

Case No: HC 02 C01138

Neutral Citation Number: [2004] EWHC 2563 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2004

Before:

THE HONOURABLE MR. JUSTICE DAVID RICHARDS

OYSTERTEC PLC
- and -
PAUL ANTHONY DAVIDSON

Part 20 Claimant

Part 20 Defendant

MR. P. MARSHALL, Q.C. and MR. D. LIGHTMAN
(instructed by Messrs. Berg & Co.) for the Part 20 Claimant.
MR. A. NEWMAN, Q.C.
(instructed by Messrs. Cooper Kenyon Burrows) for the Part 20 Defendant.

Approved Judgment

Tape Transcription by Marten Walsh Cherer Ltd.,
Midway House, 27/29 Cursitor Street, London EC4A 1LT.
Telephone No: 020 7405 5010. Fax No: 020 7405 5026

Mr. Justice David Richards:

1. There is before the Court an application to commit Paul Anthony Davidson to prison for contempt of court in failing to comply with an order of this court made on 26 March, 2004.
2. The application arises in Part 20 proceedings brought by Oystertec plc against Mr. Davidson. They were both Defendants in an action brought against them and others by minority shareholders in a company called Easyrad Ltd.
3. The background to that action was that prior to November 1998 a pending application for a UK patent in respect of an invention called the Oyster Converter was registered in the name of Easyrad Ltd. In November 1998 Mr. Davidson and Adrian Philip Binney, two of the directors of Easyrad Ltd. and together its minority shareholders, purported on behalf of Easyrad Ltd., but in fact without any authority, to assign the pending application and other intellectual property rights to Mr. Davidson.
4. I can best summarise the subsequent events by quoting from a judgment of Mr. Justice Lightman given in these proceedings on 5 August, 2004.

"3. The UK patent was granted in July 2000. In February 2001 Mr. Davidson purported to assign and sell the patent to Oystertec, a company of which he was also a director, for a deferred consideration of £3 million. In February 2001, consequent upon that assignment, Oystertec was floated on the Alternative Investment Market of the London Stock Exchange. The value and future profitability of the patent was central to the prospectus. The flotation capitalised the company at about £30 million. In March 2002 Mr. Davidson sold a tranche of his shares issued to him, realising a profit of some £6 million.

"4. The minority shareholders in Easyrad commenced a derivative action against Mr. Davidson, Oystertec, and Mr. Binney, Easyrad was added as Fourth Defendant. The Claimants in the action maintained that the assignment was void and they sought, in the alternative, the re-assignment of the patent to Easyrad or the award to Easyrad of equitable compensation, and the award of equitable compensation and/or damages for future breach of fiduciary duty against Mr. Davidson and Mr. Binney.

"5. In judgments delivered on 8 September and 7 November, 2003 Mr. Peter Prescott, Q.C. (sitting as a High Court Judge) held that the assignment by Easyrad was void, but by reason of acquiescence Easyrad was barred from asserting a proprietary right to the return of the patent and that, in lieu, Easyrad should be entitled to equitable compensation from Oystertec and to damages or equitable compensation against Mr. Davidson for breach of fiduciary duty.

"6. Oystertec then commenced the Part 20 proceedings against Mr. Davidson for misrepresentation and breach of warranty. The relevant misrepresentation and breach of warranty was that Mr. Davidson was the owner of the patent and that there were no third party claims, when in fact Mr. Davidson knew throughout of the claims of Easyrad. That application was due to be heard on 29 January 2004 and to be followed by an application by Oystertec for a freezing and disclosure order. Mr. Davidson however could not attend court on that day. The judge was told that Mr. Davidson

resided in Macclesfield and his address for service of documents was Marsden Manor, 54 Macclesfield Road, Prestbury. The judge directed that there should be a telephone conference call so that he could hear what Mr. Davidson had to say. After the telephone conference had taken place, Mr. Prescott adjourned the Part 23 application for a summary judgment until 3 February 2004. In the meantime, on the same day in the absence of Mr. Davidson, Oystertec proceeded with their application for a freezing and disclosure order, and this was granted. Assets were frozen to the value of £1.5 million and categories of documents were ordered to be disclosed by Mr. Davidson. It was acknowledged at the time that there might be some delay before that order might be served because there was in contemplation at the time the possibility of proceedings abroad.

"7. On 3 February 2004 Mr. Prescott heard Oystertec's Part 24 claim against Mr. Davidson."

5. Mr. Prescott upheld the claim and made an order in the terms which are then set out in para. 7 of this Judgment of Mr. Justice Lightman. The order included a provision that Mr. Davidson should pay on or before 12 February the sum of £391,000 on account of costs, and £184,000 by way of interim payment of damages. Mr. Justice Lightman records that Mr. Davidson had not, at the date of the judgment on 5 August, paid one penny of those sums. So far as I know that remains the position today. On 3 March, 2003 Mr. Justice Patten appointed an interim receiver of the shares held by Mr. Davidson in various companies.

6. Finally, in para. 9 of Mr. Justice Lightman records in para. 9 of his judgment:

"Mr. Davidson did not comply with the freezing order. First of all, he sold one million shares in Oystertec and disposed of part of the proceeds of sale. Secondly, he failed to provide disclosure of his assets and of the other information required by the order made by Mr. Peter Prescott, Q.C."

7. Oystertec commenced committal proceedings against Mr. Davidson which were heard by Mr. Justice Patten over, I think, four days commencing on 17 March, 2004. Mr. Davidson had made a number of affidavits which were before the Court at that hearing, and he was cross-examined on them. Mr. Justice Patten gave judgment on 26 March, and held that Mr. Davidson was in contempt of court for breach of the freezing order in the respects mentioned by Mr. Justice Lightman. Instead of committal, Mr. Justice Patten ordered Mr. Davidson to pay the costs of the application on an indemnity basis, and he made a further order for disclosure. That order required Mr. Davidson, by 4.00 p.m. on 21 April, 2004 to serve and swear on Oystertec an affidavit giving information itemised in thirteen sub-paragraphs of para. 1 of the order.

8. In his judgment Mr. Justice Patten said this in para. 29:

"The need to secure compliance with the orders of the Court is of course an end in itself and justifies the imposition of a penalty proportionate to the breach in question. But in relation to the disclosure orders, it is also of paramount importance that the orders which I make on this application should achieve what the original freezing order was intended to achieve, namely a comprehensive statement of assets and the disclosure of the relevant details of the share sale transactions and what has become of

those proceeds of sale. Without this the policing of the freezing order would be impossible and its operation could be effectively frustrated".

He then refers to the order which he made, and at para. 30 he said:

"That really leaves the question of penalty. As I have already indicated, the breaches of the freezing order are proven and there has been a knowing failure to comply. In considering the question of penalty I have to take into account not only Mr. Davidson's failure to make disclosure, but also the breach of para. 3(2) of the order in connection with the disposal of the one million Oystertec shares. Once again I do not believe that that was accidental. Although the proceeds of sale were utilised to meet both legitimate debts in the form of legal expenses and secured debts in respect of which the bank had a right of set-off, Mr. Davidson has, by the disposal of those shares, effectively placed them beyond the reach of Oystertec as a judgment creditor. Again, in doing so, I believe that he gave priority to his own interests over those of Oystertec, notwithstanding his knowledge of the order of the court. These are therefore serious breaches, but he has apologised for them and I am satisfied that he now realises the gravity of what he has done and the potential consequences of having done it. I have decided, in this particular case, that it would not be appropriate to make an immediate order of imprisonment. Nor do I think that there is any real benefit in imposing a custodial sentence and suspending it on terms that the order for disclosure which I am about to make should be complied with. Mr. Davidson can be in no doubt that if there are any further breaches of these orders, an immediate sentence of imprisonment will be inevitable. With that warning, I think I can properly deal with these contempts by making the order scheduled to this judgment and by ordering Mr. Davidson to pay the costs of this application on an indemnity basis".

9. There then followed a complete failure by Mr. Davidson to comply with the order of Mr. Justice Patten for the provision of further information. As at the time of Mr. Justice Lightman's judgment on 5 August this year, the position as recorded in the judgment was that "Mr. Davidson has not made any attempt to make the disclosure ordered as a last resort by Mr. Justice Patten". Later in his judgment, Mr. Justice Lightman said at para. 20:

"In my view it is quite plain (and it was plain to Mr. Prescott) that Mr. Davidson is a man who is unwilling to fulfil his obligations under any order or judgment of the court. It was essential, it seems to me, in order to protect the claim by Oystertec and, as it is now necessary in order to protect the judgment obtained by Oystertec, to grant the freezing relief. In this regard the relevant factors are set out helpfully in the affidavit of Mr. Morris. I would only add that still not a penny has been paid and nothing has been done to comply with the judgment of Patten J."

10. It was therefore apparent to Mr. Davidson, who appeared in person before Mr. Justice Lightman, that he was in clear breach of the order which had been made some months earlier.
11. On 20 August this year Oystertec issued the application now before me to commit Mr. Davidson for breach of the order of Mr. Justice Patten. It was duly served on Mr. Davidson. It was listed for hearing on 6 October 2004, but Mr. Davidson did not attend. A bench warrant was issued for his arrest. He attended court, in effect voluntarily, on 15 October, 2004 when the application was adjourned to 21 October. The application came

before me on 21 October when Mr. Davidson was represented, as he is today, by Mr. Alan Newman, Q.C. and solicitors who had been instructed only shortly beforehand. Then, as now, Mr. Newman, on Mr. Davidson's behalf, accepts that Mr. Davidson has been guilty of contempt in his failure to comply with the order of Mr. Justice Patten.

12. The day before the hearing before me on 21 October there was served an affidavit by Mr. Davidson in which he gave some information in response to the order of Mr. Justice Patten. Much of it was incomplete, but, for the first time in six months, it demonstrated at least a minimal effort to comply with the order. Without that effort on his part, committal to prison immediately would, I think, have been inevitable at that stage. As it was, I considered it appropriate to give Mr. Davidson an opportunity of complying fully with the order of Mr. Justice Patten. Accordingly, I adjourned the application for fourteen days, and directed that by 4.00 p.m. on 1 November he should serve a further affidavit supplying the remaining information and documents, or to the extent that he still could not do so, explaining his reasons and indicating when they would be supplied.
13. On 1 November, 2004 a witness statement of Mr. Davidson with an exhibit of further documents was served on Oystertec's solicitors. In many respects, the combination of the earlier affidavit and the witness statement served this week provides the information and documents required by Mr. Justice Patten's order. There are still omissions for which some explanations have been put forward by Mr. Davidson in the course of giving oral evidence before me. It is also right to say that there are a number of respects in which his evidence served this week contradicts either evidence that he gave in his affidavit of 20 October, or evidence which was given in affidavits and witness statements made earlier this year. He has been cross-examined on some of those aspects by Mr. Marshall, who appears today for Oystertec, but it does not seem to me that it is possible for me today to resolve any of those issues. I am satisfied that there are questions which arise from these discrepancies, but I think I must take it, as it is submitted to me, and as Mr. Davidson has told me, that his latest witness statement records the correct position as he believes it to be.
14. Oystertec's position in relation to the continuing failure by Mr. Davidson to comply fully with the order of Mr. Justice Patten is that rather than incur the further expense of scrutinising any additional evidence - expense which they are most unlikely ever to recover from Mr. Davidson - they are content to await a bankruptcy order which is likely to be made on a petition now pending against Mr. Davidson, and leave it to the trustee in bankruptcy to pursue his inquiries.
15. In those circumstances, I do not believe that there would be any useful purpose served in an order at this stage that Mr. Davidson produce any further affidavit.
16. The issue which does arise today is whether I should make an order now to commit Mr. Davidson to prison. As I have mentioned, Mr. Davidson accepts that he has been in contempt of court in failing to comply with the order of Mr. Justice Patten. There is, in my mind, no doubt at all that Mr. Davidson knew what he was required to do by Mr. Justice Patten's order, and deliberately failed to comply with it. His failure lasted for over six months, and continued even after the judgment of Mr Justice Lightman given on 5 August when, as I have already indicated, he drew specific attention to Mr. Davidson's continuing serious breach of the order.

17. I am not persuaded by the explanations that have been given to me for this non-compliance. Mr. Newman, Q.C. has drawn my attention in open court to the contents of a report which is in evidence from a consultant psychiatrist. Mr. Davidson has been under his care for some time this year. He reports that Mr. Davidson was a man of previously robust character, who liked to be in control, and considered himself a capable problem-solver. However, in the face of his legal difficulties and a perception that he was unable to challenge the process, he has slid into a mild/moderate depressive illness with associated mood-related symptoms and mild cognitive impairment. His symptoms of anxiety continue when faced with his legal difficulties and with court hearings. The prognosis is that his mental state is likely to improve should those legal difficulties come to an end.
18. I have no difficulty in accepting, on the basis of this report, that Mr. Davidson is suffering from the conditions that are described in it. This has not, however, it must be observed, stopped him from active participation in legal proceedings since Mr. Justice Patten's order in March this year. In particular, it was he who made the application for a variation of orders which had been made against him in these proceedings. He appeared in person before Mr. Justice Lightman, and conducted that application himself. He has also been before the High Court in the course of August, September, and October in connection with his proposal to put forward an individual voluntary arrangement as an alternative to bankruptcy. He has also appeared in the Macclesfield County Court, seeking to set aside statutory demands which have been served upon him. He has instructed solicitors and counsel in connection with his bankruptcy proceedings, and, of course, very late, he instructed solicitors and counsel in relation to this application now before me.
19. I am satisfied that Mr. Davidson would have been well able to comply with the order of Mr. Justice Patten at a much earlier stage if he had put his mind to it.
20. On an application to commit for contempt in a case such as this, the Court's powers have the dual purpose of punishing the Respondent for his contempt and also forcing him so far as possible to comply with the order. In *Allason -v- Random House UK Ltd.* No. 2 [2002] EWHC 1030, at para. 35, Mr. Justice Neuberger, who was hearing an application for committal, said:
- "The purpose of the contempt jurisdiction so far as the court is concerned is to make it clear to a party who fails to comply with the court order that he should have complied, and where he has still not complied, that he should comply. In a case such as this, there is an element of punishment, but an even more important element of coercion. The other party in this case, Random House, has an obvious interest in having the order enforced if necessary by imprisonment. I mentioned earlier that Random House would not seek to put Mr. Allason in prison at this stage if a more effective and less unkind way can be found of getting him to comply. I share that view, and I have been giving some thought to the appropriate course to take. I think some might regard the contempts which I have identified as established as making it inevitable that Mr. Allason should go to prison".
21. It does not follow from that passage and the course adopted by the judge in that case that in every case where, however late in the day, the order has been complied with, the Respondent will escape committal to prison. But, compliance with the order is

nonetheless, on any footing, a very weighty factor to take into account when deciding the appropriate course to take.

22. I have been referred to two decisions in which a party in breach of freezing and disclosure orders has been committed to prison. In the first, a decision in the Court of Appeal in *Golden Portfolio Holidays Ltd. -v- Cordingley*, unreported, 20 March, 1992, the Defendant was committed to prison for twelve months. He had failed, both by the time specified in the order, and at any later time, to swear and serve an affidavit and, moreover, he had withdrawn a sum of money in breach of the order.
23. It is fair to say that on the application now before me - although this was not the case on the application before Mr. Justice Patten - there has not been a positive, or active, breach of the order. It is also fair to say that in this application - unlike in the *Golden Portfolio* case - there has now been substantial compliance, or a significant degree of compliance, with the order of Mr. Justice Patten.
24. The second case was a decision earlier this year of Mr. Justice Lewison in *Great Future International -v- Sealand Housing Corporation* [2004] EWHC, 124. A Respondent was in breach of disclosure orders and he was committed to prison for three months. There had, as I understand it, been no compliance by the Respondent with the order, and he was ordered to take further steps which would go a long way towards purging the contempt. Moreover - and, again, unlike this case - the Respondent had offered no apology and had entered no equivalent to a plea of guilty. Mr. Justice Lewison said this:

"The order that a court makes on an application to commit must of course be proportionate to the contempt that has been proved, but the order of the court is not merely punitive, it is coercive as well in the sense that part of its purpose is to encourage the contemnor to comply with orders that the court has made against him. I do not believe that anything short of a prison sentence will bring home to Mr. Stuart Hanson that orders of the court are made to be complied with, and not ignored".
25. In the present case, there is no point in imposing any financial penalty because it is clear that Mr. Davidson will not, and very probably cannot, pay any financial penalty. The serious nature of the contempt in this case means, in my judgment, that it cannot pass without any penalty. Mr. Marshall has drawn attention to the fact of the existing receivership over assets of Mr. Davidson, and his likely bankruptcy. There is therefore now one officeholder appointed by the court in connection with Mr. Davidson's affairs, and it is very likely that there will soon also be a trustee in bankruptcy. The receiver does now, and they both will in the future, require Mr. Davidson's prompt co-operation and compliance with any orders that are made. I also bear in mind that he was given a very clear and stark warning by Mr. Justice Patten in his judgment on 26 March this year.
26. In considering the course that I should take, I take into account, as I have said, that very late in the day Mr. Davidson has complied, to a very considerable extent, with the orders of Mr. Justice Patten, although even now there are a number of real loose ends and uncertainties even now. I also take into account that he has apologised, and although, for the reasons I have given, it is not an adequate excuse, he has been suffering from some degree of stress and depression.

27. In all the circumstances I consider it appropriate to make an order committing Mr. Davidson to prison for a period of three months, but suspending it for twelve months. The effect is that Mr. Davidson will not go immediately to prison, but if there is, in the course of the suspension of twelve months, any non-compliance with orders that may be made by the Court, then the Court may, at any time, activate the sentence and commit Mr. Davidson immediately to prison for the period of three months.
28. I will also make an order that Oystertec's costs of this application shall be ordered to be paid by Mr. Davidson, to be assessed on an indemnity basis.