iii) An exchange of telexes and other documents in 2009 which are only produced, as I have discussed above, by reference to being annexed to the Further Information of the Particulars of Claim, and are objected to by Mr Bloch on that basis. Two of such emails in March 2009 from him request his correspondents to use his Carat email address, and not that at the Second Claimant. The most significant of the emails are those which inform the Defendant of a proposed pitch by Carat to seek to keep the business of Louis Vuitton on May 5 2009. He sends an email of 24 April 2009 to Mr Boulas, his successor as CEO, according to his pleading, saying as follows, in relation to his potential presence at such meeting with Louis Vuitton:

> "*Does my presence add value? If yes, will attend with great pleasure. If not, wish you the best of luck.*"

25. It is apparent from an email of 5 May of 2009 that in the event he did not attend. He sent an email to Mr Harnist to say that he was "*always in contact with the offices*":

> "*I proposed to attend the Louis Vuitton meeting but Suzanna recommended otherwise ... I did my duty and explained all I know to Antonio* [that is Mr Boulas]."

26. With regard to those emails, the Defendant has set out his comments in his witness statement. So far as the emails which are not objected to, he points out in paragraph 34 that the Laziza emails are not evidence of his diverting business to Carat, a point that I have already dealt with when addressing the Second Statement; but he says that he finds it striking that there are almost no emails from him at all and he does not know what they are supposed to prove. He makes no explanation as to how he came to be involved in the Procter & Gamble business or in particular why it is that he was to sign, if he did, the contract of employment describing him in March 2009 as President and Chief Executive of Carat.

27. So far as the emails are concerned to which Mr Bloch has made exception, he said as follows at paragraphs 70 to 72:

> "*Mr Oxnard refers in general terms to the Carat documents provided to me at the end of April 2011 and says that those documents are evidence of my ongoing involvement with Carat. It follows, he says, that I must have known that paragraphs 15 and 16 of my Defence were false, but chose to repeat the falsehood when I served my Amended Defence and Counterclaim.*
>
> *I would like to make two points clear in this regard. The first is that reading these documents as best I can, they appear to me to show nothing meaningful about my involvement with Carat. It would have been helpful if Mr Oxnard had identified what he takes from the documents. What I see is that the exchanges with Ms Assaf are all before 1 July 2008 and the two or three emails*

with Mr Boulos show the new Chief Executive looking for some hand holding. So what?

The second point is that Mr Oxnard is overlooking the fact that when I approved the Amended Defence and Counterclaim I was focusing my attention on the amendments which (as set out above) were very narrow and uncontroversial. I did not revisit every allegation in the Defence line by line with a microscope. I have a life beyond this litigation."

28. Mr Bloch submits that this application is not made by the Claimants in good faith:

i) He submits that the bringing of the application was without warning and that the mention of the Statement of Truth in the letter of 12 October to which I have referred was in the context of costs. By calling upon the Defendant to provide a Statement of Truth for the proposed Reamended Defence and Counterclaim abandoning the previous case, the Claimants were seeking to trap the Defendant into thus confirming or supporting a case of contempt against him by reference to the Statement of Truth on the earlier pleading. So far as this latter is concerned, I find this wholly unpersuasive. Clearly a Statement of Truth was necessary for the reamended pleading before there could be the abandonment of the case as then put forward, or at least the Claimant's solicitors were entitled to form that view.

ii) Mr Bloch submits, and reveals through the evidence, that there was what he describes as a derisory without prejudice response on 31 October to the Defendant's without prejudice offer of settlement of 16 October - which had clearly accompanied or been contemporaneous with its abandonment of its case - and thus that the application, previously served in draft as I have described, was intended to force the Defendant into such derisory settlement. I have not seen either the offer or the counter offer, both made at the time of and immediately after the Defendant had abandoned his case on liability and the whole shape of the case had plainly altered.

29. Ms Smith denies these allegations of bad faith:

i) The contempt application was and is properly brought and a necessary warning, if warning is necessary in this kind of case, was given in the letter of 12 October, which was plainly, as appears from the letter itself, quoted above, made additionally to any point relating to costs.

ii) There is no need for further evidence by the Claimants in respect of the without prejudice negotiations, which were, she submits, wrongly referred to. The counter-offer, against the background of the abandonment of the Defendant's defence, was put in before the expiry of the Defendant's own deadline for negotiations.

iii) The Statement of Truth on the Ream ended Defence and Counterclaim had no effect on the strength or otherwise of the case now being made. The timing of the application was correct, i.e. once the factual issue had fallen away and liability had been abandoned, the original defence and its Statement of Truth could be shown to be unsupportable and unsupported.

iv) The draft application was served in advance in order to see if the subsequent application for alternative service or substituted service could be avoided, but in the event the Defendant's solicitors did not agree to that course.

30. I am wholly unpersuaded, including for the reasons given by Ms Smith, that there was bad faith, improper motive or threatening behaviour by the Claimants or their solicitors, and I judge this application on its merits against the background of the law to which I now return.

31. In addition to the words of Hooper LJ, both parties wish me to consider dicta in the other cases to which I have referred above:

i) the words of Sir Richard Scott VC in **Malgar** at 396:

> "*The difficulty lies in knowing quite what mental state on the part of the accused has to be shown. But I would think that it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice.*
>
> ...
>
> *The court from which permission is sought will be concerned to see that the case is one in which the public interest requires the committal proceedings to be brought. I repeat that these are not proceedings brought for the furtherance of private interests*."

And at 400:

> "*The allegedly false statements were made in June and abandoned in July. Does this show an attempt to interfere with the course of justice of a sufficient seriousness to warrant committal proceedings?*"

ii) Cox J in **Kirk v Walton** at paragraph 29:

> "*I approach the present case, therefore, on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the*

committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective."

iii) In **KJM Superbikes** Moore-Bick LJ referred in paragraph 12 to the case of **Malgar** and he said this:

"*In* [**Malgar v Leach** the Vice-Chancellor] *declined to give permission for proceedings to be instituted against the alleged contemnors because the falsity of the statements in question could not be clearly established without trespassing on the issues in the trial and because in any event the statements themselves had not been persisted in to the point at which they were likely to affect the outcome of the proceedings. He therefore regarded the committal application as tenuous, having earlier expressed the view that in order to succeed in an application to commit for contempt in making a false statement it is necessary to show that the maker knew that what he was saying was false and that his false statement was likely to interfere with the course of justice."*

He then said:

"*16. Factors such as these are likely to indicate whether the alleged contempt, if proved, is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. In addition, the court will also wish to have regard to whether the proceedings would be likely to justify the resources that would have to be devoted to them.*

17. In my view the wider public interest would not be served if courts were to exercise the discretion too freely in favour of allowing proceedings of this kind to be pursued by private persons. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance, whether justified or not ... I would therefore echo the observation of Pumfrey J. in paragraph 16 of his judgment in Kabushiki Kaisha Sony Computer case [2004] EWHC 1192 (Ch) at 16 that the court should exercise great caution before giving permission to bring proceedings. In my view it should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it."

Finally, he states in paragraph 19 as follows:

> *"In some cases, of which this is an example, it may be possible to deal with an application of this kind at a much earlier stage, especially if the alleged contempt relates to a statement made for a limited purpose which has passed and has no continuing relevance to the proceedings. Although we did not hear argument on this point, I think that in general a party who considers that a witness may have committed a contempt of this kind should warn him of that fact at the earliest opportunity (as the appellant did in this case) and that a failure to do so is a matter that the court may take into account if and when it is asked to give permission for proceedings to be brought. However, it is important not to impose any improper pressure on a witness who may later be called to give oral evidence. In particular, if the alleged contemnor is to be called as a witness, an application under rule 32.24 should not be made, and if made should not be entertained by the court, until he has finished giving his evidence.*"

32. Before returning to Hooper LJ, I shall address these additional points.

i) Both sides agree that I should exercise this jurisdiction with caution.

ii) The public interest must require committal proceedings to be brought. I shall return to this below.

iii) The facts in **Malgar** were that false statements had been made by a Defendant at the summary judgment stage which were in the event not pursued and not relied on at the application for summary judgment: and further substantial proceedings were continuing, leading to a full trial to come and a real risk in those circumstances that a parallel application for committal would have a prejudicial effect on a very substantial and continuing trial. The reference by Moore-Bick LJ to "*trespassing on the issues in the trial*" must be seen in that context and so must the point that "*the statements have not been persisted in to the point which they were likely to affect the outcome of the proceedings*" ie the summary judgment application. I accept Ms Smith's submission that the *outcome* is not necessarily limited to the outcome of the trial. In this case the *outcome* may be constituted by the very substantial expenditure of time and costs, even if, in the event, the case was abandoned prior to an actual trial. The question of *persisting* in a case has to be seen in the relevant context.

iv) No improper pressure must be imposed on someone who may be obliged subsequently to give oral evidence. In the **Malgar** case addressed by Moore-Bick LJ in his judgment, there was to be very substantial oral evidence. In this case, the abandonment came at a time when the Defendant had concluded that he would call no evidence at the trial on liability. I shall return to this later.

33. I turn then back to Hooper LJ's summary. I deal first with the issue of public interest, to which he refers in paragraph 41(ii)(d).

34. The discouragement of the making of false statements by litigants, by way of false Statements of Truth, is and must be in the public interest: see also the approval by the Supreme Court, per Lord Clarke in **Summers v Fairclough Homes Ltd** [2012] 1WAR 2004, of the words of Moses LJ in the case of **South Wales Fire and Rescue Service v Smith** [2011] EWHC 1749 (Admin):

> "*2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a Defendant can receive just compensation ...*
>
> *4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.*"

35. Additionally:

i) There must be a strong case, bearing in mind that at the full hearing the contempt alleged must be proved beyond reasonable doubt, i.e. that the statement was false and was known to be false by the person who made it.

ii) The false statement must be significant in the proceedings.

iii) The court must be satisfied that the alleged contemnor knew the effect of the statement and the use to which it would be put in the proceedings.

36. In my assessment of the falsity of the statement, Mr Bloch submits that I should put out of my mind the content of the documents attached to the Further Information pleading, even though referred to by Mr Oxnard, because not themselves exhibited by him. Ms Smith submits in response, that, if necessary, she would be prepared to have those pleadings and the documents formally exhibited to an affidavit. In the alternative, she has this morning referred me to the power that I have under the Practice Direction 81 PD 16.2 to waive any procedural defect in the conduct of a committal application if satisfied that no injustice has been caused to the Respondent by the defect.

37. Mr Bloch submits that his client would be, and/or has been, prejudiced by this, although there is no evidence to support the proposition that when the Defendant made the comments he did, which I have set out, he was only assessing them halfheartedly because he did not regard them as part of the evidence against him. He

deals particularly with the documents in the passage, which I have quoted, in his statement, ending with the short comment "*So what*".

38. The more substantive submission that Mr Bloch makes is a complaint that the case which the Claimant is seeking to make is not sufficiently grounded, or explained, simply by the exhibiting of the documents and the explanation or exposition of them which Mr Oxnard has made in his affidavit, which I described above.

39. It seems to me that there is clear evidence by reference to the emails and the documents, both those which are exhibited to Mr Oxnard's witness statement, primarily the documents for example relating to the bank account of Carat and his apparent position as Chief Executive of Carat as late as 2009, and those exhibited to the Further Information, of his continuing involvement, close involvement, with the affairs of Carat in the manner described by me above long after July 2008, and even after the appointment of the second replacement Chief Executive in January 2009. The case is thus that his statement that he had nothing further to do with Carat after April 2008, and certainly nothing after June 2008, is falsified on the face of these documents.

40. But I note and I take into account the fact that, <u>even if</u>, as Mr Bloch invites me to do, I ignored the contents of the emails which are only attached to the pleadings and not formally exhibited, and address also the explanation given by the Defendant, it seems to me quite clear that there is a strong case that after April and June 2008, contrary to his statements in the Defence, and consequently to his Statement of Truth, he was very substantially involved in Carat, requiring considerably more explanation, if there be one, than has been given in the witness statements to which I have referred, already filed in this application.

41. I note therefore that, if the application proceeds, any ambiguity or doubt about the reliance that the Claimants place upon the documents attached to the Further Information can be made good or supplemented by an affidavit, so that when it comes to the contempt application, there can be no asserted doubt as to precisely what case the Defendant is meeting, but that, even without those documents, there is a sufficiently strong case.

42. I ask myself therefore, for the purposes of whether the application for permission should be granted, whether there is a strong case that the First Statement was made by the Defendant knowing it to be false. It seems to me clear that this is not one of those cases, as, for example, I allowed for in relation to the Third Statement, where the Defendant could have forgotten what he in fact got up to after April 2008 in relation to the affairs of Carat, or where something is being said as to what someone else did in his company or wrote to him, or what he may or may not have seen at a given time, so that a case could be made for him in opposition to the application that, if it turns out that the statement was false he had no reason to know that fact.

43. Equally, it seems to me, that he would have known, if this statement was a knowingly false statement, that it was of considerable significance in relation to the case. The claim that was being made against him, and in due course supported by substantial

evidence, and apparently due to be opposed on substantial evidence, was that he had, in breach of clause 11.2 and clause 7.5, the Carat Clause, carried on running a very substantial competitor of MEC and the Claimants for a considerable period of time, and that was the case that he was denying. It was in those circumstances particularly significant that he should make the case that he did that his only involvement after 26 March 2008 was the very limited one which, even in his own recent witness statement, he now accepts was an inadequate or inaccurate description.

44. In those circumstances, I consider it important, of course, that litigants should not feel discouraged from abandoning their case or from settling cases before trial. Far from it, that should be encouraged. But I am satisfied that there is a strong case that when these statements were made they were known to be significant and then to be false, and had they not been made then the factual defence on liability would and could not have been made, and the vast amount of time would not have been spent on this trial, which was spent before in the event the case was abandoned.

45. I turn to consider the question as to whether, if the permission application is now permitted to go ahead, the committal proceedings would, as Mr Bloch put it "*complicate and potentially prejudice the second trial given the overlap of the issues*".

46. As a result of the permission I gave to the Defendant only on Friday to amend his defence, referred to as a possibility in paragraph 7(i) and 67(iii) of my judgment, there is now to be at the quantum stage a dispute as to when the Defendant's admitted default first started: whether it was as at 28 February 2008, i.e. the moment the Agreement was signed, or only as at 28 July 2008, upon the expiry of the four month period provided by the Carat clause, or at some date in between. There will be an issue as to the construction of clauses 11.2 and 7.5 and an analysis of events between February and July 2008. This will cover, as and when the trial of that issue occurs, if it does, some of the same facts as will be considered on the contempt application.

47. This has arisen only as a result of the new issue which has arisen as a result of the amendment.

48. I do not conclude that the fact that that will at some stage need to be resolved as a matter of fact, and construction, that that will in any way prejudice the position of the Defendant in giving his account as to the truth of the First Statement. If that were otherwise, then it would mean that because of the successful amendment application, which revived the date issue, it would now mean that the contempt application which I otherwise conclude to be strongly arguable cannot be heard. I am unpersuaded that there is any prejudice, at any rate such as to cause me to come to a different conclusion as to granting permission.

49. As for the issue which Mr Bloch has raised by reference to the words of Moore-Bick LJ with regard to the devotion of resources, both parties have spent widely and freely in relation to these proceedings and have the apparent assets to do so, but in any event it seems to me clear that the evidence with regard to the contempt application will be in a small compass, and will largely depend upon evidence which has already been

adduced, or was prior to the abandonment of liability to be adduced, in relation to the four to five week trial.

50. In those circumstances, I grant permission.

MS SMITH: My Lord, I'm very grateful, and I'm most grateful to your Lordship for dealing with that overnight.