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Claim No: HC-2015-001647

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2022

Before :

LORD JUSTICE NUGEE

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Between :

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

- -
- -

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

Sitting without a hearing

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on 11 January 2022

Lord Justice Nugee:

Introduction

1. This judgment is supplementary to my judgment at [2020] EWHC 2599 (Ch), in which I found the Respondent, Mr Watson, guilty of contempt of court (**"the committal judgment"**), and a further judgment at [2020] EWHC 2796 (Ch), in which I sentenced him to four months in prison for that contempt (**"the sentencing judgment"**). I now have to deal with the costs of the committal application. By agreement between the parties I do so without a hearing on the basis of their written submissions; this has taken longer than usual for reasons that it is unnecessary to go into.

2. It is not necessary to refer in any detail to the conclusions I reached in my previous judgments. I will assume that any reader of this judgment will have read both the committal judgment, and the sentencing judgment, and I will adopt the same defined terms as I did there.

3. In brief summary however:

   (1) Kea initially sought Mr Watson's committal on 5 counts, based on alleged breaches of three orders, namely the April Order (Count 1), the September Order (Counts 2 and 3) and the November Order (Counts 2, 4 and 5): see the schedule to the committal judgment. Some of the counts were divided into a number of sub-counts.

   (2) In the event not all were proceeded with. The counts which remained in issue at the hearing of the application were Counts 1(a) to (e), Counts 3(c)(i) and (d) to (f), and Count 4.

   (3) My conclusions on each of these were as follows:

Count 1(a):	No breach.
Count 1(b):	Mr Watson was in breach of the order, but I could not be sure that such breach was contumacious.
Count 1(c):	Mr Watson was in breach of the order, but I could not be sure that such breach was contumacious.
Count 1(d):	Mr Watson was in breach of the order, but I could not be sure that such breach was contumacious.
Count 1(e):	Mr Watson was in breach of the order, but I could not be sure that such breach was contumacious.
Count 3(c)(i):	No breach.
Count 3(d):	Save for minor breaches of the order which would not justify committal, no breach.
Count 3(e):	No breach.

Count 3(f): No breach.

Count 4: Mr Watson was in contumacious breach of the order.

4. In other words, of the 10 sub-counts which were proceeded with, Kea failed to establish to the requisite standard of proof that there was any breach (or any breach of any seriousness) in 5 of them; in another 4 Kea did establish a breach, but I was not satisfied that the breach was deliberate or contumacious; but on the final count I did find that Mr Watson was in contempt of court. In the sentencing judgment I described this as "a serious contempt, deliberate and contumacious, and designed to conceal from Kea an asset which they were entitled to know about" (at [28]). I found that he was personally responsible for the breach, that there was real prejudice to Kea, and that the contempt merited an immediate term of imprisonment.

The parties' submissions

5. As so often, the parties adopt radically different positions on costs. The submissions of Ms Jones QC for Kea are to the effect that Kea is overall the successful party and should be entitled to its costs, subject to a discount to reflect the issues on which it did not succeed. She suggested that the appropriate order was that Kea should receive 70% of its costs. The submissions of Mr Grant QC for Mr Watson are that he was the successful party on the vast majority of the counts or sub-counts and should receive his costs of them, leading to an overall order that Kea should pay 70% of his costs.

Who is the successful party?

6. It was common ground that CPR r 44.2(2) applies to the costs of committal proceedings, under which if the Court decides to make any order as to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. In those circumstances the starting point is to identify which party is the successful party for the purposes of this rule. In the present case, as can be seen, that resolves into the question whether the application should be regarded as a whole, or should be looked at count by count.

7. I have not been referred to any analogous authority but on this issue I prefer Ms Jones's submissions. The application before the Court was an application to commit Mr Watson for contempt of court. That was supported by a number of discrete counts, but I take the view that it was a single application with a single objective, and that on that application Kea was the successful party as it did succeed in establishing not only a breach of the order, but a sufficiently wilful breach to require punishment by way of committal. It does not matter that the application was supported by 5 or 10 or however many counts or sub-counts: it was still a single application, not 5 or 10 separate applications. In general if an applicant seeks an order from the Court, and obtains the order that they seek, they are I think to be regarded as the successful party for the purposes of CPR r 44.2(2), even if they have not succeeded in all the grounds relied on.

8. In my judgment therefore Kea is to be regarded as the successful party and under the general rule would be entitled to its costs.

Departing from the general rule

9. However by CPR r 44.2(2)(b) the Court may make a different order, and it is accepted by Ms Jones that a different order would be appropriate in the circumstances of this case, having regard to the fact that Kea did not succeed on all the issues that it raised.

10. Here it is I think helpful to consider more closely the extent of Kea's success. The various sub-counts can be divided into the following:

    (1) The count on which Kea succeeded in establishing a contumacious contempt (count 4). Here Kea was wholly successful.

    (2) The counts on which Kea failed to establish any breach (counts 1(a), 3(c)(i), 3(e) and 3(f)). Here Kea was wholly unsuccessful. Ms Jones submitted that Kea was partly successful in count 3(e) in that it had obtained some further information, which was part of the reason for bringing the application. I do not accept this. Kea failed to establish a breach. The fact that it may incidentally have discovered more about Mr Watson's affairs does not justify treating it as having succeeded on this count.

    (3) Count 3(d), where the breaches were *de minimis* and would never have justified committal. Ms Jones submitted that Kea was in part successful in relation to this count. Again I disagree: the committal jurisdiction is not there to deal with purely technical breaches, and the substance of this count was not established. I regard Kea as unsuccessful in relation to it.

    (4) The counts on which Kea established a breach, but did not establish that the breach was contumacious (counts 1(b), 1(c), 1(d) and 1(e)). These are more contentious: see below.

    (5) The counts which Kea did not pursue: see below.

11. I will start with the counts which Kea did not pursue. Ms Jones said that these were withdrawn because they had become unnecessary either (in the case of counts 3(a), 3(b), 3(c)(ii) and 5) because Mr Watson belatedly provided the relevant information, or (in the case of count 2) because of other developments. In the case of the former, she submitted that the very fact that Mr Watson later provided the information demonstrated that there had been breaches of the order. Mr Grant however submitted that where counts had not been proceeded with Mr Watson should be regarded as having succeeded. I have decided that it is neither necessary nor appropriate for me to decide between these rival submissions. These counts contain allegations which were not tried before me, and I do not think it would be fair to either party for me to embark on a necessarily superficial examination of them with a view to seeing if I thought they were in fact well founded or not. It would not be fair to Mr Watson in effect to hold him in breach of orders when the points have not been argued; equally it would not be fair to Kea to treat them as having failed on issues which on their account were only not proceeded with because they had become unnecessary. I consider that the right course is to treat these issues as simply unresolved, that is as issues on which neither party can be said to have either been successful or unsuccessful.

12. That leaves the counts on which I found breaches of the April Order but in relation to which it was not established that Mr Watson had acted contumaciously. Ms Jones submits that having established breaches of the order, Kea had succeeded in establishing contempt and should be regarded as successful. Mr Grant submits that these were "technical" breaches and Mr Watson should be regarded as the successful party. He pointed out that because of the way I dealt with them, I did not find it necessary to resolve the question of delay, or of the lack of a penal notice.

13. Here I do not entirely accept either party's submission. I do not think Mr Watson can be regarded as the successful party. It is true that I did not commit him to prison for these breaches, but that does not affect the fact that I found that he did fail to comply with the April Order in these respects. These were not "technical" breaches; they were substantive breaches in that he failed to disclose the information that he was required to. The reason why I did not think it appropriate to proceed to a committal was because I was not satisfied to the requisite standard that he appreciated that the information should have been disclosed. That meant that the breaches were not shown to be contumacious, and it was accepted that it would not be appropriate to commit him in those circumstances: see the committal judgment at [137]. But that did not affect the question of breach, as contumaciousness is not something that needs to be proved to establish a contempt: see the committal judgment at [26]-[28], where this is all set out. In those circumstances I do not think that Mr Watson can possibly be regarded as the successful party.

14. On the other hand, I do not think Kea can be regarded as wholly successful either. The relief sought on the application was Mr Watson's committal. In order to obtain that relief, Kea not only needed to show a breach of the order, but also that it was appropriate to commit Mr Watson. That required Kea in effect to show that he acted contumaciously, and also to overcome the difficulty that there was no penal notice attached to the April Order. That last question was argued extensively but I did not need to resolve it: without attempting to resolve it now, I will simply say that there were serious arguments on both sides, and it is a distinct possibility that in the event I would not have thought it appropriate to waive the lack of penal notice.

15. Overall I think it is most appropriate to regard these counts as ones where Kea was partly but not wholly successful.

16. It is impossible to translate these degrees of success into an appropriate order with any degree of precision. I bear in mind (as CPR r 44.2(3) requires me to) all the circumstances of the case, but the most significant to my mind are that Kea was successful in its overall aim; that it also had a large but not complete degree of success on another 4 counts; and that even on those counts on which it failed, this is not a case where it can be said that Kea acted unreasonably in pursuing them. On the other hand I think a significant discount should be allowed for the fact that it failed to establish breaches on a number of counts.

17. I have come to the conclusion that the appropriate order is that Mr Watson should pay 50% of Kea's costs.

Standard or indemnity?

18. Kea asks for costs on the indemnity basis. This is the order that usually applies in

contempt applications: *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] EWHC 258 (Ch) at [56] per Rose J. I agree that Mr Watson's conduct, as detailed in my judgments, is outside the norm and there is no reason why the usual order for costs on an indemnity basis should not apply.

Interest on costs

19. Kea asks for interest on costs pursuant to CPR r 44.2(6)(g). This power is routinely exercised and the justice of it is evident. I will award interest on costs from the date each bill was paid until the date this judgment is handed down; thereafter interest will run under the Judgments Act.

20. The rate is at large. Kea asks for 3% over base, on the basis that it is to be equated with an SME. This was the rate awarded at trial. I agree that it is appropriate.

Summary

21. I will order Mr Watson to pay 50% of Kea's costs of the application, to be assessed on the indemnity basis if not agreed, with interest at 3% over base rate from the date of payment of each bill to the date of judgment.