Neutral Citation Number: [2013] EWHC 347 (TCC)
Case No:

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 28th February 2013

Before:

MR JUSTICE AKENHEAD

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Between:

BERRY PILING SYSTEMS LIMITED **Cla**

- and -

SHEER PROJECTS LIMITED **Defe**

- -

- -

Peter Oliver (instructed by **direct access**) for the **Defendant and Applicant**

Dan McCourt Fritz (instructed by **Goldkorn Mathias Gentle Page LLP**) for the **Respondents**

Hearing date: 22 February 2013

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
The Defendant, Sheer Projects Ltd ("Sheer"), applies for permission to make an application for committal for contempt against Mr Christopher Berry and Mr Peter Death, two former directors of Berry Piling Systems Ltd ("BPS"), in relation to statements which they submitted in adjudication enforcement proceedings brought by BPS against Sheer over a year ago. BPS secured a judgment in its favour for just over £20,000 and fought off an application by Sheer for a stay of execution on that judgment on the basis of those statements which are now said to contain untruths. CPR 32.14 provides:

"(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

(2) Proceedings under this rule may be brought only –

(a)
by the Attorney General; or

(b)
with the permission of the court."

The Background Facts and the Initial Proceedings

2.
In about March 2010, Sheer engaged BPS, as a sub-contractor, to carry out secant piling and associated works at 15 Tregunter Road, London SW10. The works began on 20 January 2011 but fell into delay. One of the problems that occurred during the work was said to have been leakage of water through the piles. Following a dispute about BPS' entitlement to payment under the contract, BPS referred the dispute to adjudication on 17 October 2011 claiming some £78,000. By a decision dated 30 November 2011, the adjudicator awarded BPS £20,551.87 plus VAT. Sheer did not believe that the adjudicator's award represented the true state of the account between the parties and commenced arbitration proceedings on 12 December 2011.

3.
BPS issued enforcement proceedings in the TCC on 6 January 2012 seeking summary judgment on the adjudicator's award. Sheer made an application seeking a stay of execution (in the event that the summary judgment application was successful) on the grounds that BPS would be unable to re-pay the judgment sum. To that end, Sheer relied upon the evidence of an expert accountant Mr Isaacs who said in his first report:

"2.5.1 The Company [BPS] was balance sheet insolvent in June 2010 in that its liabilities exceeded its assets.

2.5.2 At that date it also had net current liabilities because its current assets were exceeded by its current liabilities.

2.5.3 The deficiency of assets was £115k…

2.5.7 The Company's Dunn and Bradstreet credit score has been on a reducing trend during the three years to 30 June 2010 and the latest score is in the "High Risk" band.

2.5.8 There is no evidence that the Company may be less insolvent now than was the case at 30 June 2010…

2.6 Based on the available information it is my opinion that there is a significant risk that:

2.6.1 The Company may be forced to cease trading by virtue of insolvency.

2.6.2 The Company does not have the resources available to it to allow it to meet its liabilities, including any potential award that might be made if an Arbitrator were to determine that sums were due to Sheer having taken a full account of the claims and counterclaims in both directions."

4.
Mr Isaacs produced a supplemental report to consider the financial report of C J Berry Limited and Mainbelt Limited (companies in the same group as Berry) and expressed the following conclusion:

"2.15 For these reasons, the additional evidence does not cause me to alter my original opinion that there is a significant risk that the Company may be forced to cease trading by virtue of insolvency and that it does not have the resources available to it to allow it to meet its liabilities, including any potential award that might be made if an Arbitrator were to determine that sums were due to Sheer having taken a full account of the claims and counterclaims in both directions."

5.
In support of the proposition that BPS would be able to repay the judgment sum and to counter the opinion expressed by Mr Isaacs, BPS served witness statements each signed with a statement of truth in which Mr Berry and Mr Death described BPS as a solvent profitable going concern with good prospects. Mr Berry, who was BPS' Managing Director and by a debenture at least partly funded BPS, served a witness statement dated 30 January 2012 in which he stated:

"2. I have read a copy of Mr Isaacs's Report of the 20th January 2012 and the copies of the witness statements served by the defendant. His Report does not give an accurate report of the financial position of the claimant nor of its ability to repay the defendant the amount sought by the claimant in these proceedings. The claimant is well able to repay the sum sought should it be required to do so.

3… Should an award be made against the claimant to repay its claim it would do so…"

7. The financial position of the group and the claimant has not deteriorated since the contract was entered into in March 2011. Indeed the management accounts prepared by the claimant for the year ended 30.06.2011 show a profit of £18,000 and management accounts for the six months ended 30.12.2011 show a profit of about £13,500. The profit and loss and cashflow forecast for the 12 months up to December 2012 indicate a projected profit of well over £50,000…

9. The claimant has a full order book.…"

The attached management accounts for the year ending 30 June 2011 showed sales of £2.169 million and, after allowing for purchases, direct expenses and overheads including bank charges and interest, a profit of just over £18,000. The management accounts for the 6 months ending 30 December 2011 showed sales of £988,000 and allowing for the various costs, expenses and overheads a profit of some £13,500 was shown.

6.
Mr Death, BPS' Finance Director, served a witness statement dated 1 February 2012 in which he stated at Paragraph 4 that he was "fully aware of the financial position of" BPS and its associated companies and went on:

"4. I make this witness statement having been duly authorised to do so and with the knowledge and approval of Christopher Berry who confirms the content of this witness statement.……

5. I have read a copy of Mr Isaac's Reports of the 20th January and 1st February 2012 and copies of the witness statements served by the defendant. I am particularly commenting on Mr Isaac's second Report of today. I confirm (as does Mr Berry the managing director) that the claimant is well able to repay the sum sought should it be required to do so without support of either CJ Berry Limited or Mainbelt Limited but that those companies would in any event support the claimant.

8…the claimant is well able to fund the repayment if so required" "

7.
Their evidence was underpinned by a statement from a Mr Michaelides who was a chartered accountant and who worked for Berry's accountants. He stated that C J Berry Ltd and Mainbelt Ltd were subsidiaries of BPS and stated that BPS' bankers had renewed its overdraft facility on Thursday 30 December 2011 indicating that in his view "the Bank did not have concerns regarding the Claimant's solvency".

8.

The matter was heard before Mr Justice Edwards-Stuart on 2 February 2012. It is clear that he formed the view that there was no defence to the summary judgment application for enforcement of the adjudicator's decision. Having considered Mr Isaacs' reports and BPS' witness statements, Mr Justice Edwards-Stuart dismissed the Applicant's application for a stay of execution and said:

"18. Berry's most recent published accounts, for the year ending 30 June 2010, show that it suffered a loss of £115,245. The credit rating agency, Dun and Bradstreet, places it in the high risk category.

19. However, management accounts were produced by Berry for the 12 month period ending 30 June 2011 and for the 6 month period ending 30 December 2011, each of which showed a modest profit for the period of the order of £18,000 and £13,500, respectively. Mr Berry, the company's managing director, made a witness statement in which he said that Berry was still trading and had a full order book. In addition, he said that the company's bankers had, as recently as 30 December 2011, renewed its overdraft facilities, which he said indicated that the bank had a reasonable degree of confidence in Berry's future. He said also that the profit and loss forecast for the 12 month period to December 2012 indicated an anticipated profit of about £50,000.

23. However, taking the evidence as a whole, I am satisfied that Berry is currently trading profitably and will probably continue to do so for the next year or two with or without the injection of a further £20,000 at this stage. I therefore see no reason why it should find itself unable to repay the judgment sum in 12 to 18 months time if it were to receive it now."

9.
On 17 February 2012, Sheer paid to BPS the judgment sum including interest, £24,879.97. Meanwhile the arbitration initiated by Sheer proceeded with Berry requesting security for costs on 7 March 2012. There is some sketchy evidence that the arbitrator, Mr Molloy, had sought payment of fees from BPS, although it is not clear in what amount or on what basis, given that he had not yet produced his award.

10.
On 29 March 2012, Mr Berry met Axiom Recovery LLP ("Axiom") to discuss at least the possibility of Berry going into administration. It seemed to Axiom at that stage that BPS was "insolvent on a cash flow basis, pursuant to s123 of the Insolvency Act 1986 as it was unable to pay its debts as and when they fell due" and Axiom advised Mr Berry "that immediate steps should be taken to place the Company into Administration" (this being referred to in Axiom's letter dated 30 May 2012 to "all known creditors"). It is unclear what happened in terms of trading as between the end of March and 14 May 2012 when two administrators from Axiom were appointed.

11.
The Administrators' report to the creditors of 30 May 2012 identified that BPS' turnover had reduced from "£3.35m to £2m" and that there had been a pile design problem in late 2008 which had cost BPS substantial sums, although there was a potential claim against a consultant for possibly £500,000. They explained that in mid-2011 through to February 2012 three significant customers became insolvent and there were difficulties with four significant debtors in securing payment of some £240,000. Another significant factor was the claim by Sheer in the arbitration "with estimated costs of up to £200,000". Mr Berry, it was said, took the decision to demand repayment under his debenture. It outlined that the Administrators had sold to Mr Berry for some £131,000 the goodwill (£21,000), retentions (£3,319.62), contracts and work in progress (£17,400), the claim against the consultant (£70,000) and certain book debts (£19,500). The report indicates that BPS had an "outstanding debtor ledger in the sum of £319,488". The Statement of Administrator's Proposals lodged with the Court on

1 June 2012 repeated much of this information. It identified the figures on the company balance sheets for the year ending 30 June 2010 with debtors valued at £687,104 and creditors at £927,833 with a net overall liability of £115,245. The Administrators identified that at the date of their appointment they estimated that unsecured creditors' claims totalled some £930,241. The estimated statement of affairs as at 14 May 2012 identified these figures with a total overall deficiency of £862,146.72. Amongst the creditors the largest were HMRC for PAYE/NIC and for VAT at some £185,000 and £132,000 respectively and a Watford company which had supplied piling and drilling items for some £380,000. The attached list of creditors produces a total sum of some £996,000 and thus it may be that the Administrators believe that some of the claims were unjustified.

12.
The arbitration continued, albeit it appears that BPS took no further part and, perhaps unsurprisingly, Sheer obtained a reasoned award in its favour in July 2012 for just under £100,000 including interest and costs.

13.
Sheer's representatives, Contract Construction Consultants ("CCC"), who are not lawyers but claims consultants, communicated with the Administrators, for instance writing on 27 June 2012 in the following terms:

"…According to your report, by 14 May 2012, [BPS] was owed only £338,988 of which all but £19,500…was unrealisable."

CCC asked for and was provided by the Administrators on 3 October 2012 with the names and details of the three customers referred to in the report as having gone into liquidation: Archer Hoblin (debt of £47,083, into liquidation on 19 January 2012, Holloway White Allom (debt of £1,528 into administration on 5 October 2011) and Big Basement Co (debt of £72,906 into administration on 10 February 2012).

14.
CCC also wrote to Mr Berry and Mr Death seeking explanations as to why they had said what they had done in their statements in the proceedings (as set out above) and intimating an application for committal for contempt of court. No explanation being forthcoming, the current application was issued.

These Proceedings

15.
Three lever arch files of evidence have been collated for the purpose of this application. Mr Dain of CCC, a qualified but non-practising barrister, has produced two affidavits. The first dated 4 January 2013 suggests that the false statements were effectively the statements of truth verifying Mr Berry's and Mr Death's statement with the basis being two further reports of Mr Isaacs. The affidavit goes on reasonably accurately to tell the story of what happened. It introduces and highlights parts of Mr Isaacs' reports.

16.
It is necessary to consider Mr Isaacs' first report of 5 November 2012. He is a chartered accountant and he says that he reports "as an expert witness" but he says that his "overriding duty is to express an honest and unbiased opinion to assist the court" and that he has prepared a report "as if instructed by the court". However he does not set out or even summarise what his instructions from CCC are. He

explains that he has never previously acted for any of the parties to this dispute and has no financial interest in the outcome of the dispute. He reviews the various accounts including the management accounts provided by Mr Berry with his statement. Whilst he accepts that it is "not unusual for debts in the construction industry to become unrealisable when a company becomes insolvent" (Paragraph 2.8), he says that it is important to differentiate between such debts and those “debts which had previously become unrealisable and which should therefore have been written off prior to the administration or, at the very least, in relation to which a provision should be made” (Paragraph 2.9). At Paragraph 2.10, he sets out an accounting truism:

“To the extent that debts were written off or provisions made against them, profits would have been correspondingly reduced. In other words, for accounting purposes, making a provision of, say, £10,000 against the book debts has the effect of reducing the level of book debts in the balance sheet by £10,000 and also reducing the level of profits in the period in which the provision is made by £10,000."

He goes on at Paragraph 2.11 to say that:

“For this reason, I have sought to establish whether there is any evidence that the Company should have made a provision for bad debts, prior to it entering administration in May 2012."

Having identified various pieces of information which he has obtained, at Paragraph 2.15 Mr Isaacs indicates that his analysis is focused on three dates, 30 June 2011 (the end of the accounting year), 31 December 2011 and 2 February 2012 (the date of the summary judgment).

17.
He then goes on to consider seven debts said to have been due by various debtors to BPS:

(a) In relation to £72,907 said to have been due from Big Basement Co, he says at Paragraph 2.17.1 that the debt would have been outstanding by 30 June 2011 for over a year and he considers that "the Directors ought to have known that its recovery was doubtful and that they therefore ought to have made a provision against it or written it off"; if they had this would have increased the net deficiency of assets from £115,000 at 30 June 2010 to £170,000 at 30 June 2011. By 31 December 2011, the debt would have been outstanding 18 months and there would have been "an even more compelling reason for the Directors to have provided against it". If they had done, the accounts up to 31 December 2011 would have reflected a loss of about £60,000. He says that by “2 February 2012, eight days before the Big Basement Company Limited entered into administration, I consider that it is almost inconceivable that the Directors would not have known that the debt was doubtful at best and irrecoverable at worst”.

(b) In relation to £47,083 said to be due to BPS from Archer Hoblin, he says simply that it had been placed in liquidation by 2 February 2012 and that the debt should have been written off (Paragraph 2.18).

(c) Another debt of £58,219 was identified from another customer which had been invoiced in June and July 2011. Mr Isaacs says that by 31 December 2011 the debt would have been well overdue and "arguably the Directors ought to have made a provision against it". By 2 February 2012, he says that the debt would have been outstanding for over six months and "there would have been an even more compelling reason for the Directors to have provided against it". Had they provided against this, the predicted profit would have been eliminated.

(d) At Paragraph 2.20 he identifies four smaller debts for £855 (invoiced 30 March 2011), the Holloway White Allom debt of £1,528, a debt for £30,000 invoiced on 18 August 2011 and £5,000 invoiced on 6 July 2010.

(e) He goes on to say:

“2.21 In my opinion the fact that the Directors failed to provide against even a debt from a company (Holloway White Allom Limited) in relation to which at both 31 December 2011 and 2 February 2012 the Directors would have known that the company was in administration, suggests that profits and assets were being artificially inflated by a failure to write off bad debts.

2.22 Overall, it is important to note that the directors should not have provided for only one or other of the debts to which I have referred but should have provided from most if not all of them. The fact that they provided for none of them seems, on the face of the evidence, to be recklessly optimistic at best.”

(f) At Paragraph 2.23, he calculates that by taking the seven debts which he has considered as bad debts the estimated deficiency of assets at 30 June 2011 was £170,000, at 31 December 2011 £215,000 and at February 2012 £299,000.

18.
He says at Paragraph 2.24 that he considers that “the Directors would have been likely to have known, at 2 February 2012 that the Company had insufficient funds to meet its VAT liability” of £98,000. At Paragraph 2.26 he considers it "inconceivable that Messrs Berry and Death would not have taken a keen interest in and had a detailed knowledge of the Company’s book debts. If customers disputed amounts that were due or were late in paying their debts, I would have expected that, if the sums in question were significant, the directors would have been fully aware of the nature of the dispute and the prospects and timescales for payment." At Paragraph 2.28, he goes on to say:

“Ultimately it will be for the court to decide whether the Directors’ witness statements demonstrated a reckless disregard for the factual position or whether they were positively intended to deceive but it is certainly my opinion that, at 2 February 2012, the Directors would have known that:

(i) The purported profits to which Mr Berry referred in his witness statement failed to take into account any bad debt provisions in relation to balances that the Directors knew were unrealisable.

(ii) Had proper account been taken of the bad debt provisions, the accounts would have shown that [the] Company had been incurring losses consistently since 30 June 2010.

(iii) Consequently the Company had a very significant deficiency of assets.

(iv) The Company was also unable to pay its debts as they fell due and specifically would not be able to pay its VAT for the quarter of £98k.

(v) On that basis that Company was insolvent at 2 February 2012 on both a net asset basis and on the basis that it was unable to pay its debts as they fell due.

(vi) Therefore their witness evidence was incompatible with what they knew (or should have known) about the finances of the Company.”

19.
His second report of 14 November 2012 adds little that is relevant but attaches the abbreviated accounts of CJ Berry Ltd for the year ending the 30 June 2011 which identifies within the Notes for

"Fixed Asset Investments" that BPS' aggregate capital and reserves were in deficit of £305,825 with a loss for the year of £190,580.

20.
Mr Berry's and Mr Death's solicitors complained in correspondence that Mr Dain's first affidavit did not comply with Paragraph 5.2 of Practice Direction 81 in failing to identify the statements said to be false and failing to explain why the relevant statements were false and why their clients knew the statements were false when they made them. To that end, Mr Dain swore his second affidavit which spelt out that the false statements were those set out in Mr Berry's statement (Paragraphs 3 and 7) and in Mr Death's statement (Paragraphs 4, 5 and 8). Addressing the issue as to why the relevant statements were said to be false and why Messrs Berry and Death knew the statements to be false and/or were reckless as to their falsity, he referred to the two reports of Mr Isaacs saying at Paragraph 12:

"It is on the basis of these reports that the Applicant says that the relevant statements made by the Respondents are false and the Respondents knew them to be false and/or were reckless as to their falsity."

He then goes on to refer to many of the paragraphs in Mr Isaacs' first report.

21.
Mr Mathias, Mr Berry's and Mr Death's solicitor submitted an affirmation dated 12 February 2013 which highlights the primary point which is argued on their behalf, namely to the effect that Mr Isaacs does not go nearly far enough, it being insufficient merely that Mr Berry and Mr Death were careless in their particular statements. It has to be shown that they actually knew that what they were saying was false. He says that in any event a committal application would be grossly disproportionate; a forensic accountant would have to be instructed at substantial cost and legal costs would be incurred on both sides which would far exceed the sum in issue in the original proceedings. He complains that CCC has refused to provide the instructions issued to Mr Isaacs.

22.
Messrs Berry and Death issued a security for costs application against Sheer but did not proceed with it.

23.
Skeleton arguments were exchanged. Counsel for Sheer argued that, based on the practice and principles applicable for this type of application, there was sufficient evidence to justify the Court proceeding with contempt proceedings and that in particular Mr Isaacs' report clearly established that there was a strong prima facie case that Messrs Berry and Death knew that BPS was and would be unable to repay the judgment sum given what they must have known about the true financial position of the company. He argued that actual knowledge, although established in his submission, was not necessary; a reckless disregard for the truth was sufficient. Counsel for Messrs Berry and Death argued that actual knowledge is required and that on analysis Mr Isaacs went no further than saying that they ought to have known that BPS was not profitable at the end of June 2011, the end of December 2011 and early February 2012. He argued that the application should be dismissed because the instructions to Mr Isaacs have been withheld and that the first affidavit of Mr Dain was deficient on the basis of non-compliance with the Practice Direction.

The Law

24.
Contempt of court covers many different types of misbehaviour of one sort or another. That with which this court is concerned is that covered in CPR Part 32.14 where a person "makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth". Simply as a matter of wording, this would cover a statement made by a person who knew it to be untrue or who was reckless as to whether the statement was true or not. If a person has no idea one way or the other whether what he or she is saying is true, he or she does not have an honest belief that it is true. However, there is some authority supported in the Divisional Court that the person charged with this type of contempt must be shown to have known that what he was saying was untrue.

25.
In **Malgar Ltd v RE Leach (Engineering) Ltd**(1999) EWHC 843 (Ch), the Vice-Chancellor on an application to bring contempt proceedings in relation to allegedly false statements in witness statements supported by a statement of truth said:

"It is, I think, necessary to make clear that Rules of Court cannot make substantive changes in the law of contempt. There is much case law describing in what circumstances a contempt of court is committed. There are civil contempts and there are criminal contempts and the line between the two is not always easy to draw. But the circumstances which may justify a finding of contempt are established by case law and set out in the text books on the subject. It is not open to Rules of Court to introduce a new category of contempt, and CPR 32.14 does not do that. It provides for the possibility of a person being prosecuted for contempt if he makes or causes to be made a false statement, etc., but it does not predict what the outcome of the prosecution will be. That is a matter which must be left to the general law…

So what is the general law in this particular area? The general law of contempt is that actions done by an individual which interfere with the course of justice or which attempt to interfere with the course of justice are capable of constituting contempt of court. In order for the individual who has done acts which fall into that category to be liable for contempt, an appropriate state of mind of the individual must be shown. As to this the case law is not entirely clear and I am certainly not going to attempt to resolve it on this application. On one view it must be shown that the individual who is being prosecuted for this species of contempt intended to interfere with the course of justice. The other view is that it must be shown that the individual intended to do the acts in question, and that the acts interfere with the course of justice. I only mention that for the purpose of showing that there are difficulties which may arise if an attempt is made to commit for a contempt consisting of interference with the course of justice. The difficulty lies in knowing quite what mental state on the part of the accused has to be shown. But I would think that it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice…

…I agree with [Counsel] about the importance of statements of truth and I certainly agree that it is important that flagrant breaches of the obligation to be responsible and truthful in verifying statements of case and in verifying witness statements should be policed and enforced if necessary by committal proceedings. The problem in the present case, however, relates partly to the nature of the Claimant's case for challenging the veracity of the statements and partly on the stage that the proceedings have reached…" (emphasis added)

26.

In **Edward Nield and another v Loveday**[2011] EWHC 2324 (Admin), the Divisional Court said at Paragraph 9:

"As Sir Richard Scott V-C (as he then was) noted in Malgar Ltd v R.E. Leach (Engineering) Ltd…this did not make any change to the law of contempt, and it was still necessary for it to be shown that in addition to knowing that what you were saying was false, you had to have known that what you were saying was likely to interfere with the course of justice. The standard of proof, of course, in respect of each of the elements of contempt, is proof beyond reasonable doubt, the burden of proof of that being on the party who is bringing the proceedings for contempt."

27.
It does not appear that these courts were actively considering whether a statement made by someone who effectively does not care whether what he or she says is true, that is recklessly, amounts to this type of contempt. Often, the difference between recklessness as to the truth and deliberate and consciously uttered misstatements is almost theoretical and a judge will have little difficulty in establishing actual knowledge. There are in criminal law different crimes which permit recklessness (manslaughter and assault occasioning actual bodily harm) or gross negligence (manslaughter) as sufficient mens rea. It can however be a fine line between mere carelessness or negligence and recklessness in the making of a statement.

28.
On balance, I conclude that it can be contempt of court for a witness to make a statement, supported by a statement of truth recklessly, that is, saying something which it can be proved beyond reasonable doubt that he or she consciously has no idea whether it is right or wrong. This is supported by the wording of CPR Part 32.14 and by the Vice Chancellor in **Malgar** when he said that CPR Part 32.14 did not introduce a new category of contempt; it is not undermined by the **Edward Nield** case which was not concerned with whether a reckless statement could amount to contempt. Recklessness is a concept which judges can address as they do in a criminal context. Logic also suggests that a person who represents as true something which he or she consciously does not know whether it is true or not is consciously misleading the Court and that should be considered as contemptuous.

29.
Kirk v Walton [2008] EWHC 1780 (QB) was a personal injuries case in which there was video evidence which was said to show that statements made by the claimant were untrue. Mrs Justice Cox reviewed various cases, in particular **Malgar** and **Sony Computer Entertainment and Others v Ball**[2004] EWHC 1192 (Ch) and said, authoritatively:

"29. I approach the present case, therefore, on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective."

30.
These five elements (strong prima facie case, not straying into the merits, public interest, proportionality and overriding objective) have been adopted by the editors of the White Book and I accept that this is and should be the right approach. I add these further observations:

(a) It is not enough for there to be merely a prima facie case; it must be a strong case. Without straying into the merits, the judge can, as the Court in **Malgar** and **Kirk** did, review critically the evidence to satisfy himself or herself that there is such a case.

(b) It can be said that the strong prima facie case requirement is a primary one because there is often a public interest in a given case (and as a matter of deterrence) to pursue people who it strongly appears have deliberately misled the Court and where such misleading may well have led to an interference with justice. This requirement may often overlap in fact with one or more of the other requirements.

(c) Optimism or even carelessness in the making of statements particularly in the case of value judgement type statements will not be sufficient to establish that a party deliberately or recklessly made a misstatement.

(d) As to proportionality in the exercise of the Court's discretion, it is not possible to give some blanket definition as to the factors to take into account as circumstances will vary widely. One can however have regard, amongst many other factors, to the strength of the case against the particular respondents, the amounts in money terms which were involved in the proceedings in which the allegedly false statement was made and which were affected by such statement, the likely costs involved or to be involved on both sides in the pursuant contempt proceedings and the court time likely to be involved in the case managing and hearing the matter. In doing this exercise, one must have regard to the overriding objective.

31.
It goes almost without saying after over 15 years of their deployment that statements of truth incorporated in witness statements or in pleadings are and must be regarded as important. People who sign or authorise the signing of such statements of truth must appreciate that there is a real possibility that the Court might act on the basis that they are true and that the opposing party might well have regard to them also. People who signed them knowing that the contents of the attested document are untrue must also appreciate that they may face contempt proceedings and, possibly, independent criminal proceedings. The Technology and Construction Court is not particularly different from other types of court. The reliability of information about the financial solvency or viability of a company or firm deployed to secure a stay of execution in the case of adjudication enforcement is particularly important because, unlike a final judgement which is final and binding (subject to appeal), an enforced adjudication decision is only binding until a final resolution of the underlying dispute in arbitration or litigation as the case may be. Of course, a stay of execution pending an appeal to the Court of Appeal procured on the basis of false information provided to the Court can have similar ramifications and consequences.

32.
Paragraph 5.2 of Practice Direction 81 provides as follows:

"Where the permission of the court is sought under rule 81.18(1)(a) or 81.18(3)(a) so that rule 81.14 is applied by rule 81.18(2) or 81.18(4), the affidavit evidence in support of the application must –

(1) identify the statement said to be false;

(2) explain –

(a) why it is false; and

(b) why the maker knew the statement to be false at the time it was made; and

(3) explain why contempt proceedings would be appropriate in the light of the overriding objective in Part 1."

The compliance with this provision is extremely important because contempt proceedings are in the nature of criminal proceedings and the person against whom committal is sought is entitled to know in effect what the charges are and broadly what the evidential basis is said to be.

Discussion

33.
It is necessary first to consider whether there has been non-compliance with the Practice Direction. I have no doubt that Mr Dain in his first affidavit did not comply with Paragraph 5.2. There is no and certainly no clear statement as to which statements made by Mr Berry and Mr Death were said to be false or why they were false. It is possible to try to infer but inference is not good enough: they must and should have been spelt out. Of course, when he says the statements of truth themselves are false, that is not necessarily wrong but such statements of truth are only false if substantive parts of the underlying statements by these two people are said to be false. If this deficiency had not been put right, I would have dismissed the application as it would not be fair, let alone in accordance with Article 6 of the Human Rights Convention, for an application like this to proceed without a clear spelling out of the complaints against Mr Berry and Mr Death. However, this deficiency was put right in Mr Dain's second affidavit where, in my judgment, he eventually complied with the Practice Direction. He did so at a time which enabled Mr Berry and Mr Death in sufficient time to deploy the evidence and arguments which they wished to deploy to challenge the application. I therefore consider that the application can go ahead to be considered on the merits.

34.
The first step therefore is to consider whether there is a strong prima facie case against either Mr Berry or Mr Death. I attach little weight or importance to what Mr Dain says other than introducing the background history and chronology as well as the evidence of Mr Isaacs. Mr Dain works for CCC who are claims consultants, most of whose employees are building professionals with great experience as to what happens on construction sites. Although he has qualified as a barrister, he is non-practising and does not owe any professional duty to the Court. He clearly misunderstood the Practice Direction. I am also very concerned that he and CCC considered that it was unnecessary to reveal to the Court or to Mr Berry's or Mr Death's solicitors what the instructions to Mr Isaacs were. It is very common practice for experts openly to identify, often in some detail, what their instructions are; it is even more important where in effect Mr Isaacs is being asked to give evidence in one sense for the "prosecution" of a serious charge which might lead to imprisonment or a fine. I do not by this suggest that Mr Isaacs has behaved improperly but, if he was given a very restricted brief and even budget, that might have been a material factor to consider at this stage. Mr Isaacs' reports do not identify what questions or issues he was actually asked to consider; he says only at Paragraph 1.3.1 is that he has "been instructed to provide my opinion as a Chartered Account and Licensed Insolvency Practitioner in relation to the solvency of the Company, in the context of the evidence, based on the available information." He qualifies that by saying that Paragraph 1.3.2 that his conclusions "are reliant upon the completeness and accuracy of the information provided to me". His Appendix 2, which lists documents which he has considered, seems to be extremely limited, comprising even less than the documentation referred to in this judgment. He seems to have carried out no more than a

desk top or paper investigation. He does not reveal whether he wanted to or did carry out any additional forensic investigation.

35.
I have formed the view that, although Mr Isaacs' evidence and the documentation on which he relies arguably just about establishes a prima facie case, it does not establish a strong such case. My reasons are as follows, this being primarily based on a review of the evidence proffered by Sheer on this application:

(a) On analysis, his exercise is predicated upon a limited analysis of 7 debts which he suggests were either so old or were overtaken by events such as administration or liquidation of the relevant debtors that Mr Berry and Mr Death should or must have known that they were worth nothing and would never be recovered so that the figures presented to the court by Mr Berry properly adjusted would have demonstrated deficits at the relevant stages.

(b) Although he concludes that Mr Berry and Mr Death as directors of BPS would have known that debts on the company's books were bad debts and that the company was insolvent at 2 February 2012 and had a "very significant deficiency of assets", his final conclusion in Paragraph 2.28 (vi) demonstrates essentially what his opinion is which is that their "witness evidence was incompatible with what they knew (or should have known) about the finances of the Company". Essentially, what he is saying is that the limited evidence which he has looked at supports either case but he can not honestly say which. If the complaint is only that these directors "should have known", that is at best a complaint of carelessness on their part and that is not enough to found a charge of this type of contempt. If he can not demonstrate sufficient to enable him to conclude that either of the Directors had actual knowledge or had acted recklessly in making the identified statements, the Court should be slow to infer that there is a strong prima facie case to that effect.

(c) The analysis of the seven individual debts does not reveal certainty on the part of Mr Isaacs:

(i) In relation to the Big Basement Company debt, he starts by saying that the Directors "ought to have known" by mid-2011 that its recovery was doubtful. He continues by saying that as at the end of 2011 "there would have been an even more compelling reason for the Directors to have provided against" the debt. Finally as at 2 February 2012 he considers it "almost inconceivable that the Directors would not have known that the debt was doubtful at best and irrecoverable". He has done no research on the Big Basement Company and as to any reported or well-known problems with it prior to February 2012.

(ii) He says very little about the debt owed by Archer Hoblin other than saying that because it had been placed into liquidation (on 19 January 2012) "this debt should have been written off". That is not enough to found a complaint that the Directors must have known that the debt was worthless. Again, no research has been done on this company and as to what sort of liquidation it went into or how publicised the liquidation was.

(iii) As for the unnamed debtor referred to by Mr Isaacs, he says no more than that "arguably" by 31 December 2011 the Directors "ought to have made a provision against" the debt and that by 2 February 2012 "there would have been an even more compelling reason for the Directors to have provided against it"; this more compelling reason is presumably the further 33 days which had elapsed. He does not suggest that the Directors must have known that this unnamed debtor's debt was a bad one. He provides very little information about this.

(iv) The next debt relied upon is £855 which is surely de minimis and demonstrates nothing of relevance as to the Directors' knowledge. On its own it would have no material impact. I am surprised that Mr Isaacs felt it even necessary to refer to such a small debt.

(v) Similar considerations apply about the £1,528 debt from Holloway White Allom. The only difference is that this old well-established company went into administration in early October 2011 and it may well be that the Directors would have known about that. However, without any evidence as to what sort of administration it was and whether there was likely to be a recovery for general creditors, it does not seem fair or obvious that the Directors must have known consequently that what they were saying in their statement was untrue as a result of the administration of that company.

(vi) The debt of £30,000 was from an unnamed debtor and had been invoiced in August 2011, less than six months before the court hearing. I do not see that this can readily give rise to any inference that the directors must have known that this was a bad debt.

(vii) The final debt of £5,000 going back to July 2010 is again a small debt which, even if a bad one, would necessarily have made no material difference to the views expressed by the Directors in their statements.

(d) Based on this very limited information, Mr Isaacs does little more than say that, assuming that they did know that all these debts were bad, they would then have known that their expressions in their statements about ability to repay were, to borrow from how Mr Isaacs puts it at Paragraph 2.22, "recklessly optimistic at best". What is missing in this exercise is evidence, even if it was opinion evidence, that on each of the seven debts the Directors must have known that they were bad debts. Indeed on most of them, he does not conclude that this is the case. But based on that incomplete exercise on each of the seven debts, he then jumps to saying that the Directors "would have known" that BPS was in reality insolvent by 2 February 2012.

(e) It is not as if one can say virtually on a res ipsa loquitur analogous basis or by way of irresistible inference that Mr Berry and Mr Death must have known that their identified statements were wrong. Their business was a continuing one and had had a reasonably substantial turnover. Like other companies in the economic downturn of the last 4-5 years it doubtless suffered as a consequence. The real issue is whether it could repay some £20,000, probably at least some months after the Court gave judgment in February 2012; it was a relatively small sum and, provided that it was able to keep trading, it was not obviously inferable that it would not be able to find such a sum out of receipts. Of course, Mr Berry was talking to potential administrators some 7 to 8 weeks later but the Administrators' report indicates that part of the problem ("another significant factor") was the adjudication and High Court action referred to above together with the impending arbitration which Sheer had started. Put another way, part of the given reasoning which led to the administration of BPS was the defending of the court proceedings and the pursuit of the arbitration by Sheer. There is no evidence that Mr Berry or Mr Death had made any decision by early February 2012 let alone actively thought about putting BPS into administration.

(f) There was a series of accounting arguments deployed by Counsel for Sheer which were not deployed by Mr Isaacs such as a comparison between the nominal value of BPS' book debts, contracts and work in progress, retentions and the like represented by the price paid by Mr Berry and the debts due to BPS identified in the management accounts exhibited by Mr Berry. If Mr Isaacs did not deploy them, I do not consider that it is appropriate for the Court at this stage to give them any weight. There is at least one obvious explanation which is that at a "fire sale" stage it is often the case that book debts are very substantially written down because the assignee takes a very real risk that they

are not worth trying to enforce. There was an attempt to compare the total debt in the 2009/2010 accounts (£687,104) with figures culled from the exhibited accounts and the book debts in May 2012 identified by the administrators as being in the debtor ledger (£319,488). Again, there is at least one explanation which is that the position is likely to change substantially in two years.

(g) If one was just doing a paper exercise, one might be able to draw a conclusion that on a balance of probabilities, based only on the evidence submitted by Sheer, Mr Berry and Mr Death knew that their views about their company were optimistic. However, a balance of probabilities is not enough in a case which has to be proved beyond reasonable doubt. It is not unlike identification evidence in which the victim can only say that it was probably the accused. That case would be dismissed, if it ever got to a trial, at the conclusion of the Crown case.

36.
I can not at this stage draw any inference (and indeed, although mentioned in his skeleton, Sheer's Counsel does not ask me to) from the fact that neither Mr Berry nor Mr Death had yet put in a statement to deal with these allegations. These are in the nature of criminal allegations and it is and must be legitimate for people being accused of deliberately or recklessly misleadingly the Court to know what case is being made against them before committing themselves in writing.

37.
It would be wholly disproportionate for this matter to proceed to a committal hearing. The original case only involved some £24,000. The parties have between them, even this far, spent between £50,000 and £60,000 in total in costs. Mr Berry and Mr Death would, unless they admit the contempt (which seems extremely unlikely), assuming that they could be jointly represented (and that is not a certain assumption), be entitled to deploy their own expert evidence. It is likely that a substantial amount of documentation would be deployed and generated; for instance, I assume that the Administrator retains substantial quantities of BPS' papers and files which would help identify whether and to what extent the debts were bad or obviously so. I can see that the proceedings could take the best part of a year to come to a substantive hearing and once in court it is unlikely that any trial would take less than four or five days and it could run to twice that. It is at least foreseeable that Mr Berry and Mr Death would want to deploy evidence that they had reason to believe that the allegedly "bad debts" were not bad and that would involve considering possibly many individual contracts and their history as well as the process of accounting on each individual case. Therefore not only will substantial court time have to be found but also the parties will incur very substantial costs. Although no estimates were put before the court, I can take judicial notice of the fact that very few 4-5 day cases, with contested factual and expert evidence, will cost less than £150,000 per party and sometimes, particularly with accounting experts, often costs substantially more. Whilst of course there is a public interest in pursuing people who have deliberately or even recklessly misled the court, that must be weighed in what is at best a marginal case by the proportionality of the exercise; proportionality is measured in a case like this largely by reference to the cost and time likely to be involved. On a pure proportionality basis, it does not make obvious sense for expenditure of probably well over £300,000 in relation to an alleged misleading of the court as to about £24,000, particularly when a substantial amount of court time will be required in a busy court diary.

38.
I also have to say that I have doubts as to whether the prosecution of this case has been best served by the deployment of CCC in the area of quasi-criminal proceedings. I have no criticism at all of CCC in its given area of expertise and experience which is advising and assisting parties to construction contracts in pursuing claims but contempt is a very different area of the law. There were initial non-

compliances with the rules by CCC and its lack of understanding about the disclosure of expert's instructions (as set out above) which undermine any confidence which I might have in its experience in dealing with contempt proceedings.

Decision

39.
It follows from the above that the application is dismissed. A strong prima facie case has not been established, it would be wholly disproportionate to pursue contempt proceedings and therefore it would not be in the public interest to allow the application.