Neutral Citation Number: [2019] EWCA Civ 1964

Case No: A2/2019/2367
A2/2019/2368

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before:

LORD JUSTICE DAVIS
LORD JUSTICE McCOMBE
and
LADY JUSTICE ASPLIN DBE

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Between:

STEPHEN CORRIGAN	**Appellant / Defendant**
- and -	
CHELSEA FOOTBALL CLUB LIMITED	**Respondent / Claimant**

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Mr Adam Tear, solicitor advocate of Hodge, Jones and Allen for the **Appellant**
Mr Edward Rowntree (instructed by **Kerman + Co LLP**) for the **Respondent**

Hearing date: 9th November 2019

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Approved Judgment

Lord Justice Davis:

Introduction

1. The activity of ticket touting has been judicially described as a “disreputable scourge”. It is in fact capable of constituting a criminal offence under s.166 of the Criminal Justice and Public Order Act 1994. It particularly affects, although is by no means confined to, sporting and musical events.

2. Chelsea Football Club, the famous Premier League football club, is one of a number of holders or organisers of such events seeking, by use of civil proceedings, to detect, deter and disrupt the activities of ticket touts.

3. In the present case, it is alleged that the defendant, Stephen Corrigan, was detected seeking to engage as a tout in an unauthorised ticket transaction on 8 April 2019. He arranged to sell to an individual (in fact, an agent of the football club) a ticket with a face value of £23.50 for the sum of £125, payable in cash, for the home game that evening against West Ham United. The transaction took place in Fulham Broadway, near to the football club’s ground at Stamford Bridge.

4. The defendant was in due course identified as the individual undertaking the sale. Civil proceedings were commenced against him in the High Court on 12 April 2019. On 15 April 2019, on the ex parte application of the claimant, Stewart J granted wide ranging relief by way both of negative injunctions and of mandatory orders for disclosure.

5. As at 15 July 2019 the defendant had, notwithstanding due service, failed to comply with the mandatory orders, to appear at a hearing in the interim or to take any part in the proceedings. On that date, when the defendant again did not attend, Murray J made an order committing him to prison for 6 months, suspended until 26 July 2019. That period of suspension was stated to be designed to enable the defendant even then to comply with the Order of 15 April 2019. He did not do so; and on 26 July 2019 Murray J confirmed that the suspension ceased to have effect. On 30 July 2019, the defendant attended in person before Murray J having been arrested under a bench warrant and, following a further hearing, the immediate term of imprisonment was confirmed. The defendant was eventually released from prison on 10 September 2019.

6. It is now said on this appeal, brought on behalf of the defendant as of right, that the suspended sentence order for contempt of court should not have been made; or, even if it was properly made, it should not thereafter have been activated.

7. It seemed, at least in the written arguments presented by Mr Tear on behalf of the defendant prior to the hearing, that it was being suggested that potentially important points of principle and practice arose: in particular by reason of the asserted mental capacity issues of the defendant and by reason of his lack of legal representation at all relevant stages. However, my own firm opinion is that the proper outcome for this appeal rests on the particular circumstances of this particular case. No point of principle arises.

Background

8. The ticket transaction in question was, on the current evidence, initiated by the defendant at a Starbucks café in the Fulham Broadway Centre, at around 6pm on 8 April 2019. This is a short distance from the football club's ground at Stamford Bridge. An individual, described in the evidence as "the claimant's agent", was, as it is alleged, approached by a man subsequently identified as the defendant. The agent was asked if he wanted to buy a ticket for the match that evening. It is said that a number of other tickets were at that time identified in the defendant's possession.

9. The agent agreed to pay £125 in cash, which he was told was the price. He handed over £130, receiving £5 by way of change in return. He was handed a ticket with a face value of £23.50. It is alleged that the defendant also told the agent that he regularly dealt in tickets for Chelsea matches; and he provided the agent with his telephone number. The ticket in question was identified as having been initially issued to an individual who was a member of the club. It was a genuine ticket. There was evidence that tickets are issued to members subject to Match Ticket Conditions of Issue. Further, Terms are printed on the back of each ticket. It is sufficient for present purposes to say that the various terms and conditions make clear that a match ticket may not be resold and may not be transferred to a guest at above face value. It is also made clear in the terms and conditions both that the unauthorised sale or disposal of a match ticket may result in a criminal offence and that the football club may commence court proceedings in the event of a breach.

10. In due course the defendant was identified as the individual concerned in the sale. His home address in Hertfordshire was also ascertained. (It seems, in fact, that he had formerly been a member of the club.) It was further established that the defendant operated a Twitter account. That, when accessed, included posts advertising tickets for sale for a variety of football matches.

The proceedings

11. Proceedings were started, with leave of the Master, in the High Court on 12 April 2019. The Particulars of Claim – doubtless in standard form for a case of this kind brought by the club, albeit adapted to the facts of the particular case – are detailed. There are various causes of action advanced: breach of contract, conspiracy, procuring or inducing a trespass, wrongful interference with goods and so on. Damages, an account of profits and injunctive relief are among the remedies sought.

12. On 15 April 2019 the claimant applied for wide-ranging orders. The application was made ex parte: the defendant thus had no notice of it and was not present. Stewart J granted the orders sought. These included injunctions restraining the defendant from trading in Chelsea tickets and restraining him from being within 400 yards of the ground at Stamford Bridge or 200 yards of Fulham Broadway Underground Station in the 48 hours prior to the date of any home match.

13. In addition, the Order included mandatory orders for delivery up and disclosure. I need not, for present purposes, set out the precise terms of such orders: but they extended to delivery up of all Chelsea tickets in the defendant's possession or control; required him to give contact details, with regard to certain identified home matches, of those from whom the defendant had purportedly acquired, and of those to whom the defendant had

purportedly sold, Chelsea tickets; and further required him to give details of any such transactions. The latter aspects were required to be verified by affidavit, served by 18 April 2019, of the defendant.

14. In addition, this was stated at paragraph 2(d) of the Order:

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

15. The Order, as sealed, included (as is required) a Penal Notice endorsed on the front page. That Notice, printed in bold and in capital letters, made clear, among other things, that disobedience might result in a finding of contempt of court and imprisonment. The Order further went on among other things to state, in bold letters, that the defendant should read the order very carefully and that "you are advised to consult a solicitor as soon as possible". The right to apply to vary or discharge was also highlighted. The Return Day was specified as 24 April 2019 at 10:30 am.

16. The Order and other documents (including the Claim Form) were personally served on the defendant on 16 April 2019. Also on that date, the claimant's solicitors, Kerman & Co. ("Kerman"), wrote to the defendant at his home address enclosing an application notice for the Return Day.

17. The defendant did not comply with the Order by serving any affidavit by 18 April 2019. Nor did he attend on the Return Day. In such circumstances, inevitably, Waksman J in effect continued the previous Order of Stewart J: he also ordered the defendant to pay costs of £12,679 by 8 May 2019. That order of Waksman J was served on the defendant thereafter.

18. It is common ground that on 29 April 2019 the defendant telephoned Mr Thorndyke, an associate partner of Kerman. He said that he had received the paperwork. According to Mr Thorndyke, the defendant also said that he could not afford to pay the costs of over £12,500 thus far awarded against him. He also referred to mental health problems and to having been in a mental health hospital and to being on prescription drugs; and said that he could not read. It was suggested to him by Mr Thorndyke that he go to the Citizens Advice Bureau. He was also reminded of the salient terms of the Order of Stewart J with regard to the production of information. Nothing further happened, however.

19. During June 2019 Kerman wrote a number of letters to the defendant about proposed proceedings for contempt. An application to commit for contempt of court and an application for judgment in default were issued on 21 June 2019. A letter from Kerman of that date sent to the defendant concluded with these words: "We recommend that you seek urgent legal advice". Personal service of the application to commit, with supporting documents, was effected on 27 June 2019.

20. The application notice for the committal hearing gave a date of 15 July 2019 with a time "TBC". The application notice for the default judgment hearing gave a date of 26 July 2019 at 3 pm. However, an order was obtained from the Master on 2 July 2019 vacating that date and time for the hearing of the application for default judgment and directing that that matter be listed to be heard with the committal application on 15 July 2019 at a time to be confirmed. The defendant was sent a letter by Kerman so informing him on 3 July 2019. That letter concluded: "We again recommend that you seek legal advice."

21. On 5 July 2019 Kerman wrote again to the defendant, enclosing bundles for the hearings scheduled for 15 July 2019. The letter in terms informed him that he was required to attend the hearings. It also drew attention to the potential consequences of non-compliance with the Orders previously made. As to the contempt of court application this was said:

> "In relation to the latter application, we are obliged to make you aware of the possible availability of criminal legal aid. You may contact the legal aid agency either by email or by telephone. We enclose with this letter a document setting out the contact details for enquiries to the legal aid agency and refer you to the section headed 'Crime Applications' and the telephone number mentioned therein."

It is plain that this was intended to be, and was, in compliance with the requirements of paragraph 15 of CPR Practice Direction 81.

22. On 12 July 2019 Kerman sent a further letter to the defendant advising him that the hearing on 15 July 2019 was at 10:30 am at the Royal Courts of Justice before Murray J. The letter again concluded: "We again suggest that you seek urgent legal advice".

Hearing of 15 July 2019

23. There was no attendance by the defendant at that hearing of 15 July 2019. Mr Rowntree appeared for the claimant. We have seen a transcript of that hearing. It is clear that Murray J had carefully familiarised himself in advance with all the papers. Those papers included the first affidavit of Emma Shaw, an associate solicitor at Kerman. That affidavit among other things included, at paragraph 17, express reference to the contents of the telephone discussion with Mr Thorndyke, where the defendant had among other things referred to his mental health problems, to his medication and to his claimed inability to read.

24. Having considered the papers and the submissions, the judge in his judgment noted the frequent advice given to the defendant to seek legal advice. He found that the claimant had "done all that it could do to make it clear to Mr Corrigan what he had to do to comply with the order." The judge further found that the defendant had been duly notified of the hearing and "there is no excuse for him not to be here." He found that, on the evidence, contempt had been proved. He found the breach to be "flagrant". He said: "There has been absolutely no engagement whatsoever, apart from one call to a colleague of Ms Shaw's." The judge selected a sentence of 6 months imprisonment as the appropriate sanction but concluded in this way:

> "I bear in mind that when sentencing for contempt, we are concerned with punishment, but we are also concerned with coercion, because the most desirable outcome is that Mr Corrigan ultimately purges his contempt and complies with the order. So it seems to me that it is appropriate to suspend the sentence for a short period of time to allow him to seek legal advice, if he has not done so already, and to comply."

25. The judge also on that day gave judgment permitting judgment in default to be entered. As to the committal order, as sealed, among other things paragraph 2 made explicit on its face that the applicant stood committed to HMP Pentonville for a period of 26 weeks, but suspended until the return date "pending the Defendant purging his contempt". As to that, paragraph 3 of the Order said this:

> "3. There will be a return date on Friday 26 July 2019 at 10:30am (reserved to Mr Justice Murray) for the purpose of the Defendant establishing that he has purged his contempt and, in the alternative, to lift the suspension on the prison sentence imposed above."

Events following 15 July 2019

26. The Orders of 15 July 2019 were sent by post by Kerman, the covering letter again suggesting the defendant take urgent legal advice. The committal order was also served by a process server on 16 July 2019. In a witness statement of 17 July 2019, which verified service, the process-server said that he was telephoned by the defendant (the process-server having previously left his number). In that conversation, according to the statement, the defendant made reference to telling people about his mental health issues. He then became aggressive when told that there that had to be service of the Order and said: "I don't give a fuck as I will be dead in a couple of week as I will hang myself."

27. Thereafter there was correspondence from Kerman to the defendant concerning the Return Day of 26 July 2019. By letter dated 25 July 2019 the defendant was told that it would be at 10:30 am before Murray J in a particular court. The defendant did not attend. Murray J lifted the suspension and a warrant was issued for the defendant's arrest.

28. It is said by the defendant that he in fact attended court that afternoon and that the court staff then told him of the morning's hearing. He then, as is accepted, telephoned Ms Shaw saying that he was at court. According to her, he asked as to whether a warrant for his arrest had been issued. She advised him by subsequent text to attend court on Tuesday 30 July 2019. She also advised him to go to the Law Society or Citizens Advice Bureau: but according to the defendant in subsequent evidence he got no real assistance from the Law Society when, as he says, he went there.

Hearing of 30 July 2019

29. The matter came back before Murray J at 2pm on 30 July 2019. The defendant attended in person. Mr Rowntree again appeared for the claimant. The defendant had in fact been arrested when he attended court on that date by the Tipstaff pursuant to the extant warrant.

30. Here too we have a transcript. The defendant indicated that he understood why he was there. The judge asked him what he would like to say. He said that he had come on Friday afternoon (referring to the date and time marking on the initial notice of the default judgment application). He also said "I suffer badly from mental health" and "I've been in and out of mental health units." When asked by the judge why he had not engaged with the court and explained his difficulties, he briefly indicated that he had, on an unspecified occasion, spoken to a solicitor. He also said: "I don't sell tickets to anybody…I've nothing got [sic] to do at all with Chelsea… I don't have nothing."

31. In his further ruling, the judge again referred to the lack of any engagement on the part of the defendant. He said that the defendant had "completely ignored" the suspended sentence order of 15 July 2019. The judge confirmed that he had reviewed the evidence and was satisfied that the defendant had had notice that the hearing on 26 July 2019 was at 10:30 am. The judge noted the defendant's statements about his mental health difficulties but decided that he had no option but to send him to custody. The defendant was ordered to pay costs. The defendant was also referred to the desirability of his thereafter obtaining a solicitor whilst in prison and to the possibility of applying to have the custodial term shortened. The hearing concluded with the defendant saying: "I won't be alive sir, I won't last in prison."

32. The defendant was thereupon taken to HMP Pentonville.

Events after 30 July 2019

33. Ultimately, the defendant succeeded, from prison, in retaining the services of Mr Tear of Hodge, Jones and Allen. On 4 September 2019 that firm applied for his immediate release. Murray J on that date, and on the papers, ordered such release pending the hearing of an application to purge his contempt (as is to be gathered, no such hearing has as yet taken place). The defendant made a typed witness statement (not affidavit), signed by him with a statement of truth, dated 4 September 2019. Annexed to this statement was a handwritten document of the defendant which provided to the best of his knowledge, as it is said, the information as ordered in the Order of 15 April 2019. He also said in his witness statement:

> "I wish to apologise to the court for failing to engage with the matter in the manner expected. As notified to the claimant I couldn't afford a lawyer and was unaware of being able to apply for exceptional legal aid to enable representation in these matters."

In the annexed handwritten document, which provided certain information, the defendant among other things said that he had previously bought and sold tickets irregularly but had kept no records. He also said:

> "I have mental health difficulties and the sentence has affected my ability to access treatment."

The appeal

34. Given all this, one might have expected that, in terms of the contempt proceedings, matters would have rested there. The defendant had spent time in prison; he had since seemingly purged his contempt, thereby securing his release (which it is clear that Murray J had throughout been wanting); and he could now get access to any treatment he may need.

35. But matters took what may be thought to be an unexpected turn. The whole tone of the (successful) application to Murray J of 4 September 2019 was one of apology and of belated compliance with the original order. But quite shortly thereafter, on the instructions of the defendant, Hodge Jones and Allen issued an Appellant's Notice on 17 September 2019. This sought to challenge the Orders of 15 July 2019 and 30 July 2019 (although the latter date was then at some stage deleted from the Appellant's Notice). It was said that the defendant was wrongly found to be in contempt of court on 15 July 2019 and the sentence activated on 26 July 2019 was wrongly continued on 30 July 2019. Had Murray J known on 4 September 2019 that this course of action was being contemplated and that this was apparently the defendant's mindset it may be perhaps queried whether he would have summarily ordered on the papers the release of the defendant at that stage as he did.

36. To a considerable extent, the appeal is founded on fresh evidence which the defendant seeks leave to adduce. That is in the form of (1) an affidavit signed by him on 21 October 2019 and (2) a psychiatric report dated 5 September 2019 from a consultant psychiatrist, Dr Meena Naguib. That report had in fact been obtained for the purposes of a forthcoming sentence hearing in the Crown Court concerning a count of inflicting grievous bodily harm which the defendant then faced.

37. Mr Rowntree objected to the admission of such evidence. He said that evidence of such a kind, if to be relied upon, could and should have been raised in the proceedings below and could not satisfy the requirements of *Ladd v Marshall* [1954] 1 WLR 1489 and at all events should not be admitted under CPR 52.21(2). To foreshorten argument, we indicated at the outset of the hearing that the court would in the first instance receive such proposed evidence de bene esse: as also proposed evidence in response from the claimant in the form of two further witness statements of Ms Shaw.

38. The main focus of the recent affidavit of the defendant is on his mental health. He says that shortly before 8 April 2019 he had been in hospital, following a suicide attempt, before being discharged. He says that he is manic-depressive and suffers from post-traumatic stress disorder. He refers to serious falls in his previous career as a jockey, causing head injuries, and says that he "regularly ends up" being sectioned under the Mental Health Act. He says that at the time of service of these proceedings he was not well. The court papers were bulky and he did not read them: "it was all just overwhelming." He says that he was sectioned again on 22 April 2019: although he also refers to being under a "hospital order". (No documentary evidence relating to any sectioning or hospital order has, I note, ever been produced.) He says that he was discharged on 29 April 2019. He was under medication. He had no idea what the court orders were: "they were simply buried in thousands of pages of documents". He says:

"I just wanted to get on with my life and not be stressed by it all." He gives an account of events leading up to his appearance at court on 30 July 2019, saying: "I still didn't have a clue what was going on". He also describes his experiences in prison. At no stage in this affidavit does he describe any attempts to find a solicitor prior to his being committed to prison, apart from his statement that he went to the Law Society on 26 July 2019. Of that visit, he says that he was given a telephone number: but he does not say that he followed that up.

39. As for the proposed evidence in the form of the report of Dr Naguib, that, as I have said, was obtained for the purpose of the quite separate Crown Court criminal proceedings. The report gives details of the very troubled background of the defendant (which I need not set out here). It records his past problems with drink and drugs. It records that he can read and write. Dr Naguib had viewed the defendant's medical records and she states, as to his psychiatric history, that he had been admitted to hospital several times, including admission under the Mental Health Act. The last admission to a psychiatric hospital identified by her was a voluntary re-admission to a psychiatric unit on 16 March 2019, with discharge the following day "as there were no concerns raised about his mental health or safety". No record of him being sectioned on 22 April 2019 or thereafter is mentioned by Dr Naguib. His antecedent history is also set out: that includes a number of previous convictions and cautions for various matters (including, I note, convictions and cautions for touting at football matches), none of which resulted in a custodial sentence or hospital order. He is described by Dr Naguib as a "vulnerable person due to his complex mental, neurological and physical health problems". He was diagnosed by her as having a Mental and Behavioural Disorder (due to his cocaine abuse); Mental and Behaviour Disorders due to alcohol abuse; and an Organic Personality Disorder (primarily attributable to a head injury received by him when a jockey). Evidence of a borderline Emotionally Unstable Personality Disorder was also noted. However, contrary to the defendant's assertions in his affidavit, Dr Naguib makes no findings as to any Manic Depressive (bipolar) symptoms or Post-Traumatic Stress Disorder. She records her opinion that his current mental state "is not showing evidence of active psychotic or mood disorder symptoms"; and there was no recommendation for making a hospital order.

40. The proposed evidence in response from the claimant is in the form of two witness statements of Emma Shaw, the Associate Solicitor at Kerman having main responsibility for handling this case. In those statements, she corrects – primarily by reference to the documents – a number of clear factual errors or misapprehensions in the defendant's grounds of appeal and skeleton argument. She points out, for example, that at no stage had the defendant said to Kerman that he had in the past been sectioned. The only previous relevant contact he had with Kerman was the telephone call of 29 April 2019 to Mr Thorndyke: and to assume from that one conversation that he had serious mental health issues might have been discriminatory, she observed. Further, following the telephone call to her by the defendant on 26 July 2019 when, as she says, he was aggressive and also stated that he would hang himself, she says that she contacted the Hertfordshire Police to request a welfare check and that they subsequently reported to her that they had no concerns. Overall, she said, "the respondent did all it could to try to get the appellant to engage with the proceedings."

Disposal

41. There is no doubt that the belligerent written Grounds of Appeal and supporting skeleton argument include a number of purportedly factual assertions which are wholly unsustainable. For example, it is said that Kerman knew that at some time in the course of these proceedings the appellant was under a hospital order. That is plain wrong. Indeed there is no evidence that he ever was under a hospital order or even any satisfactory evidence that, in the course of the proceedings, he had been sectioned (certainly Dr Naguib does not say so and he has never produced any written record to confirm it). To the extent that it was also suggested in the written argument that the defendant may even have lacked mental capacity such that he may have needed a litigation friend, as it was put, that was also demonstrably incorrect: and was not pursued at the hearing before us.

42. Further, the skeleton argument to a considerable extent deals with matters that are irrelevant for present purposes. For example, Mr Tear at some stages attacked the basis on which the Order of Stewart J of 15 April 2019 was obtained. But that is wholly beside the point. The point is that such order was made and was continued by Waksman J. We were in fact told that the defendant has now obtained, exceptionally, legal aid to set aside that Order of Stewart J. Given the events that have since occurred, it is not clear to me what practical purpose such a step could possibly achieve or whether the indicated grounds for so applying could in any event prosper: but no doubt that is for another day. At all events, criticisms of the Order of 15 April 2019 as unjustifiably requiring the defendant to incriminate himself fall away in the light of paragraph 2(d) of that Order; and further suggestions in the written argument that "the Order was bad on its face" also fall away. To the extent that Kerman are then criticised for failing to do enough about advising the defendant on obtaining legal aid and legal representation, that is unfair and wrong. The correspondence shows Kerman repeatedly urging the defendant to seek urgent legal advice and, also, in their letter of 5 July 2019, complying with both the spirit and the letter of paragraph 15.6 of the Practice Direction. To the extent that the written argument even goes so far as to suggest that Kerman were under a duty to "ensure" that the defendant had independent legal representation in the committal proceedings that is demonstrably an unsustainable proposition. It is also wholly wrong to assert that Kerman had told the defendant that the hearing on 26 July 2019 was at 3 pm. To the contrary they had informed him otherwise: and the Order of 15 July 2019 had also specifically identified the time of the Return Day as 10:30. Murray J in fact expressly found that the defendant had notice of that hearing at that time.

43. In so far as the written grounds and argument sought in general terms to present the defendant as somehow a hapless and vulnerable victim oppressed and exploited by a powerful and well-resourced claimant that is, in the circumstances, little short of grotesque: and I would wholly reject such a case. The activities of ticket touts are a scourge for football clubs and the wider society. The defendant has now admitted selling tickets in the past and tweeting about having tickets for sale. He has admitted selling a ticket to the claimant's agent on 8 April 2019 and giving him his telephone number if he wanted more tickets. Furthermore, the correspondence and course of events show Kerman repeatedly urging the defendant to engage in the process. He did not do so. Any implicit allegation of oppression and exploitation is unsustainable.

44. At the hearing before us, Mr Tear in fact, at least to some extent, wisely moderated his argument. His emphasis was now not so much on the conduct of the claimant and Kerman (and, for the avoidance of doubt, I make clear that I would reject all criticisms in that regard) but on the position of the defendant with his mental health issues, albeit not such as to show a lack of capacity, and with his lack of legal representation. In such circumstances, he submits, Murray J was not justified in making the Order of 15 July 2019: or, at all events, he was not justified in activating the suspended sentence on 30 July 2019. What Murray J should have done, it is said, was to ensure that the defendant obtained legal representation and adjourned the matter for that purpose. Whilst Mr Tear necessarily accepted that the provisions of the Equality Act 2010 did not apply in this context, he suggested that "reasonable adjustments" should have been made. He also made brief reference to the Equality Treatment Bench Book in this regard.

45. In the context of civil contempt proceedings, which of course have the potential for leading to a term of imprisonment being imposed, the importance and desirability of defendants having legal representation, and of obtaining legal aid for that purpose, have frequently been emphasised by the courts: see, for example, *Brown v London Borough of Haringey* [2015] EWCA Civ 483, [2017] 1 WLR 542, in particular at paragraph 39 of the judgment of McCombe LJ. That has often since been reiterated in the courts.

46. Thus in the recent decision of a constitution of this court in *O (Committal; Legal Representation)* [2019] EWCA Civ 1721, it was stated by Peter Jackson LJ at paragraph 2 of his judgment that "respondents to committal proceedings are entitled to be provided with legal representation if they want it and … they will qualify for non-means-tested legal aid". On the facts of that particular case, indeed, it was held that it had been wrong of the judge to proceed with the committal hearing and that he should have granted an adjournment, as requested by solicitors on the record, to enable suitably qualified counsel to represent the wife at the committal hearing.

47. As I see it, and as Mr Rowntree submitted, the problem for Mr Tear's argument lies in the words "if they want it." In *O*, legal representation clearly had been requested and wanted. But that is not the case here. The defendant (who it is accepted can in fact read and write) simply, as the judge found with ample evidential support, had effectively refused to engage at all. He ignored the Order of 15 April 2019 of Stewart J; he ignored the repeated urgings of Kerman in correspondence to seek urgent legal advice; he failed to attend hearings although duly notified of them; and so on. There were no indications of his wanting – truly wanting – legal representation or of any preparedness to take serious steps to obtain it.

48. Mr Tear sought to explain the defendant's stance by reference to his mental health issues. But, although one can in general terms have an amount of sympathy for the defendant for his various issues, that will not do as an explanation. It will not do because the current evidence relating to his mental health issues simply does not begin to justify or explain his stance of neither complying with the Orders nor obtaining legal advice (for which he would have been entitled as of right to legal aid in connection with the committal proceedings).

49. In this regard, Dr Naguib's report does not in any way deal with the defendant's conduct in the civil proceedings. She in no way suggests that he was unable sufficiently to follow what was going on or to instruct solicitors. It is no good simply seeking to rely on that report as some kind of sufficient explanation for what occurred. As Chamberlain

J pointed out in the touting case of *The All-England Tennis Club Ltd v McKay* [2019] EWHC 2373 (QB) (at paragraph 29), a defendant can only benefit from legal representation if he is prepared to engage with legal representatives and the court; and to the extent that medical evidence is relied upon to explain absence from court or participation in the process, then, as Chamberlain J further pointed out in that case, such medical evidence should ordinarily satisfy the criteria indicated in court decisions such as *Levy v Ellis-Carr* [2012] EWHC 63 (Ch). This report does not do so; and the defendant's own position, as advanced by him in his affidavit to the effect that he felt "overwhelmed" and so on, does not suffice either. Indeed, his self-certification (as it were) of his inability to cope with all the papers being served on him is undermined by his assertion in his affidavit "No one was telling me what to do or even that I had to read the papers." To the contrary, he was constantly being advised what to do – in particular, to seek legal advice. Further, that he spoke to Kerman on the telephone on 29 April 2019 and attended court on the afternoon of 26 July 2019 is in any event consistent with him having read and absorbed at least some of the papers and correspondence.

50. Ultimately, I think that Mr Tear was minded to accept, when all these points had been raised in argument, that Murray J was entitled to proceed on 15 July 2019 and to impose the suspended sentence as he did. In any case, I conclude that Murray J was so entitled. But Mr Tear maintained that the position changed at all events on 30 July 2019, when the defendant did attend court and did directly raise his (asserted) medical health issues with the judge. In such circumstances, he said, the only proper course was then to adjourn to enable the defendant to obtain legal representation and advice, rather than cause him immediately to be incarcerated in prison.

51. In my view, this was a matter for the judge's discretion. He was confronted with a defendant who thus far had refused to engage with the court process and who had failed (over a period of many weeks) to take steps to obtain appropriate legal advice and representation. This was a defendant who had also failed to avail himself of the opportunity afforded by the prior Order of 15 July 2019 to purge his contempt. Indeed at the hearing of the 30 July 2019 the defendant did not himself seek any further adjournment – and his statement to the judge "I don't sell tickets to anybody" was plainly false (as his own subsequent affidavit in effect confirms). What he said to the judge in fact conveys no sense of apology or contrition or any desire to purge his contempt. There was nothing to suggest that, even had an adjournment been granted for legal aid and legal representation to be obtained, the defendant would even then have properly engaged.

52. In such circumstances, the judge was entitled to proceed and to find that there had been no engagement on the part of the defendant. The judge was entitled to find that he had completely ignored the Order of 15 April 2019 and then not taken any steps to take advantage of the Order of 15 July 2019 and to purge his contempt. The judge stated that he had regard to what the defendant had said to him about his mental health difficulties – but that, as the judge found, gave no sufficient basis for excusing his prior non-cooperation and non-attendance. In such circumstances, and confronted as the judge was by a defendant who thus far had so conspicuously failed to engage, it was in my judgment a proper exercise of discretion on the part of the judge to proceed as he did on 30 July 2019 and to activate (in confirmation of his Order of 26 July 2019) the

suspended sentence as he did. He was entitled, given the circumstances, in effect to conclude that enough was enough.

Conclusion

53. The activities of ticket touts are pernicious. Doubtless they will never be eradicated; but the courts will lend their assistance to institutions seeking to detect and prevent those activities. Defendants who engage in such activities should not be surprised that, when detected, they may face robust orders and sanctions. Nor should they in any way be encouraged to think that they can advantage themselves by ignoring court orders and by refusing to engage in the court process. This case, indeed, stands as an illustration of the potential consequences of failing to do so.

54. I am, for my part, of the clear view that on the facts and in the circumstances of this particular case this appeal should be dismissed. In so concluding, I have, as will be gathered, had regard to what has been said in the further evidence which has been sought to be adduced on this appeal. But not only is it material of a kind that could have been adduced below but also it does not in any event begin to amount to a sufficient justification to the defendant. In formal terms, therefore, I would also dismiss the application to adduce such evidence.

Lord Justice McCombe:

55. I agree that the appeal should be dismissed and that the application to adduce fresh evidence should be refused for the reasons given by Davis LJ. I agree also with the judgment of Asplin LJ below which I have read in draft.

56. I add only a few words of my own in view of my Lord's reference to my judgment in *Brown v London Borough of Haringey* (supra).

57. I repeat what I said there as to the need for respondents to committal applications (if at all possible) to have proper legal advice and legal aid to procure such advice. However, the facts in *Brown's* case were very different. That was not a case where the respondent had steadfastly refused to engage with the legal proceedings in the manner manifested by the defendant in these proceedings. Nor had he ignored repeated exhortations to seek legal advice as this defendant did in the present case. As Davis LJ says in paragraph 47 above, the essence of the matter is that respondents to committal proceedings are entitled to legal representation "if they want it" (per Peter Jackson LJ in the *O* case (supra) quoted above). This defendant showed no signs of wanting such representation at any stage.

58. I observed in paragraph 41 of my judgment in *Brown* that the requirement of a judge faced with an unrepresented respondent to a committal application was to make full enquiry as to whether the respondent *wanted* legal representation. There are, however, limits to that requirement. It seems to me that, on the facts of this case, the judge was fully entitled to proceed as he did, for the reasons given by Davis LJ, even though the defendant was unrepresented.

59. In *Brown*, the respondent had attended court on the first morning of the hearing and there was evidence that solicitors acting for him had been trying to get legal aid. It was not clear whether the solicitors were still on the record and no questions were asked of

the respondent about the legal aid position. The hearing proceeded. On the second day, however, the respondent did not appear at the court and a member of the public told the court that the respondent had been taken to hospital. The judge failed to make any further enquiry.

60. As can be seen, the facts of the *Brown* case were very different from the facts of this one.

Lady Justice Asplin DBE:

61. I agree that the appeal should be dismissed for all the reasons set out by Davis LJ. I too have had regard to the content of the additional evidence. I also agree, however, that in formal terms I would dismiss the application to adduce it. It could have been adduced below and in any event, did not justify the Appellant's approach to the proceedings. I also note that this is far from a situation in which a defendant wants to be represented in committal proceedings but has been denied that representation. Although the Appellant stated at one stage that he had consulted a solicitor, there was no indication that he wished to be represented despite having been urged to take advice by Kerman in their correspondence. Nevertheless, as Peter Jackson LJ stated recently in the case of *O*, it should be stressed that respondents to civil committal proceedings are entitled to legal representation if they want it and will qualify for non-means-tested legal aid. It goes without saying that if they want legal representation they should be given the opportunity to obtain it.