Neutral Citation Number: [2023] EWHC 2797 (Comm)

Case No: CL-2022-000608

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

Date: 09/11/2023

Before :

MR JUSTICE FOXTON

- -

Between :

(1) EPISO 4 PILGRIM HOLDING SARL **(2) TRISTAN CAPITAL PARTNERS LLP**	**Applicants/ Defendants in Claim**
– and –	
TIMOTHY DAVIES	**Respondent**
– and –	
TB PROPERTY INVESTMENTS (PLYMOUTH) LIMITED	**Claimants in Claim**

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Bobby Friedman (instructed by **Bryan Cave Leighton Paisner LLP**) for **the Applicants**
Adam Porte (instructed by **Acuity Law**) for **the Respondent**

Hearing date: 3 November 2023
Draft Judgment Circulated: 3 November 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 09 November 2023 at 10:30am.

The Honourable Mr Justice Foxton:

1 This is an application by the Defendants in these proceedings (**"the Applicants"**) for permission under CPR 81.3(5)(b) to pursue committal proceedings against the Respondent ("**Mr Davies"**) on the basis that he made a number of knowingly false statements in two witness statements signed with statements of truth.

The proceedings

2 On 15 November 2022, the Claimant, TB Property Investments (Plymouth) Limited (**"TB Property"**) commenced proceedings against the Applicants in relation to a dispute arising out of a joint venture to redevelop a Plymouth department store. The Applicants applied for security for costs on 28 December 2022. That application came before Mr Adrian Beltrami KC, sitting as a Deputy High Court Judge of the Commercial Court, on 21 April 2023.

3 The central issue in the security for costs application was whether ordering TB Property to provide security would stifle the claim, for which purpose the issue of whether TB Property could satisfy any order for security from funds raised from other parties was the key question.

4 Mr Davies, who at that time was a director and 25% shareholder of TB Property, provided two witness statements in response to the application to address that question. The first was dated 31 March 2023 (**"Davies 1"**). That statement was the subject of extensive criticism in a witness statement filed for the Applicants on 14 April 2023. Those criticisms were addressed by Mr Davies in a second witness statement dated 19 April 2023 (**"Davies 2"**).

5 On 20 April 2023, the Applicants filed their skeleton argument in which the evidence in Davies 1 and 2 was heavily criticised. In response, later that day, TB Property's solicitors sent a detailed letter (**"the Acuity Letter"**) attaching further information and responding to a number of the points raised. The letter attached bank statements (the absence of which had been strongly criticised by the Applicants) which showed both a cash balance of substantially in excess of £10,000, and the existence of a £10,000 overdraft (which the letter also confirmed). The letter also addressed in some detail the financial position of Mr Davies' wife, Gwyneth Davies (**"Mrs Davies"**).

6 At the hearing, the Judge read the witness statements. The statements were subject to a number of criticisms by the Applicants in the course of argument. The judge largely endorsed those criticisms, observing:

> "The defendant has subjected [Mr Davies'] evidence to considerable criticism with which I am, by and large, in agreement ….
>
> Certainly, so far as Mr Davies is concerned, there are substantial assets which were not mentioned and should have been."

7 The Judge concluded:

> "Not only has the claimant not satisfied the burden which I have referred to, but on the face of the evidence before the court it does seem to me that the claimant does have access to sufficient funds or assets which could be realised and which could in fact satisfy an order for security."

8 The Judge ordered TB Property to provide security for costs in the sum of just under £216,000 by 2 June 2023 and ordered TB Property to pay the costs of the application on an indemnity basis. However, the security which the Judge had ordered to be provided was not paid.

9 On 29 July 2022, TB Property had commenced separate proceedings against a company now owned by the Applicants relating to an alleged debt claim to a deposit of £750,000 (**"the Deposit Claim"**). I transferred the Deposit Claim to the Central London County Court. An application for security for costs was made in those proceedings.

10 On 20 April 2023, Davies 1 and 2 were filed by TB Property in the Deposit Claim.

11 On 24 and again on 26 April 2023, TB Property made two offers to provide security for costs for the Deposit Claim in relatively small amounts.

12 On 27 April 2023, the Applicants wrote to TB Property's solicitors referring to information about a property owned by a company which Mr Davies had an interest in, which they had obtained from the Land Registry.

13 On 28 April 2023, the Applicants wrote to Mr Davies warning him of a possible committal application relating to allegedly untruthful statements in Davies 1 and 2.

14 On 5 May 2023, Mr Davies filed a further witness statement ("**Davies 3"**) in which (to put matters neutrally for the moment) he corrected certain statements made in Davies 1 and 2, and referred for the first time to two further properties which he owned jointly with Mrs Davies, which had not been mentioned in Davies 1 and 2 and which were together worth some £400,000 (**"the Missing Properties"**).

15 Following the service of Davies 3, there was agreement that security would be given for the costs of the Deposit Claim, and TB Property was ordered to pay indemnity costs.

16 On 26 May 2023, TB Property applied to stay these proceedings pending the determination of a summary judgment application in the Deposit Claim. In response, on 31 May 2023, the Applicants cross-applied for an unless order, which would provide that, if the security was not put up within 7 days, the action would be dismissed.

17 Those two applications came before Mr Beltrami KC on 21 July 2023. He dismissed the stay application and made an unless order in relation to the outstanding security for costs. The Judge did not accept the Applicants' submission that there should be a

7-day period for providing the security; instead, he ordered that it be provided by 11 August 2023. However, the security was not provided.

18 On 14 August 2023, TB Property's solicitors came off the record. On 15 August 2023, the Applicants applied for an order entering judgment and seeking costs. That application came before me on 6 October 2023, and I entered judgment for the Applicants and awarded them the costs of the proceedings.

19 The Applicants now seek the court's permission to bring committal proceedings in respect of what they allege were knowingly false statements made by Mr Davies in Davies 1 and 2. The statements relied upon are as follows:

i) "I do not own any stocks or shares other than my investment in the Claimant" in Davies 1 (**"Statement 1"**).

ii) "As of 27 March 2023, I had approximately £10,000 of cash available across my various accounts" in Davies 1 (**"Statement 2"**).

iii) "My financial position based on my significant assets, cash, stocks and shares and debt is as follows" in Davies 1 **("Statement 3"**).

iv) "The assets above …. are all the significant assets I have" in Davies 1 (**"Statement 4"**).

v) Mr Davies' "significant assets", with the exception of £10,000 of liquid assets totalled "a 50% share in approximately £1,136,000 of non-liquid assets" in Davies 1 (**"Statement 5"**).

vi) "I have made loans / invested capital of … £370,000 to the Claimant" in Davies 1 (**"Statement 6"**).

vii) "In terms of bank accounts, I hold two bank accounts at NatWest, neither of which have any overdraft facilities" in Davies 2 (**"Statement 7"**).

viii) "I have provided information about all significant assets. For the avoidance of doubt, this includes all assets over £5,000 and I do not own any further assets over £5,000 other than those mentioned within my first and second witness statements" in Davies 2 (**"Statement 8"**).

ix) "There are no further assets of which I am aware that are held in Gwyneth's [Mrs Davies] name which I have not already mentioned within either my first or second witness statements" in Davies 2 (**"Statement 9"**).

The application for permission

20 CPR 32.14 provides:

> "Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, prepared … during proceedings and verified by a statement of truth without an honest belief in its truth."

21 CPR 81.3(5) provides:

> "(5) Permission to make a contempt application is required where the application is made in relation to—
>
> (a) interference with the due administration of justice, except in relation to existing High Court or county court proceedings;
>
> (b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement."

22 The principles to be applied when determining whether or not to grant permission have been discussed in a number of authorities. Hooper LJ in *Barnes v Seabrook* [2010] EWHC 1849 (Admin), [41] summarised them as follows:

i) A person who makes a statement verified with a statement of truth or a disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when they made it.

ii) It must be in the public interest for proceedings to be brought.

iii) In deciding whether it is in 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".

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

v) Only limited weight should be attached to the likely penalty.

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

23 In *KJM Superbikes Limited v Hinton* [2008] EWCA Civ 1280, [9], Moore-Bick LJ explained:

> "Knowingly to give false evidence in a witness statement intended for use in proceedings, particularly proceedings of a kind that are ordinarily determined without evidence, will usually involve an attempt to interfere with the course of justice and such proceedings might therefore be regarded as a matter primarily for the public authorities. However, a private individual, usually a party to the proceedings, may well be directly affected by such action."

24 At [11], the Court of Appeal emphasised that:

> "When the court gives a private person permission to pursue proceedings for contempt against a witness who is alleged to have told lies in a witness statement it allows that person to act in a public rather than a private role, not to recover damages for his own benefit, but to pursue the public interest. That is why the court will be concerned to satisfy itself that the case is one in which the public interest requires that the committal proceedings be brought and that the applicant is a proper person to bring them".

25 At [16], the Court continued:

> "Whenever the court is asked by a private litigant for permission to bring proceedings for contempt based on false statements allegedly made in a witness statement it should remind itself that the proceedings are public in nature and that ultimately the only question is whether it is in the public interest for such proceedings to be brought. However, when answering that question there are many factors that the court will need to consider. Among the foremost are the strength of the evidence tending to show not only that the statement in question was false but that it was known at the time to be false, the circumstances in which it was made, its significance having regard to the nature of the proceedings in which it was made, such evidence as there may be of the maker's state of mind, including his understanding of the likely effect of the statement and the use to which it was actually put in the proceedings. 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."

26 At [17], the Court warned against permission being granted "too freely", and suggested 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."

27 In *Norman v Adler* [2023] EWCA Civ 785, [39], the Court of Appeal held that the requirement of a strong case required a case where "the evidence is sufficiently strong, without more, to satisfy the criminal standard of proof".

28 It is also clear that permission will not be given when the proposed committal proceedings are not in accordance with the overriding objective (*Stobart v Elliott* [2014] EWCA Civ 564, [44]).

Have the Applicants shown a strong prima facie case that the statements relied upon were made by Mr Davies knowing that they were untrue?

29 It has been emphasized that, at the permission stage "it will usually be wise to refrain from saying more about the merits of the complaint than is necessary" (*KJM*, [18] and see also *Frain v Reeves* [2023] EWHC 73 (Ch), [24])). It is easy to see why this is so. If the court grants permission, the merits will be a matter for the judge hearing the application. If the court refuses permission, the respondent will not have an opportunity to answer the complaint. For those reasons, I have addressed the merits of the various complaints as concisely as possible.

Is there a strong prima facie case that the statements were untrue?

30 Mr Davies has accepted that the following statements were false:

i) Statement 1 (because Mr Davies owned shares in two companies not mentioned, Citrim Properties Limited (**"Citrim"**) and Highmead Dairies Limited (**"Highmead"**)).

ii) Statement 2 (Mr Davies' accounts having always held significantly more than £10,000, and at the relevant time over £30,000).

iii) Statement 3 (because Mr Davies owned significant assets which were not referred to).

iv) Statement 9 (because Mr Davies accepts the Missing Properties were held in Mrs Davies' name at the time of Davies 1 and Davies 2).

31 So far as the other statements are concerned, I am satisfied that there is a strong prima facie case that they are also untrue:

i) Statements 4 and 5: there is a strong prima facie case that Mr Davies had significant assets other than those listed, namely his shares in Citrim and Highmead, his pension and the Missing Properties.

ii) Statement 6: Mr Davies lent £2m to TB Property through a company he owned with Mrs Davies, there being a strong prima facie case that his statement about

"loans / capital" advanced by Mr Davies to TB Property, on its natural meaning, included funds advanced by a company he owned.

iii) Statement 7: because there is a strong prima facie case that the NatWest current account has an overdraft facility of £10,000, as this is recorded on a bank statement and was confirmed in the Acuity Letter.

iv) Statement 8: because there is a strong prima facie case that Mr Davies had not provided information about all his significant assets, having failed to refer to the Missing Properties.

Is there a strong prima facie case that Mr Davies knew that the statements were untrue?

32 For this purpose, the Applicants must show a strong prima facie case that Mr Davies *knew* that the statements were untrue, rather than merely being reckless as to the truth of those statements: *Norman*, [61].

33 The explanations offered for the contents of Davies 1 and 2 are as follows:

i) Davies 1 and 2 were prepared without independent legal advice (viz for Mr Davies personally, as opposed to TB Property) as a result of which Mr Davies wrongly understood that he did not need to include "information in the public domain" or assets which he did not believe would be capable of providing security.

ii) Davies 2 was prepared "urgently".

iii) Mr Davies had forgotten to include some assets.

iv) Some statements were made because they were believed to be true but were in error.

v) It is still maintained that one alleged misstatement was true.

vi) The omission from Davies 1 of the shares in Citrim and Highmead and pension was corrected in Davies 2 and the position relating to the overdraft and cash balance in the Acuity Letter.

34 No express response is offered at this stage to statements 7 and 9, but I draw no inference from that omission.

35 It is of course entirely possible that, having heard evidence from Mr Davies and having had that evidence tested in cross-examination, a judge hearing any committal application would conclude that the explanations are or may be true and that the alleged contempt is not made out.

36 However, it is necessary at this stage to stand back:

i) The witness statements were prepared to address the assets Mr Davies had access to. Both Davies 1 ("I do not own any stocks and shares other than my

investment in the Claimant" and "the assets above are all the significant assets I have") and Davies 2 ("I have provided information about all significant assets" and "I do not own any further assets over £5,000") are expressed in all-encompassing terms.

ii) Davies 1 included properties on the Land Registry (and therefore a matter of public record) and illiquid assets which it was asserted could not be used to provide security, the witness statement distinguishing between identified assets which could and could not be used to provide security. Davies 2 also included assets which it was being said could not be a source of security (e.g., properties owned by Citrim and subject to long leases or Mrs Davies' assets).

iii) Davies 2 referred to Mr Davies' pension pot, Citrim and Highmead only after they had been raised by Rebecca Campbell, solicitor for the Applicants, in her second witness statement of 14 April 2023 and the Acuity Letter only produced bank statements (which revealed the overall cash balance and the existence of an overdraft) after the Applicants' skeleton argument had strongly criticised the absence of such documents.

iv) The Missing Properties were not disclosed prior to the security for costs hearing before Mr Beltrami KC, even though the Acuity Letter had addressed the position of Mrs Davies' assets in some detail.

v) The Missing Properties were disclosed in Davies 3 after the Applicants had sent letters making it clear that they were inspecting the Land Registry, and threatening committal.

vi) There were a substantial number of false statements relating to the asset position, or statements where there is a strong prima facie case that they were false, each of which gave a false impression that Mr Davies' assets or funds were less than they were. This is a context in which it would be open to the trier of fact, if sure that there had been a deliberate understatement of assets in one or more respects, to rely upon that fact when considering other statements.

37 Against that background, I am satisfied that there is a strong prima facie case that Mr Davies knew that the statements were untrue.

Is there a strong prima facie case that the statements were made with intention of interfering with the due administration of justice?

38 Mr Porte did not seek to suggest that, if I was satisfied that there was a strong prima facie case that Mr Davies made the statements knowing they were untrue, it would not inevitably follow that there was a strong prima facie case that Mr Davies made the statements with the intention of interfering with the due administration of justice. In any event, I am satisfied that there is such a strong prima facie case that Mr Davies intended to mislead the court as to the assets available to him.

Should the court grant permission to the Applicants to pursue committal proceedings?

39 My conclusion that there is a strong prima facie case that Mr Davies made the statements knowing they were untrue plainly raises a serious and concerning matter. It has been noted that "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" (*KJM*, [23]). Further, Mr Davies has failed to offer the degree of contrition which would be appropriate when evidence with so many inaccuracies has been tendered to a court (a matter of obvious potential relevance to any costs order).

40 However, my finding that there is a strong prima facie case is not the end of the enquiry. In this case:

i) Davies 1 and 2 were prepared for and deployed at a security for costs hearing. By the time of that hearing, the only substantial misstatement which remained uncorrected was the existence of the Missing Properties (I leave on one side a misidentification in Davies 2 of the address of two properties owned by Citrim, but not their value, which was subsequently corrected and which I am satisfied may well have been an innocent error).

ii) At the hearing of the security for costs application, the Applicants made significant criticisms of the accuracy and comprehensiveness of Mr Davies' evidence, which the Judge accepted. The contention which Davies 1 and 2 were intended to support – that an order for security would stifle TB Property's claim – was decisively rejected, substantial security in the full amount sought by the Applicants was ordered, and an order for indemnity costs was made.

iii) There were public judicial criticisms of Mr Davies' evidence in the Judge's judgment, and there has been further adverse comment in this judgment.

iv) The proceedings have since been struck out and the costs of the proceedings awarded to the Applicants.

v) The Applicants understandably claim that they "have been put to very substantial cost and wasted time" as a result of the misstatements in Davies 1 and 2. To the extent that Davies 1 and 2 increased the costs incurred by the Applicants, which cannot be recovered from TB Property, it is open to the Applicants to seek an order against Mr Davies under s.51 of the Senior Courts Act 1981. However, I am not persuaded that the Applicants suffered any prejudice beyond costs from the late or non-disclosure of assets by Mr Davies, nor that the costs wasted are at all proportionate to the costs of a committal application.

vi) Committal proceedings do not provide an avenue for redressing any wasted costs – in particular, they cannot properly be pursued with a view to inducing Mr Davies to compensate the Applicants in return for any committal proceedings being discontinued, as Mr Friedman accepted. I do not seek to go behind his assurance that the Applicants are solely motivated by the public interest in bringing this application. It is striking, however, how much more public-spirited

litigants in the Commercial Court have become over the last decade, in which committal applications have grown significantly.

vii) The significant misstatement which had yet to be corrected prior to the security for costs hearing – relating to the Missing Properties – was corrected in Davies 3, filed on 5 May 2023 (i.e., within a relatively short period, albeit after Davies 1 and 2 had been deployed in the Commercial Court hearing), albeit I accept this may well have been prompted by the Applicants' correspondence.

viii) An order for substantial security was made in the Deposit Claim, together with an order for indemnity costs of the security application.

41 Further, granting permission will consume court resources at a time when the Commercial Court lists are under particular pressure, in circumstances in which the substantive proceedings in this court have come to an end. Realistically the trial of any committal application would require a 3-day hearing (including one day's reading time), which on current lead times would only come on in late 2024 or early 2025. Those facts require the court to consider with particular care whether a committal application would serve the public interest and the overriding objective. Having considered the matter carefully, and in the circumstances outlined in [40], I am satisfied that it would not, and permission is refused.