Neutral Citation Number: [2022] EWHC 563 (Ch)

CLAIM No: HC-2016-001671

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Before: The Hon Mrs Justice Falk DBE

23 February 2022

B E T W E E N:

CARE SURGICAL LIMITED

Claimant

- and -

PAUL SHANE BENNETTS

Defendant

JUDGMENT

MR T ALKIN appeared on behalf of the Claimant
MR H O'DONOGUE appeared on behalf of the Defendant

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MRS JUSTICE FALK:

Introduction and procedural background

1. This is my decision on an adjourned contempt application made by Care Surgical Limited ("CSL") against Mr Paul Bennetts on 12 March 2021. There was an initial hearing before Bacon J on 6 October 2021 at which she refused an application by Mr Bennetts to strike out or stay the contempt application. She concluded that permission was not required to make the application, and made directions for it to be heard in a single hearing that would deal with both liability and sentence. The hearing was listed for 2 and 3 February 2022.

2. As I will explain, I have had to adjourn the hearing part-heard on two occasions. The directions provided, among other things, that any witness statement or affidavit upon which Mr Bennetts wished to rely was required to be served three weeks prior to the first day of the hearing, and that any request for cross-examination of any witness should be notified two weeks prior to the first day of the hearing. Skeleton arguments were required three clear working days in advance.

3. Mr Bennetts provided no evidence in accordance with Bacon J's order and his counsel's skeleton argument was also not filed within the time required. However, on 31 January 2022, two days before the first day of the hearing, his solicitors emailed my clerk to indicate that Mr Bennetts would be admitting the contempt. Later in the day, also on 31 January, a witness statement was provided from Mr Bennetts. I will address below the extent of the admission made in it.

4. A skeleton argument from Mr O'Donoghue, counsel for Mr Bennetts, followed the next morning, 1 February. Shortly afterwards, Mr Bennetts informed his solicitors that he was feeling unwell and had tested positive for Covid-19 using a lateral flow test. His advisers sought an adjournment, which CSL refused to agree on the basis of wholly inadequate evidence of a genuine positive test. I refused the adjournment application at the hearing on 2 February, at which both parties were represented by counsel, on the basis that I would hear the parties' submissions, so far as they were able to give them, and adjourn part-heard to a fixed date of 21 February which would allow for any required recovery time on the part of Mr Bennetts.

5. I also agreed to permit Mr Bennetts another opportunity to provide written evidence and to provide oral evidence. As well as covering the reasons for his non-attendance, I made clear that further evidence about Mr Bennetts' personal position, including caring responsibilities for his 12-year old son, would be particularly helpful.

6. However, no further written evidence was provided within the time permitted by my directions, which was 15 February. On 17 February, a further application was made on behalf of Mr Bennetts to adjourn the 21 February hearing on different medical grounds, which I refused on the papers. I also dismissed an attempt to revisit that refusal the following day, Friday 18 February. In each case, the medical evidence provided fell far short of what would be required, particularly given the circumstances in which the previous hearing had been adjourned.

7. At the hearing on 21 February, which Mr Bennetts did attend, I refused a further oral application for an adjournment. At that hearing, some limited additional documentary medical evidence was provided and Mr Bennetts also gave oral evidence in support of the adjournment application, on which he was cross-examined. I explained in an ex tempore judgment why I was refusing that application.

8. For the purposes of this decision, I should refer to the fact that the additional documentary evidence did support Mr Bennetts' evidence that he was admitted to hospital between 2 and 4 February, having self-referred with a complaint of chest pains, but it did not corroborate his oral evidence that before being discharged he had been advised by cardiology consultants to have a period of complete rest for four weeks.

9. The location of the hospital in Southport, Merseyside, and the time of Mr Bennetts' arrival at it, are also inconsistent with any genuine intention on the part of Mr Bennetts to attend court on 2 February. Further, no effective explanation was provided as to why the further documentary evidence was not provided either to the claimant or to the court until the court specifically requested it at the hearing on 21 February.

10. In summary, I did not accept the submission on Mr Bennetts' behalf that the hearing should not proceed because Mr Bennetts could not cope with addressing, and had not prepared to address, the issues in the case, as opposed to the evidence that he was prepared to give about the reasons for his absence on 2 February. It should have been well apparent to Mr Bennetts that attempts to adjourn had failed and that he needed to prepare on the basis that the hearing would proceed. I also reiterated that Mr Bennetts was under no obligation to give oral evidence.

11. In the event, Mr Bennetts did give oral evidence and was cross-examined on his witness statement. He appeared to me to have been well able to cope with that. However, by the close of Mr Bennetts' evidence, it was apparent that there would be insufficient time to hear submissions and give judgment. Mr O'Donoghue also sought a longer period than had been made available to him to take instructions from Mr Bennetts following his release from the witness box, even with the court sitting late, for which I am very grateful to court staff.

12. I therefore made further directions adjourning the hearing to 23 February at 2 pm, with a view to that hearing being limited to judgment. I required Mr O'Donoghue's further submissions to be provided in writing by 11 am on 22 February, and requested that Mr Alkin, counsel for the claimant, provide an indication of any submissions he wished to make in response as soon as possible thereafter. These tight time limits, which I am grateful to both counsel for meeting, reflected not only limited court availability but the fact that I had made very clear last week that I was not prepared to adjourn the 21 February hearing. The directions also took into account the prior procedural history, to which I have referred in some detail.

Background to the Contempt Application

13. The underlying litigation concerned a group of companies to which I will refer as the EC Medica Group ("ECMG"). In 2016, four companies in the ECMG commenced High Court proceedings against CSL, then called CS Medical Limited, and its three directors, who had previously all been employed by ECMG. At the time, Mr Bennetts was a director of each of the claimants, and for three of them was its managing director.

14. The claims made included allegations of infringement of intellectual property rights and misuse of confidential information, particularly in relation to various versions of a face cushion designed for prone surgery. An application for interim injunctive relief was refused but ECMG was given permission to amend its Particulars of Claim to include allegations of infringement of UK unregistered design rights ("UKUDRs"). The defendants counterclaimed for unjustified threats of design infringement, adding Mr Bennetts as a Part 20 defendant.

15. The claim was tried before Bacon J, then Ms Kelyn Bacon QC, sitting as a Deputy High Court Judge, at a four-day trial in June 2018. At the trial, ECMG maintained its allegations of misuse of confidential information and infringement of UKUDRs. Mr Bennetts gave evidence in support of the claim. He relied on four witness statements, each supported by a statement of truth. At the start of his oral testimony, he swore on oath as to the truth of his written evidence, save for the correction of one minor and immaterial matter.

16. ECMG's case at trial was that it was the owner of the UKUDRs and confidential information. Mr Bennetts' written evidence, confirmed in his oral testimony, reflected this. The issue of infringement of UKUDRs took up a considerable amount of time at trial, including reliance by ECMG on expert witness evidence to establish copying of the relevant designs.

17. In a reserved judgment handed down on 27 July 2018, the judge largely dismissed the claim. The counterclaim succeeded. At a consequentials hearing in September 2018, ECMG was ordered to make an interim payment on account of costs, substantially on the indemnity basis, in the sum of £233,000. The non-payment of that costs order led to members of the EC Medica Group being placed into insolvent liquidation.

18. In the meantime, a third company, JMW Resources Limited ("JMW"), claimed to have acquired the ECMG business and began to run it in competition with CSL. This led to CSL taking an assignment from the liquidators of the UKUDRs which ECMG had asserted against it and which CSL and the liquidators, understandably, believed that ECMG owned, and then commencing proceedings in the Intellectual Property Enterprise Court in order to seek to prevent JMW from continuing to compete against it by utilising the UKUDRs.

19. On 14 May 2019, Ms Kelyn Bacon QC made a non-party costs order against Mr Bennetts as a result of the failure by ECMG to make the interim payment on account. In a witness statement filed in opposition to the application for that order,

his sixth witness statement, Mr Bennetts stated that in order to raise money to pay trial costs, ECMG had sold unspecified assets to an unnamed third party in June 2018 before the trial for £100,000, that JMW had purchased the business in January 2019 "from the then current owner which was not EC Medica Group", and that he could not comment on any arrangements between JMW and the previous owner. Mr Bennetts was not present at the hearing, and neither his counsel nor his solicitor were able to provide additional information in response to the judge's questions.

20. I need to refer to aspects of Ms Bacon QC's ex tempore judgment on the non-party costs application in some detail. First, the judge referred to an application that the defendants in the claim had made for security for costs, which was considered at the pre-trial review on 3 May 2018. Mr Bennetts had given evidence in response to that application, in the form of a fifth witness statement, to the effect that the total net assets of the ECMG group stood at £596,000 as at June 2017, and that its net worth was estimated to be approximately £574,000 in January 2018, adding that it was clear that the claimants (that is ECMG) would be able to meet any costs order "without risking the viability or liquidity of the group", and that any costs order would be "paid in its entirety within a reasonable period of time, given that the vast majority of the resources are easily liquidated and realisable". The application for security for costs was dismissed.

21. Secondly, Ms Bacon QC's judgment refers to the question of the claimant's ability to pay being raised again at the consequentials hearing in September 2018. At that hearing, on instructions from Mr Bennetts, counsel for the claimants said that they would be able to pay £160,000 on account within 90 days but would require a further 90 days to raise the rest, albeit that ECMG "does have the assets to meet this". The judge decided to order the full amount to be paid within 90 days. In fact, no payment was made of any amount.

22. Thirdly, the judge found that Mr Bennetts had been the controlling mind of ECMG and its sole director at the time of trial.

23. Fourthly, at paragraphs 28 to 30, the judge commented that she had seen no evidence to justify the net asset figure that Mr Bennetts had provided at the pre-trial review, nor any credible explanation of the apparent change in circumstances between the date of the pre-trial review in May 2018 and the position in September 2018 or subsequently, when no payment was made. She rejected Mr Bennetts' suggestion that there had been "unexpected difficulties" in raising the money as not being plausible.

24. Fifthly, the judge referred to the evidence then available about apparent divestitures of key assets by ECMG, including a response by Mr Bennetts that unregistered designs had all along been owned by a different entity which had licensed them to the claimants, a response which the judge found was not supported by documentary evidence; also, Mr Bennetts' evidence that remaining intellectual property rights had been sold to a third party company on or around 1 June 2018 to fund legal expenses, although no documentary evidence had been provided.

25. As regards JMW, the judge found Mr Bennetts' statement about JMW's acquisition of the business to be highly evasive. She commented that if there had been an asset sale to an interim owner on 1 June 2018 as the defendants suggested, then that would amount to serious impropriety, given that none of this was revealed at trial (see paragraph 39 of the judgment). I pause to note that, at this stage, the defendants had not correctly identified the interim owner, but the substance of the judge's point remains valid. At paragraph 40, the judge drew what she described as an unavoidable inference that Mr Bennetts had sought to transfer the value of the group's businesses to third parties either since July 2018 or possibly even before then.

26. Mr Bennetts failed to pay the non-party costs order and was made bankrupt on 4 June 2019. His bankruptcy remains undischarged, having been extended due to failure to co-operate with his trustee in bankruptcy. It is convenient to note at this point that the restrictions on legal action against bankrupt individuals contained in Section 285(3) of the Insolvency Act 1986 do not apply to contempt proceedings (see *Bayliss v Saxton* [2018] EWHC 3365 (QB)).

27. In November 2019, JMW filed its defence to the infringement proceedings against it and disclosed documents evidencing a sale of ECMG's business to a company called Design Build Limited (DBL) and from DBL to JMW. DBL was established by Mr Bennetts' brother, Michael, shortly before the trial in 2018. The sale agreement between ECMG and DBL was dated 1 June 2018, five days before the trial commenced, and was signed by Mr Bennetts on behalf of the three ECMG sellers and by Michael Bennetts on behalf of DBL. On the face of the agreement, and leaving to one side a schedule relied on by Mr Bennetts, the assets agreed to be sold, for a price of £100,000, included all of the sellers' intellectual property rights, including design rights, confidential information and the right to sue for past infringements.

28. In April 2020, CSL commenced proceedings against, among others, Mr Bennetts, JMW and DBL, alleging fraud and/or unlawful means conspiracy and alleging that the sale agreement to which I have just referred was a sham document. On 20 November 2020, Mr Bennetts produced a defence, supported by a statement of truth signed by him, denying the sham allegation and positively averring that the intellectual property rights had been sold to DBL on 1 June 2018. In other words, his pleaded case in the conspiracy proceedings was explicit that the intellectual property rights and confidential information had been transferred out of ECMG shortly before the trial began.

29. As well as Mr Bennetts' bankruptcy remaining undischarged due to failure to co-operate, ECMG's liquidator has confirmed that Mr Bennetts' co-operation has been minimal and that he has failed to provide substantive information. However, I note that Mr Bennetts has denied that in oral evidence and says that substantial co-operation has been provided.

The Contempt Allegation

30. Turning to the contempt allegation, the allegation made by CSL is as follows: that Mr Bennetts wilfully interfered with the due administration of justice by, first, making

a statement under oath at the liability trial in these proceedings which was material to those proceedings and which he knew to be false or did not believe was true, namely confirming under oath his evidence that ECMG was the owner of the unregistered design rights and confidential information asserted against the defendants at that trial; and/or, secondly, wilfully omitting to inform the court before swearing that evidence and/or when under oath that he had, five days before the trial, executed a document which purported to divest ECMG of the aforesaid rights.

31. In essence, CSL says that without the relevant rights, ECMG had no standing to pursue the trial on the basis that it did; that Mr Bennetts knowingly allowed the trial to proceed on a false basis; and further, that he swore his evidence with no genuine belief in the truth of its contents.

32. Mr Alkin accepted that the way the allegation was framed amounted to a single allegation of contempt put on alternative bases. I agree. The allegation relates to the alleged falsity of the evidence at trial as regards the sale of the rights, both in terms of positive statements and omissions in the case put and in Mr Bennetts' evidence.

Liability

33. I turn to the question of liability. As already indicated, Mr Bennetts indicated through his advisers that he was admitting the contempt two days before the hearing on 2 February. However, the witness statement that was then produced falls well short of being a clear admission of the allegations made. The oral evidence that Mr Bennetts provided on 21 February did not clarify the position. Although he initially suggested that he could not recall signing a witness statement on 31 January, he ultimately confirmed the correctness of that statement. He was asked questions about certain aspects of it, in particular the asset sale agreement dated 1 June 2018 and about the requirement for funds for the trial.

34. To a large extent, I understood his oral evidence to be broadly consistent with his witness statement, subject to one point as to the involvement of a charity to which I will return. The first paragraph of the witness statement states that Mr Bennetts wishes to admit the contempt allegation. This is followed by paragraphs stating that he wishes to make a sincere apology to CSL and the court, that he recognises that he should have been candid far sooner and should have informed his then legal team of the 1 June 2018 sale agreement so that it and the court could assess the significance of the actions taken before the trial began, but that he was "desperately trying to raise funds to keep the litigation going and fight for the survival of EC Medica." He adds that it is "clear to me, though, that my actions interfered with the proper administration of justice, and for this I am truly sorry".

35. After providing some background, the witness statement goes on to state that the motivation for the asset sale was that ECMG's solicitors had stated that ECMG needed to pay £95,750 plus VAT prior to the trial commencing to continue the litigation. Documentary evidence is exhibited showing that most of the sale proceeds were, indeed, used to pay legal bills. It states that because Mr Bennetts felt distrust

towards ECMG's legal team, he did not inform them of the sale or engage legal advisers to assist with it but, instead, amended a precedent document.

36. What follows in the witness statement is an assertion that Mr Bennetts did not consider the sale agreement to be relevant to what he refers to as the three principal issues in the proceedings, although he does not identify what those issues were. He relies on one of the schedules attached to the sale agreement, labelled as Schedule 15, which he said listed three specific design rights that did not include the design that was the subject of the litigation. He says that the IP for the face cushion, the subject of the litigation, was retained and, therefore, he did not believe the sale agreement affected the principal issues in dispute, although he accepts that non-disclosure was foolish and that the question was one for legal professionals and the court.

37. The witness statement also provides evidence of Mr Bennetts' ill health with gastroenteritis at the time of the trial, although he accepts that he should nonetheless have disclosed the asset sale. It states that at the time he did not grasp the seriousness of his actions. Some evidence is also provided of Mr Bennetts' current circumstances, including his ill health, financial circumstances and his involvement with his 12-year old son.

38. I have concluded that it is not appropriate to treat Mr Bennetts' witness statement or oral evidence as a true admission of liability and that, instead, I must satisfy myself that the contempt allegation is made out beyond reasonable doubt. I am so satisfied.

39. The asset transfer agreement dated 1 June 2018, which Mr Bennetts not only signed on behalf of each of the selling companies but was involved in producing, is clear on its face. It is a sale of the business on a going concern basis, including goodwill, the right to use the business name, stock, tooling and other movable assets. It contemplates that employees would transfer under TUPE. The assets sold include all "Business Intellectual Property Rights", a term which is defined to cover all "Intellectual Property Rights" used in the business, together with (at clause 2.1.2) the right to sue for past infringements. Intellectual Property Rights, in turn, is broadly defined and includes "…rights in designs… rights in confidential information… and any other intellectual property rights, in each case whether registered or unregistered…".

40. Mr Bennetts relies on a list in a schedule attached to the agreement titled "Schedule 15" and, under that, "Schedule: Tooling and IP Costs". This schedule lists various items of tooling and further items under a sub-heading labelled "IP Schedule". However, there is no clear link between the list of IP and the body of the agreement which, as already explained, provides for the sale of all business-related IP rather than a specific list of IP. In contrast, the definitions of movable assets and stock in the body of the agreement do cross-refer to Schedule 1 to it. That schedule, in turn, has references to Schedule 15 (in the case of tooling) and to "Per attached schedule" in the case of stock and IP rights.

41. I am prepared to accept that, given the existence of Schedule 15, notwithstanding the clear words in the body of the agreement, there might be some doubt about whether

the intellectual property rights sold should be treated as confined to the items on the list in that schedule, or that Mr Bennetts might have believed that that was the case. But even if I proceed on that basis, it does not assist Mr Bennetts for the following reasons.

42. First, Mr Bennetts relied on the first three items in the list of IP as not including the design for the face cushion that was relied on in the litigation. The fundamental problem with that is that it ignores the fourth item, described as "Products … Unregistered DUK – all products in the 2018 catalogue". Given the text of the preceding item, "Unregistered DUK" clearly stands for unregistered designs UK, and Mr Bennetts did not dispute that.

43. On that basis, the key relevant face cushion design, a version known as 10.3, was clearly included in the list in Schedule 15. I can only infer that Mr Bennetts' failure to refer to this in his witness statement must have been deliberate. I do not accept his oral evidence that the agreement was not intended to cover those rights. He accepted that version 10.3 was the most up to date product. It clearly would have been in the 2018 catalogue, and I did not detect that he denied that when that was put to him.

44. Secondly, the fact that the face cushion design rights were intended to be included is further supported by the fact that the tooling included in the sale specifically included the injection moulding tools required to produce that version of the face cushion. A sale of that tooling would be pointless without a transfer or at least a licence of the relevant design rights. Mr Bennetts accepted in oral evidence that the tooling for version 10.3 had been transferred.

45. Thirdly, Mr Bennetts chose to focus only on the face cushion design rights, but what was in dispute went beyond that and certainly included further confidential information. Even if Schedule 15 was intended to comprise a full list of intellectual property in the most conventional sense, the breadth of the definition of Intellectual Property in the body of the agreement, including all confidential information, together with the clear aim of the agreement to transfer the business as a going concern with the means to operate it, simply cannot be ignored. Mr Bennetts' written evidence failed to address this.

46. Further, I do not accept Mr Bennetts' suggestion at one stage in oral evidence that not all confidential information was intended to be transferred, despite his having earlier agreed with Mr Alkin that under the terms of the agreement, confidential information was in fact transferred.

47. Fourthly, further and importantly, Mr Bennetts' witness statement directly contradicts his defence to the conspiracy claim. He makes no attempt to address the discrepancy between them. When it was put to him in cross-examination, he simply denied that he had changed his story.

48. Fifthly, Mr Bennetts also makes no attempt to explain what happened to the intellectual property that he now alleges was not transferred but which JMW nonetheless claims to have acquired.

49. It is also clear that the trial proceeded on the basis of ECMG's asserted ownership of both confidential information and design rights (see the trial judgment [2018] EWHC 1952 (Ch) at paragraph 28).

50. In the light of these points, I am driven to conclude that the account of the sale in Mr Bennetts' witness statement is incredible. It conflicts with the sale agreement and his own defence in the conspiracy proceedings, and I cannot accept it. It also contains important omissions.

51. The same, unfortunately, applies to Mr Bennetts' oral evidence. During that evidence, and having been taken through the terms of the sale agreement in cross-examination, Mr Bennetts sought to raise an additional point to the effect that some form of beneficial ownership in or licence over the UKUDRs was held by an associated charity called BIRTH, with a licence back to ECMG, and that it had been so held for some years prior to the trial. As I understood the evidence, he claimed that this was a basis for his view that the asset sale agreement did not transfer, or at least was not intended to transfer, the design rights in the face cushion.

52. I cannot accept this. As already mentioned, at the trial ECMG straightforwardly asserted ownership with no mention of the charity. Further, there is no mention of the charity in Mr Bennetts' recent witness statement which, instead, asserts that the intellectual property in respect of the face cushion unregistered design rights "was not in fact transferred by the APA [that means the sale agreement] but remained in the ownership of EC Medica Manufacturing Limited" (one of the claimants). The point was only raised by Mr Bennetts once he had been taken to the relevant parts of the agreement and, in my view, it was an attempt to change tack when he could see that the approach that he had taken was not working. It was also unclear whether Mr Bennetts' evidence in fact related to design or other rights in existence at earlier times, rather than version 10.3 of the face cushion.

53. Further, as I understood his evidence, Mr Bennetts only asserted that the charity has or had some form of equitable ownership, rather than asserting that it is or was the legal owner, and said that there was a licensing agreement in favour of ECMG. If that was so, then I cannot see any basis for concluding that the sale agreement did not transfer both the legal ownership and the benefit of any such licence. But in any event, if BIRTH did have any form of ownership rights, then in reality that would simply be another basis on which Mr Bennetts' evidence at the trial that ECMG owned the rights was false.

54. I should also clarify that I do not accept Mr Bennetts' attempt to claim in cross-examination that the focus of the trial was breach of fidelity and not unregistered design rights. Apart from being obviously incorrect factually in terms of the issues addressed (see paragraph 28 of the trial judgment) it conflicts with his recent witness statement. In reality, Mr Bennetts' evidence simply does not stack up and I have no hesitation in refusing to accept it.

55. I also cannot accept Mr O'Donoghue's submissions that Mr Bennetts' oral evidence showed confusion as to what was transferred, such that he did not knowingly give

false evidence at the trial. Leaving to one side, as I do, Mr Bennetts' purported admission of the contempt, my assessment of Mr Bennetts' oral evidence was that he was quite capable of following what the agreement said and its clear purpose, and was not at all confused but chose not to give straightforward answers and, instead, sought to obfuscate. In particular, when taken to the terms of the sale agreement, it was perfectly clear to me that Mr Bennetts had no difficulty in following and understanding its terms including, at times, reading ahead.

56. For the reasons already given, including but not limited to his contradictory defence in the conspiracy proceedings, I simply cannot accept Mr Bennetts' claim that at the time it was signed, he did not appreciate what the agreement did.

57. I should also record that in his written submissions following the last hearing, Mr O'Donoghue indicated that Mr Bennetts would accept a decision of the court that the terms of the agreement in fact covered the relevant intellectual property, whilst not accepting that he understood that at the time. As already indicated, I do not accept the latter point. Mr O'Donoghue also submitted that the fact that the re-amended Particulars of Claim referred to informal licences of the rights from EC Medica Manufacturing to the other ECMG claimants somehow assisted Mr Bennetts. It does not. The preceding paragraph in the re-amended Particulars averred that the claimants owned the unregistered rights and there is no mention of any charity. There is no real lack of clarity or factual complication that supports any suggestion of confusion.

58. Accordingly, I am satisfied beyond all reasonable doubt that the sale extended to the unregistered design rights and confidential information asserted in the litigation, and that both elements of the contempt allegation are made out. Namely, that Mr Bennetts has made a false statement under oath which he knew to be false or did not believe was true about the ownership of those rights, and that he wilfully failed to inform the court of the sale agreement divesting or purporting to divest ECMG of those rights.

59. Although more relevant to sentencing than liability, it is also convenient to deal now with Mr Bennetts' case that the sale was forced on him by the need to fund the litigation. Mr Bennetts claimed in his defence in the conspiracy proceedings that his brother was not prepared to cause DBL or the family's property company, Stadt Und Hof Properties Limited ("SUHP"), to lend the necessary funds to ECMG, but suggested that the funds could be raised by a sale of assets to DBL which would be funded by a loan of £100,000 from SUHP to DBL.

60. In his witness statement, Mr Bennetts made no attempt to address the evidence filed in support of the contempt application that SUHP in fact owed ECMG about £140,000. No explanation was offered as to why ECMG did not instead seek repayment of all or part of that debt, rather than selling assets to DBL. In oral evidence, Mr Bennetts accepted that the loan existed but said that it was intended to be a long-term loan, and that it had been agreed that it would only be repaid when SUHP agreed to that.

61. Given Mr Bennetts' involvement with SUHP and his failure to deal with the point in his witness statement, despite the evidence having been supplied with the contempt

application almost a year ago, I am very dubious about this point, but I have concluded that I should not rely on it, not least because there is no indication that the liquidator has in fact been able to recover the debt.

62. However, that is not the end of the matter. I have also reviewed an email from ECMG's then-solicitors dated 17 May 2018, which Mr Bennetts relied on in his defence to the conspiracy claim as prompting the need for urgent action to raise funds for the litigation. He relied on it again in this application. It is apparent from that email that there had in fact been regular discussions about costs and that the solicitors had explained in an email dated 23 April 2018 that it was their policy to obtain all trial fees on account prior to the trial. The later email, which gave a relatively detailed summary of costs incurred and anticipated, and did so by reference to the costs budget, would not therefore have come out of the blue and create a need for funds to be raised that had not previously existed. This was not a simple demand with a threat to withdraw representation, in the way presented by Mr Bennetts. I cannot accept that Mr Bennetts was not expecting the demand that arrived in May or at least a very substantial part of it, or that it came without prior warning.

63. Further and importantly, Mr Bennetts has not properly addressed the inconsistency between the apparent urgent need to raise funds by selling the business with his evidence in response to the security for costs application heard at the pre-trial review on 3 May 2018 and, in particular, his evidence that ECMG would be able to meet any costs order without risking viability or liquidity.

64. I reject Mr Bennetts' attempt in cross-examination to claim that that evidence was given by reference to out-of-date management accounts. It was evidence from a director that involved a clear representation about the claimants' current and indeed anticipated financial position, and about the nature of the assets then held.

65. I also note that the description in Mr Bennetts' witness statement of raising funds to "fight for the survival of EC Medica" is not easy to reconcile with the sale of its business, unless that sale was to an entity from whom the business could be re-acquired or through which control of the business could be retained.

Sentencing: Principles

66. I turn to sentencing. First, the principles to apply. In *Liverpool Victoria Insurance Company Limited v Zafar* [2019] EWCA Civ 392; [2019] 1 WLR 3833, the Court of Appeal gave guidance about the approach to sentencing a contempt arising from a false statement of truth; in that case, by an expert witness. The court said this at paragraph 58:

> "In the context of a contempt of court involving a false statement verified by a statement of truth, the contemnor may have acted dishonestly, or recklessly in the sense of not caring whether the statement was true or false. In either case, it is always serious, because it undermines the administration of justice. In considering just how serious it is in all the circumstances of an individual case, and in

> deciding the appropriate punishment for contempt of court, we think that the approach adopted by the criminal courts provides a useful comparison, though not a precise analogy. In particular, the Sentencing Council's definitive guidelines on the imposition of community and custodial sentences … and on reduction in sentence for a guilty plea are relevant in cases of this nature. It is therefore appropriate for a court dealing with this form of contempt of court to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the contempt of court. Having in that way determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest."

67. The court went on at [59] to say:

> "We say at once, however, that the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth."

68. At [61], the court commented that, "In principle ... the contemnor who acts recklessly is less culpable than one who acts intentionally." However, the extent of any difference depends on the circumstances of the case. Persistence in a false statement and/or resort to other forms of misconduct to cover up a false statement would increase the culpability of an expert witness (see paragraph 63).

69. In summary therefore, the court must consider culpability and the harm caused, and then consider whether a fine would be a sufficient penalty (see also *FCA v McKendrick* [2019] 4 WLR 65 at paragraph 39). Imprisonment is a last resort.

70. In *Crystal Mews Limited v Metterick* [2006] EWHC 3087 at paragraphs 8 to 13, Lawrence Collins J set out a list of further factors likely to be relevant to the assessment of seriousness. These factors have been referred to in a number of subsequent cases, but they were usefully summarised with one addition by Popplewell J in *Asia Islamic Trade Finance Fund Limited v Drum Risk Management Limited* [2015] EWHC 3748 at paragraph 7(6) as follows:

> "The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as he then was, at para.13 of the *Crystal Mews* case, namely:
> (a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;
> (b) the extent to which the contemnor has acted under pressure;

(c) whether the breach of the order was deliberate or unintentional;
(d) the degree of culpability;
(e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;
(f) whether the contemnor appreciates the seriousness of the deliberate breach;
(g) whether the contemnor has co-operated;
to which I would add:
(h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

71. If a custodial sentence is considered to be warranted, the court must consider the appropriate length of it and impose the shortest sentence necessary, having regard to the two-year maximum term. However, that maximum term is not reserved for the very worst sort of case (see *FCA v McKendrick* at paragraph 40). In determining the length of sentence, any relevant aggravating or mitigating factors must also be taken into account. As explained in *Zafar* at paragraphs 65 to 67, albeit in the context of expert witnesses, mitigating factors will include any early admission in advance of a contempt proceedings, any co-operation, genuine remorse, (potentially) serious health, previous good character and the impact of committal on persons other than the contemnor, in particular children or vulnerable adults for whom the contemnor is the sole or principal carer. I would add, in the context of remorse, that a sincere apology to the court is clearly relevant.

72. Having decided the appropriate length of the term, the court must decide what reduction should be made to reflect any admission during the course of the contempt proceedings, with the amount of the reduction being on a sliding scale from one third for an admission made as soon as proceedings commenced down to around 10 per cent where an admission is made at trial (see paragraph 68). Finally (see paragraph 69) it must consider whether the term can be suspended.

Sentencing: preliminary comments

73. I will first address some submissions by Mr O'Donoghue that I do not fully deal with elsewhere, and then explain the approach that I am adopting.

74. Mr O'Donoghue submitted that the failure to disclose the sale agreement was relevant only after the trial, to the recovery of costs, and that it had had little effect on the trial. That is not correct. The right to sue for past infringements was expressly included in the assets sold and, furthermore, ECMG was seeking injunctive relief. The trial proceeded on a wholly false basis.

75. Mr O'Donoghue further submitted that it was inappropriate to rely on comments made by Ms Bacon QC in her decision on the non-party costs order and that it was necessary to look at the matter afresh. I do agree with that to some extent, but the comments of the judge who was the trial judge and therefore had significant familiarity with the case must be relevant in determining the impact of Mr Bennetts' actions on the trial. Ms Bacon QC also covered relevant factual matters relating to the

pre-trial review and consequentials hearing, as well as in respect of the hearing of the non-party costs application and what was known at that time.

76. Mr O'Donoghue also submitted that Mr Bennetts was being exposed to a form of double jeopardy because he had already had the non-party costs order imposed on him. I do note that, but I have to say that I would have more sympathy with it if any recovery had been made under that order.

Sentencing: discussion

77. Mr Bennetts' actions in suppressing the sale of the assets just before the trial amounted to a serious contempt which has caused significant harm. The administration of justice has been materially undermined by the trial being allowed to proceed on a false basis. If the truth had been known, the trial would not have gone ahead. The proceedings that followed it would also either not have gone ahead or at least would have done so on a different basis. CSL and the other defendants would have been able to limit the costs they incurred and the time expended, not only at the trial but subsequently. They would also have become aware at a much earlier stage of where the business assets were being held, and may have been able to take much more effective action to recover their previously incurred costs. JMW may never have become involved at all. CSL would certainly have not been led to take abortive infringement action against it.

78. Mr Bennetts' actions were and remain highly culpable. As already discussed, the alleged justification of the urgent need to raise funds for trial is not one I have been able to accept. I am driven to conclude that the sale was intended to be an insurance policy against the risk of the case being lost, the aim being to put the assets out of the reach of the defendants in that eventuality.

79. The culpability is compounded by Mr Bennetts' evidence at the pre-trial review in response to the security for costs application, by the submissions made on his instructions at the consequentials hearing, and by a continued lack of candour at the hearing at which the non-party costs order was granted. At one stage, Mr Bennetts even sought to blame the court for his failure to reveal the truth, by claiming that the judge at trial had not permitted him to do more than answer questions in cross-examination.

80. More recently, that lack of candour has continued with Mr Bennetts' latest witness statement, his oral evidence and with a lack of co-operation at least up until recent times, if his evidence is to be believed, with not only his trustee in bankruptcy but with ECMG's liquidators. Although, as indicated, Mr Bennetts claims that he has now provided most of the information requested by his trustee and the liquidators, my understanding is that there still has been zero recovery by the claimant. Mr Bennetts' persistence in making false statements and failure to provide a genuine account only serves to increase both his culpability and the harm done.

81. I have considered the factors listed in the *Crystal Mews* case. There has clearly been real prejudice to CSL and the other defendants and there is, as yet, no indication that

any of that harm will be remedied. I have already addressed Mr Bennetts' evidence that he was under pressure to raise funds for the trial. I am also satisfied that Mr Bennetts' actions were deliberate and that they were his own. He was not placed in this position by others. He is highly culpable.

82. The fact that the funds raised were used to pay lawyers does not, to any extent, excuse the failure to tell the truth at trial. Any co-operation that has been provided has not yielded results and the apology provided is a hollow one, in my view. I agree with Mr Alkin that the apology given appears to have been a belated attempt to appear contrite. That attempt has failed. The very late admission is far from a genuine acceptance of culpability and, in truth, seeks to obfuscate further.

83. I also cannot accept Mr Bennetts' excuses about his alleged distrust of his legal team and ill health as reasonable ones, and I note that in relation to the claim of ill health at the time of trial, his evidence was, in any event, of illness on 5 June just before the trial started, not 1 June when the assets were sold or in the period leading up to that, when the sale must have been planned.

84. I also need to refer to the circumstances in which this hearing was adjourned part-heard. The evidence Mr Bennetts has provided that he was suffering from Covid-19 was highly unsatisfactory. Despite requests, no further evidence was provided to confirm that Mr Bennetts had in fact contracted the virus. This resulted in a further waste of the court's and CSL's resources. Further, the medical evidence now provided is different to what was provided on that occasion and the difference was not properly explained.

85. It is clear that Mr Bennetts had no intention of attending court on 2 February. I have already referred to further and more recent attempts to adjourn. The reason the hearing overran on 21 February and had to be adjourned again to today, using up further resources, was as a result of a further failed attempt to adjourn and the fact that Mr Bennetts had not prepared, as he should, to answer the case before him.

86. In all these circumstances, a fine cannot be a sufficient penalty. I must consider a custodial sentence and I must determine the shortest period necessary. In doing so, I must take into account both aggravating and mitigating factors. I have already set out aggravating factors: in particular, the actions taken since the trial that have continued to obfuscate the true position, as well as the actions at the pre-trial review and the lack of any effective action to remedy the harm done, whether in part or in whole. I am afraid I detect no real remorse about the contempt actually committed, or any real acknowledgement of the seriousness of Mr Bennetts' action.

87. However, in mitigation, I do take into account Mr Bennetts' personal position and the position of his 12-year old son. I also bear in mind the existence of the non-party costs order although, given that it shows no sign of being met, the weight that I can put on it is limited.

88. Where a contempt consists of a breach of a court order, the object of the sanction is two-fold, namely to punish the historic breach and secure future compliance. The

second element does not apply here in exactly the same way, but there is an analogy in terms of co-operation to remedy at least some of the damage done. In this case, this may well in practice need to extend to the position of JMW.

89. Turning to Mr Bennetts' personal position, Mr Bennetts is 70 years old. His latest witness statement describes him as having had to retire due to ill health. It states that he suffers with acute hypertension, has undergone three major operations for cancer and has had two minor strokes. He has also gone through a divorce since the start of the legal proceedings. He describes his remaining joy as being spending time with his 12-year old son. The statement also says that Mr Bennetts' ex-wife works long hours and that Mr Bennetts takes his son to school and collects him each day, and plays a part in his son's life by taking him to and from sports activities at weekends in an informal arrangement.

90. As regards Mr Bennetts' age and health, I pay regard to what he says, although it would have been preferable for clear medical evidence to have been provided. I note that Mr Bennetts' evidence does not indicate that he is currently undergoing any course of treatment for cancer. The most recent medical evidence in the form of what appears to be discharge notes from Southport hospital do support Mr Bennetts' evidence that he has been referred to the Rapid Access Chest Pain Clinic, and also refer to blood test results which Mr Bennetts states indicate a potential cardiological issue. However, he was clearly regarded as being fit for discharge from hospital on 4 February with what was no doubt considered to be appropriate medication.

91. I also take into account Mr Bennetts' arrangements in relation to his son and the impact on his son. The description in Mr Bennetts' witness statement does not suggest that Mr Bennetts is his son's sole or principal carer. The child lives with Mr Bennetts' ex-wife, Ms Borgerson. It is also notable that Mr Bennetts' evidence does not clearly address the impact that a separation might have on his son, as opposed to its impact on Mr Bennetts. No doubt, if Mr Bennetts had engaged earlier, then this important point could have been better explored.

92. However, when adjourning part-heard on 2 February, I did make very clear that further evidence on this aspect could assist, and there was specific mention by Mr Bennetts' legal team of obtaining evidence from Mr Bennetts' ex-wife. Yesterday afternoon (so, some three weeks later and after the adjourned hearing date) a copy of a letter from Ms Borgerson was provided, asking that Mr Bennetts is not committed to prison.

93. The letter explains that Ms Borgerson works long hours and relies heavily on Mr Bennetts to take her son to and pick him up from school four days a week, support him in extracurricular activities and, when required, with homework and an evening meal. It states that if Mr Bennetts was unable to provide support, that would impact on Ms Borgerson' job either by requiring her to reduce her hours significantly or, if her request for reduced hours was not accepted, leave her job. The letter says that Ms Borgerson would then have difficulty paying her mortgage and house bills and managing financially, and refers to Mr Bennetts' inability to pay the £1,200 per month he is supposed to pay under a court order but has largely not paid "due to his ill health and inability to work". The letter also refers to Ms Borgerson having tried to shield

her son from the ongoing knowledge of the litigation, although it states that this has been made very difficult by the actions of process servers which had distressed him. It says no more about the son.

94. Late yesterday evening, following a query from the court, a short witness statement was provided by Ms Borgerson confirming the accuracy of the letter. However, beyond providing some limited documentary evidence supporting the existence of a mortgage on her home, there was no other documentary evidence to support her comments about working hours or her financial position.

95. It is not easy to place a lot of weight on this evidence. Mr Bennetts' solicitors stated that they had written three times over the last three weeks to ask that any letter be signed and include her address. The evidence has been produced only at the very last minute, which suggests that Ms Borgerson was not that keen to put the points made in the letter to the court. The witness statement followed even later than the letter. Mr Bennetts' solicitors themselves stated that the information had been provided "inexplicably late", and it is clear from the correspondence that they had been chasing Ms Borgerson directly. There has clearly been no possibility of cross-examination and, as already indicated, the documentary evidence to support the statement is very limited.

96. The failure to act earlier is hard to reconcile with a genuine concern that a custodial sentence would have a material adverse effect on Ms Borgerson and her son. Further, I bear in mind that the child is aged 12 and might be expected not to require to be taken to and from school each day. Nonetheless, I do place weight on the evidence that has very belatedly been produced and have taken into account the likely impact of a custodial sentence on Ms Borgerson and, in particular, on her son including, despite the extremely limited evidence of it, the potential emotional effect on him.

97. Taking all the matters that I have referred to into account, I conclude that the minimum sentence I can impose, and I do impose, is twelve months. Mitigating factors, and in particular the potential impact of a custodial sentence on Mr Bennetts' son and ex-wife, as well as Mr Bennetts' medical conditions, are fully reflected in the term I have set. I have had to weigh these factors against the fact that a very serious contempt has been committed that has caused significant harm and that has been aggravated by Mr Bennetts' actions since the trial.

98. Ordinarily, an admission would lead to a reduction in sentence of around 10 per cent where the admission is made at trial. As already discussed, I have been unable to accept Mr Bennetts' admission as a genuine one. It was made in the face of incontrovertible documentary evidence but it also sought to present that evidence as something that it was not and, in my view, did so deliberately. I have therefore not been able to make any reduction for an admission.

99. There is no basis on which I can suspend this sentence. I have given full weight to mitigating factors in deciding the appropriate length of it.

100. I would add that there remains some scope for Mr Bennetts to make amends by starting to co-operate properly in addressing the harm done. If he did so and that co-operation was genuine and had positive results, then he could apply to the court. The court has power to reduce a sentence or even grant an immediate release under CPR 81.10. This reflects the fact that the object of a committal order is ordinarily both to punish and coerce or deter. Here, whilst the damage to the administration of justice is done, some amelioration would be possible as far as CSL was concerned if the costs order started to be met. I cannot say by how much the sentence might be reduced, but the more real the co-operation in terms of effective assistance, combined with real contrition, the greater this is likely to be.

101. Finally, I must inform Mr Bennetts of his right to appeal against my decision without permission. Any appeal must be lodged with the Court of Appeal Civil Division within 21 days. I am also ordering a transcript of this judgment to be produced at public expense, which will be published on the judicial website.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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