Neutral Citation Number: [2016] EWHC 3222 (Comm)

Case No: CL-2009-000709

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter lane, London EC4A 1NL

Date: 16/12/2016

Before :

MR. JUSTICE TEARE

- -

Between :

Deutsche Bank AG	**Claimant/ Applicant**
-and-	
Sebastian Holdings Inc	**Defendant**
Alexander Vik	**Defendant for costs purposes only/ Respondent**

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Sonia Tolaney QC, James MacDonald and Andrew Lodder (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Applicant**
Duncan Matthews QC and Charlotte Tan (instructed by **Taylor Vinters LLP**) for the **Respondent**

Hearing dates: 28 July and 9 December 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE TEARE

Mr. Justice Teare :

Introduction

1. Sebastian Holdings Inc. ("SHI"), the Defendant, conducted substantial foreign exchange and equities trading with Deutsche Bank ("DB"), the Claimant. This trading became loss making and when SHI failed to meet margin calls DB took proceedings to recover the debts owed to it. DB was awarded judgment in the sum of US$243m. plus 85% of its costs on an indemnity basis. SHI is the creature company of Mr. Vik, its former, and until April 2015, sole director and shareholder. Accordingly he has been held to be liable to pay DB £36m. on account in respect of its costs. He has paid that amount on account of costs but SHI has not paid the judgment debt. It appears that Mr. Vik has taken action to strip SHI of any assets. It was in those circumstances that I made an order on 20 July 2015 requiring Mr. Vik to provide documents in SHI's control relating to SHI's means of paying the judgment debt and to attend court in order to be cross-examined about SHI's means. That order was served on Mr. Vik when he was within the jurisdiction. Mr. Vik applied to set aside the order. That application was dismissed by Cooke J. He subsequently provided some disclosure and attended this court for cross-examination. DB contends that Mr. Vik deliberately failed to disclose many documents and lied under oath. As a result it has issued an application seeking permission under CPR 6.38 to serve an application for a suspended committal order out of the jurisdiction, an order permitting personal service of the committal application on Mr. Vik in Monaco where he resides and, in the event that he does not accept personal service, an order under CPR 81.10(5) and CPR 6.15 dispensing with personal service and permitting DB to serve the committal application via email and registered post on Mr. Vik's solicitors, Taylor Vinters LLP.

The issues

2. In response to this application Mr. Vik has advanced three points of law. First, it is said that the court can only make a suspended committal order pursuant to CPR 71.8, second, it is said that CPR 71 does not have extra-territorial effect and third, it is said that there is no jurisdictional gateway pursuant to CPR PD 6B. All three issues raise issues of construction of the CPR.

Is DB constrained by the provisions of CPR71.8 ?

3. CPR 71 provides for a judgment debtor or officer of a judgment debtor to be required to attend court to provide information for the purpose of enabling a judgment creditor to enforce a judgment or order against him. CPR 71.2 sets out the procedure to be followed to obtain such an order and CPR 71.8, entitled "Failure to comply with order", provides as follows:

> "(1) If a person against whom an order has been made under rule 71.2-
>
> (a) fails to attend court;
>
> (b) refuses at the hearing to take the oath or to answer any question; or

> (c) otherwise fails to comply with the order,
>
> the court will refer the matter to a High Court judge or Circuit Judge.
>
> (2) That judge may, subject to paragraphs (3) and (4), make a committal order against the person.
>
> …….
>
> (4) If a committal order is made, the judge will direct that –
>
> (a) the order shall be suspended provided that the person-
>
> (i) attends court at a time and place specified in the order; and
>
> (ii) complies with all the terms of that order and the original order; and
>
> (b) if the person fails to comply with any term on which the committal order is suspended, he shall be brought before a judge to consider whether the committal order should be discharged.
>
> (Part 81 contains provisions in relation to committal.)"

4. CPR 81.1 states that Part 81 sets out the procedure in respect of contempt of court. CPR 81.2 states that Part 81 is concerned only with procedure and does not itself confer upon the court power to make an order for committal. CPR 81.4(1)(a) provides that if a person required by a judgment or order to do an act does not do it within the required time then the judgment or order may be enforced by an order for committal. CPR 81.10 states how the committal application is to be made. In particular, the grounds on which the application is made must be set out and each act of contempt alleged must be identified. The application notice and the evidence in support must be served personally unless the court dispenses with such service.

5. In essence the submission of Miss Sonia Tolaney QC on behalf of DB is as follows. The court's power to order committal is an inherent power which is not conferred by the CPR. It derives from the inherent jurisdiction of the courts to compel obedience with their orders. CPR 71 and CPR 81 merely set out the procedures to be followed in order to obtain an order of committal. CPR 81 contains a generally applicable procedure for committal whereas CPR 71.8 provides a summary and streamlined procedure which is only available to enforce orders made under CPR 71.2. In the present case both procedures are available to DB.

6. In essence the submission of Duncan Matthews QC on behalf of Mr. Vik is as follows. Given that the committal is sought in respect of alleged breaches of an order made under CPR 71 the court only has power to make an order for committal in accordance with the provisions of CPR 71.8. That is so because CPR 71.8 only empowers the court to make an order for a suspended committal rather than an order for immediate imprisonment and prescribes a specific procedure to be followed. The restrictions imposed cannot be outflanked or circumvented by proceeding under CPR

81 or the court's inherent jurisdiction. Unlike CPR 81, which seeks to regulate the court's inherent jurisdiction to commit for contempt, CPR 71.8 is a discrete form of statutory contempt.

7. The power to commit to prison for contempt is a common law power; see *Griffin v Griffin* [2000] 2 FLR 44 at paragraph 21 per Hale LJ. This supports Miss Tolaney's submission that the court's power to commit for contempt is not conferred by the CPR. Indeed that is what CPR 81.2 states. There is no such statement in Part 71 and there is a note in the White Book at paragraph 3C-21, upon which Mr. Matthews relies, which states that CPR 71 gives the court power to commit for contempt not for the purpose of enforcing judgments but for the purpose of enforcing procedural orders and suggests that CPR 71 may be regarded, at least indirectly, as constituting a discrete form of statutory contempt of court liability. However, I was not persuaded by that note. It seems to me that the court's common law power to commit for contempt applies as much to the enforcement of a judgment as it does to enforcement of a procedural order. I further consider that both CPR 81 and CPR 71 provide for the procedure to be followed when that common law power or jurisdiction is exercised. The question raised by Mr. Matthews' submission is whether a party who alleges breach of an order made under CPR 71 must proceed under the provisions of CPR 71.8 or whether he can elect to proceed under CPR 81.

8. It is apparent from *Broomleigh Housing Association v Okonkwo* [2010] EWCA Civ 1113 that CPR 71.8 was designed to meet criticisms that the procedure for ensuring co-operation with an order for oral examination was too slow and that CPR 71.8 was intended to streamline the process, subject to appropriate protections; see paragraph 28 per Carnwarth LJ. Thus, although the court must be satisfied to the criminal standard that there has been a contempt, there is no requirement that an application notice must be served and there is no requirement to set out or serve the detailed grounds for the committal. If the court is not satisfied to the criminal standard that there has been a contempt the court can adjourn the application and give directions for a hearing.

9. If CPR 71 provides a streamlined or summary process then one would expect that either it or the more detailed process of CPR 81 could be used by the person seeking a committal order, the choice depending upon whether the case was appropriate for the summary or streamlined process or not. Where the alleged contempt is simple, such as a failure to attend court, the streamlined process may be appropriate. But where the alleged contempt is more difficult to prove, such as a failure to answer questions honestly, the more detailed process may be appropriate. Thus in this very case when counsel for DB, dissatisfied with Mr. Vik's answers, requested the court to make a suspended committal order pursuant to CPR 71.8 Cooke J. stated that the application could not be determined that day, that it would have to be properly formulated and he drew counsel's attention to CPR 81.10; see pages 219 and 232 of the transcript for the hearing on 11 December 2015. Cooke J. obviously thought that even though there had been an alleged breach of the order made pursuant to CPR 71 it was appropriate for the allegation of contempt to be determined pursuant to the procedure set out in CPR 81. The express reference in CPR 71.8 to CPR 81 is consistent with that approach. I respectfully agree with the approach of Cooke J. since it would be odd if an allegation of contempt arising out of an alleged breach of an order made pursuant to CPR 71 had to be determined by the summary or streamlined process provided by CPR 71 even if

that procedure was inappropriate. In my judgment a party who alleges a breach of an order made under CPR 71.2 may proceed with a committal application under CPR 81.

10. I have considered the arguments advanced by Mr. Matthews but am not persuaded by them. I am unable to accept that where there is a breach of an order made under Part 71 a party can only proceed in accordance with Part 71.8. It is true that Part 71.8 provides a specific procedure and only provides for a suspended committal order but the specific procedure is for applications where the summary or streamlined procedure is appropriate. If such a procedure is appropriate then the specific procedure must be followed. But if it is not then the procedure provided by Part 81 must be followed. The summary or streamlined procedure can only result in a suspended committal order whereas the longer procedure in Part 81 is not so limited. There is no question of "outflanking" or "circumventing" the restrictions imposed by Part 71.8. The procedure in Part 71.8 is for one type of application, that is, the summary or streamlined procedure and the procedure in Part 81 is for other cases.

Does CPR 71.8 have extra-territorial effect ?

11. There is no dispute that CPR 81 has extra-territorial effect*; see Dar Al Arkan Real Estate Development Co. v Refai* [2014] EWCA Civ 715, [2015] 1 WLR 135. Accordingly the fact that Mr. Vik is out of the jurisdiction is no bar to an order for committal being sought against him pursuant to Part 81.

12. There is however a dispute as to whether the fact that Mr. Vik is now out of the jurisdiction is a bar to an order for a suspended committal being sought against him pursuant to CPR 71.8. On the basis of my decision concerning the first issue, this second issue does not arise. I shall therefore deal with it shortly.

13. There is no dispute that orders made pursuant to CPR 71.2 cannot have extra-territorial effect; *see Masri v Consolidated Contractors International (UK) Ltd (No.4)* [2010] 1 AC 90. The House of Lords held that Part 71 does not contemplate an order against an officer outside the jurisdiction. Mr. Matthews submits that there is no relevant distinction between CPR 71.2 and 71.8 and therefore CPR 71.8 also cannot have extra-territorial effect. Miss Tolaney submits that there is a distinction. *Masri* and CPR 71.2 are concerned with whether an order should be made in aid of private rights after judgment whereas committal proceedings, whether pursued subject to the procedure of CPR 71.8 or of Part 81, engage a strong public interest in upholding and enforcing the court's orders; see Beatson LJ in *Dar Al Arkan* at paragraph 42. Once an order has been validly made and served against the officer of a company Miss Tolaney submits that the officer cannot evade compliance with that order by leaving the jurisdiction. *Masri* was concerned, she submits, with the scope of the court's power to make orders under CPR 71.2. It was not concerned with the scope of the court's power of committal. In response Mr. Matthews points out in order to discharge the suspended order for committal and replace it with an immediate order for committal the respondent "shall be brought before a judge". This envisages, he submits, that the respondent is within the jurisdiction. Similarly he submitted that the provisions in PD71 relating to service of the suspended committal order contemplate that the respondent is within the jurisdiction.

14. Had it been necessary to decide this issue I would have accepted the submissions of Miss Tolaney. There is force in Mr. Matthews' submission that where the House of

Lords has held that Part 71 does not contemplate an order against an officer outside the jurisdiction there is, in the absence of clear words, no reason to distinguish one part of Part 71 from another. However, it seems to me that in circumstances where jurisdiction has been established against an officer whilst he was within the jurisdiction of the court and the court has therefore made a valid order against him pursuant to CPR 71.2 there is an obvious and strong public interest in upholding and enforcing that order; see the approach of Beatson LJ in *Dar Al Arkan* at paragraphs 35-42 when considering whether an order for committal could be obtained against an officer of a company pursuant to Part 81. I consider that such interest is so obvious and strong that clear words are not required to state expressly that where an order has been validly made against an officer of a company when he was within the jurisdiction an order for committal pursuant to CPR 71.8 can be sought notwithstanding that he has left the jurisdiction. The requirement in CPR 71.8 that the respondent "shall be brought before a judge" if he fails to comply with a term on which the committal order is suspended no doubt contemplates that the respondent will be brought before a judge to consider whether an order made pursuant to CPR 71.8 should be discharged but I do not consider that CPR 71.8 should be construed as meaning that if that cannot happen (because the respondent is out of the jurisdiction and there is no means to enforce his return) the court is unable, pursuant to CPR 71.8, to consider whether the committal order should be discharged. Were that the case it would mean that where an officer within the jurisdiction went into hiding and so could not be brought before a judge the court would be unable to consider whether the order should be discharged. That cannot have been intended. In any event the requirement that the officer be brought before a judge does not apply to the making of an order for committal pursuant to Part 71.8 but only to the question whether the order should be discharged.

Is there a jurisdictional gateway for service out of an application to commit pursuant to Part 81 ?

15. DB's position is that permission to serve a committal application out of the jurisdiction (whether pursuant to Part 71 or Part 81) is not required where the court already has jurisdiction over Mr. Vik (by reason of a valid order made pursuant to CPR 71.2 having been served upon him whilst he was within the jurisdiction). DB supports this submission by reference to the decision in *Marketmaker Technology Limited v CMC Group PLC* [2008] EWHC 1556 (QB) at paragraphs 26-27 and to the note in the White Book 2016 at n.81.10.4. The decision in that case concerned a respondent who had submitted to the jurisdiction of the court by commencing an action before this court but DB submits that that is an immaterial distinction. However, permission to serve out has nevertheless been sought and that is the application with which the court is concerned. Mr. Matthews said that the application that has been brought is not concerned with the question whether service out can be properly effected without permission. I agree and, it may be added, I heard no detailed submissions on the question either from Miss Tolaney or from Mr. Matthews. If and when DB purports to serve an application out of the jurisdiction without permission or seeks a ruling that permission to serve out is not required the matter will have to be carefully considered at that time.

16. Miss Tolaney submits that there is a jurisdictional gateway pursuant to PD6B para.3.1(10) which provides that the court may grant permission to serve out where "a

claim is made to enforce any judgment or arbitral award". An application for a committal order is a "claim" for the purposes of PD6B para.3.1; see *Dar Al Arkan* in the Court of Appeal [2015] 1 WLR 135 at paragraphs 17 and 55-56. Further, an application for a committal order is "made to enforce" a judgment; see *Dar Al Arkan* at first instance [2013] EWHC 4112, [2014] 1 CLC 813 at paragraph 33 per Andrew Smith J. Finally, the application for a committal order in this case is made to enforce a "judgment" because the order of July 2015 is a judgment for the purposes of PD6B 3.1(10). "Judgment" should be understood in the same way as that word is understood in CPR 74; see *Tasarruf Mevduati Sigorta Fonu v Demirel* [2006] EWHC 3354 (Ch) at paragraph 53 and [2007] EWCA Civ 799 at paragraphs 17-18 and in the same way as it is defined in Article 2(a) of the Recast Brussels Regulation which expressly includes orders. Thus an application for a committal order pursuant to Part 81 is a claim to enforce a judgment.

17. Mr. Matthews submits that the words "any judgment or arbitral award" in PD6B 3.1(10) refer only to claims to enforce substantive final decisions on a claim, that is, a money judgment. That is suggested by "judgment" being placed together with "arbitral award". This construction is also consistent with the legislative purpose of the gateway which was to fill a gap in the service regime in relation to claims to enforce at common law judgments emanating from countries whose judgments were not capable of registration in England; see *Dicey & Morris* paragraph 11-223. Thus neither the context nor the purpose of the jurisdictional gateway suggest that it was intended to apply to an order. Part 74 does not assist and there is no good reason to construe "judgment" in PD6B 3.1(10) in the same way as it is expressly defined in the Brussels Regulation.

18. If Mr. Matthews is correct then there is no specific jurisdictional gateway in PD6B permitting service out of the jurisdiction of an application to commit an officer of a company for contempt of an order made pursuant to Part 81 or Part 71 notwithstanding that the fact that the officer is out of the jurisdiction is no bar to the making of such an application. This may raise the question whether the court has an inherent jurisdiction to permit service out of the jurisdiction; cf the comments of Sir Anthony Clarke in *Masri v Consolidated Contractors* [2010] 1 AC 90 at paragraphs 63-64. However, no reliance was placed on an inherent jurisdiction in the present case. Reliance was placed solely on PD6B paragraph 3.1(10).

19. I have reached the conclusion that whilst the committal application is a "claim to enforce" the court's order under CPR 71.2 (see *Dar Al Arkan* at first instance [2014] 1 CLC 813 paragraphs 33, 61 and 70-74 and in the Court of Appeal [2015] 1 WLR 135 at paragraphs 55-56) the court's order under CPR 71.2 is not a "judgment" within the meaning of PD6B 3.1(10). I have reached that conclusion for these reasons. First, the word "judgment" is not ordinarily used to describe an order. When the order pursuant to CPR 71.2 was made on the documents (as it happens by me) I do not consider that I would have described the order as a "judgment" even though I had exercised some judgment in deciding to make the order. Similarly, in *Mansour v Mansour* [1989] 1 FLR 418 Lord Donaldson MR (when dealing with the predecessor of PD6B 3.1(10)) entertained grave doubts as to whether an injunctive order was a judgment and said that he would have thought that a judgment meant a determination of the rights of parties in the same way as an arbitral award does. Second, CPR 81.4 provides that a "judgment or order" may be enforced by an order for committal. That suggests that

where the CPR refers to a judgment such reference is not apt to include an order, unless it is clearly defined as including an order. CPR 74, which provides for the enforcement of judgments in other jurisdictions, is an example of a provision which expressly defines a judgment as including an order; see CPR 74.2(1)(c)(ii). Third, the legislative purpose of PD6B 3.1(10) and its predecessor was to fill a gap in the service regime in relation to claims to enforce at common law foreign judgments which were not capable of registration in England; see *Tasarruf* at paragraph 52 per Lawrence Collins J., the White Book n.3.37.45 and *Dicey & Morris* paragraph 11-223. Such judgments were judgments for a definite sum of money; see *Dicey & Morris* paragraph 14-022. Thus orders to attend court pursuant to CPR 71.2 were not the subject of the legislative purpose in enacting PD6B 3.1(10). Fourth, the juxtaposition of "judgment" with "arbitral award" suggests that the subject matter of PD6B 3.1(10) is a judgment or award which determines the rights of the parties and orders the payment of money. Fifth, there are no words in PD6B 3.1(10) which clearly show that judgment includes an order such as one made pursuant to CPR 71.2.

20. I have considered the matters relied upon by Miss Tolaney in support of a wider interpretation of "judgment" but am not persuaded by them. Reliance is placed on the definition of a judgment in the Recast Brussels Regulation but I do not consider that PD6B 3.1(10) can be interpreted by reference to that Regulation. The definition in that Regulation is set out in CPR 74.2 but that is an example of "judgment" being given expressly a wider meaning than its ordinary and natural meaning. Reliance was placed on the approach of the court to the construction of the predecessor of PD6B 3.1(10) in *Tasarruf* at paragraph 53 where the court referred to CPR 74. But that case concerned the question whether the presence of assets within the jurisdiction was a precondition of service out under that head. Lawrence Collins J. observed that there was no such requirement under CPR 74 and that it would be odd if the gateway were to be construed as requiring such a pre-condition. (The Court of Appeal agreed with the approach of the judge; see [2007] 1 WLR 2508 at paragraphs 16 and 17.) I do not consider that *Tasarruf* suggests that in construing "judgment" in PD6B 3.1(10) one should give it the same express definition which is to be found in CPR 74 but not in PD6B 3.1(10). Reliance was also placed on the circumstance that in *Masri* [2011] EWHC 409 (Comm) Gloster J. at paragraph 88 referred to the possibility of service of a committal application out of the jurisdiction being permitted by PD6B 3.1(10). However, she said nothing further about that possibility. Finally, it was said that there was a clear public interest in enforcing court orders, which public interest should be reflected in PD6B 3.1(10), otherwise no court orders could be enforced by service out under that gateway. However, I do not consider that that clear public interest is sufficient to distort what I consider to be the meaning which the gateway reasonably bears having regard to its ordinary and natural meaning, the context of the gateway within the CPR where other provisions expressly make clear whether judgment includes order, the legislative purpose underlying the gateway and the juxtaposition of judgment with award.

21. It follows that I must dismiss the application for permission to serve out of the jurisdiction pursuant to PD6B 3.1(10).

Other matters

22. There was also before the court an application for an order dispensing with personal service in the event that Mr. Vik did not designate a date, time and location for

personal service. This application was therefore based on the premise that the case was a proper one for permission to serve out.[1] Since the application for permission to serve out has failed the application to dispense with service must also fail.[2]

23. Finally, there was an application to dispense with personal service of an exhibit and of any other documents to be served in connection with the contempt application. Again, this application is premised upon the basis that the case is a proper one for service out and since it is not (at any rate pursuant to PD6B 3.1(10)) there is no need to deal with that application. In any event there was insufficient time to debate that issue on 28 July and it was not debated on the resumed hearing on 9 December.

Conclusion

24. DB is not restricted to applying for a committal order pursuant to CPR 71.8. DB may also apply for a committal order pursuant to CPR 81. However, the court has no jurisdiction pursuant to PD6B 3.1(10) to grant permission to serve the committal application out of the jurisdiction.

[1] After this judgment was handed down in draft I was informed by Miss Tolaney that the application was made whether or not service out was permitted. I did not understand that to be the case (and Mr Matthews has told me that his argument proceeded on the basis that the application depended on permission to serve out being granted). The notice of application appeared to link the order to the request for permission to serve out.

[2] If DB wishes to make the application in conjunction with seeking a ruling that service out is not required both applications can be heard together. The note sent after this judgment was handed down in draft suggests that it would be better to grant the application now and let Mr. Vik decide whether to challenge service. However, before the court grants the application it seems to me preferable for the court to decide whether DB's reliance on *Marketmaker* is well founded.