Neutral Citation Number: [2019] EWCA Civ 1

Case No: B2/2018/1187, 1186 and 2581

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT OXFORD
HH Judge Melissa Clarke
C02UB930

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 January 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEGGATT
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

HUGHES JARVIS LIMITED	**First Appellant/ Claimant**
- and -	
DAVID SEARLE	**Respondent/ Defendant**
- and -	
NEIL DAVID MARTIN JARVIS	**Second Appellant/ Third Party**

- -
- -

Mr Jarvis appeared in person
Mr Oliver Hyams (instructed by **Duncan Lewis**) for the **Respondent**

Hearing date : 12 December 2018

- -

Approved Judgment

Lord Justice Patten :

1. These appeals are from various orders made by HH Judge Melissa Clarke in the Oxford County Court during the trial of an action for possession of a first floor flat at 42A Oak End Way, Gerrards Cross ("the Flat"). The two appellants are the claimant, Hughes Jarvis Limited ("HJL") and the third party, Mr Neil Jarvis ("Mr Jarvis"), who is the sole director and shareholder of HJL. The defendant and respondent to these appeals, Mr David Searle ("Mr Searle"), has been the tenant of the Flat since about 1989 under an assured or statutory tenancy governed by the Rent Act 1977 ("RA 1977").

2. There is an issue between the parties as to whether the tenancy includes the use of a garden and parking space. Mr Searle also rents some neighbouring garages from a different landlord and claims that he has a right of way to those garages along an access road which is also in the ownership of HJL.

3. The Flat is one of a number of flats above a parade of shops in Oak End Way. HJL acquired most of the parade (together with some adjoining property) in 2014 with a view to the re-development of the site and, as at the date of the trial, it had secured vacant possession of a large part of the site with the exception of the Flat and some other premises in the parade. Planning permission has been obtained for residential development of the site in the form of a number of self-contained apartments and the development project will be financed by loans from a variety of lenders including a facility of £500,000 from Limecourt Finance & Investments Limited ("Limecourt") which, according to Mr Jarvis's evidence, was intended to provide additional working capital to HJL and has been drawn down in full. The loan is secured by a second charge on the development site and by a personal guarantee from Mr Jarvis.

4. Mr Searle has declined to vacate the Flat to allow the development of that part of the site to proceed and on 2 December 2016 HJL commenced proceedings against him for possession of the Flat together with the garden and car parking space I have described. The claim is brought under Ground 9 of Schedule 2 to the Housing Act 1988 ("HA 1988") or alternatively s.98(10)(a) of the RA 1977: namely, that suitable alternative accommodation will be available to Mr Seale and his wife when the possession order takes effect. To succeed HJL must therefore satisfy the Court that the alternative accommodation it relies on is suitable having regard to the conditions set out in Part III of Schedule 2 and also that it is reasonable to make the order: see HA 1988 s.7(4).

5. HJL has made various offers to Mr Searle of what it contends would be suitable alternative accommodation but as at the trial its pleaded case relied on the provision of a two-bedroomed flat in Block B of the new development together with a parking space (which was complete and ready for immediate occupation) with the option of a one-bedroomed flat and parking space in Block E as and when it is completed. Mr Searle denies that a new flat on the site would be suitable alternative accommodation because, *inter alia*, it would lack a garden which he needs for his dog and because it will be too small. But he has also pleaded that the proposed new flat in Block E may not be available because there is a substantial risk that the development may not be completed. It was therefore necessary to examine at trial what was the state of the development and the impact which, for example, a failure by HJL to

obtain an order for possession of the Flat would have on the offer of suitable alternative accommodation.

6. In addition to resisting the claim for possession, Mr Searle has also counterclaimed against both HJL and Mr Jarvis. The counterclaim against HJL is for breach of its repairing obligations under the existing tenancy but he also alleges that both HJL and Mr Jarvis have obstructed his right of way along the access road and have trespassed by attempting to enter the garages which he rents from the other landlord.

7. The trial of the action was listed for a three-day hearing beginning on Wednesday 25 April 2018. Mr Jarvis began his evidence that day and was being cross-examined at the time of the short adjournment. Before rising the judge gave Mr Jarvis the customary warning not to discuss his evidence with anybody. She said:

> "I have to give you the same warning that I give every witness who has a break halfway through their evidence, which is that it is extremely important that you do not speak to anybody about the evidence you have given or the evidence that you are about to give during this short break. That includes your legal advisers, that includes anyone on the phone, that includes your wife if she phones up. Just say: "I can't talk about it". Do not discuss any evidence, all right? Just for this short break."

8. Then later in the afternoon the following exchange occurred:

> "MR JARVIS: May I just ask a question on process? If it gets to 4.30 and we haven't finished, does that prevent me talking to my legal counsel overnight?
>
> JUDGE CLARKE: Yes, it does, I am afraid. That is why it is nice to try and get it sorted. But certainly you cannot have any discussions with your counsel about your evidence. You can about very ordinary matters like what time you are attending in the morning, etc.
>
> MR JARVIS: Would that not disadvantage me?
>
> JUDGE CLARKE: No, not at all. It ensures that the evidence that you give is completely untainted by anything anyone may say to you."

9. By the end of the afternoon Mr Jarvis was still being cross-examined. Before adjourning until the next day, the judge said:

> "I have to give you the same warning that I gave you at lunchtime, but it is an important one, not discuss the evidence you have given or any evidence you may give with anybody."

10. The judge did, however, give Mr Jarvis permission to talk to his solicitors and counsel for the purpose of identifying certain architects' drawings relevant to the development. This occurred during a discussion between the judge and counsel about further evidence:

> "JUDGE CLARKE: [addressing counsel for the claimant]: I do not know whether there is very much that you do need to discuss today. What did we say that you would need to sort out overnight? Between the two of you, you were going to think about something overnight. Oh, the pleadings.
>
> MS TOMAN: Your Honour, and there are going to be some architects' drawings, but I think we have got those already. So that is just a matter of producing.
>
> JUDGE CLARKE: The pleadings, I do not think, is a matter you need to really discuss with Mr Jarvis at this stage. That is really something that is going to be addressed in closing. So you will be able to take instructions about that. In terms of identifying architects' drawings then you can discuss that with Mr Jarvis, that does not seem to be an issue.
>
> MR JARVIS: I have some administration issues of things I think they should have provided that I'd like them to provide. Can I talk to them about that?
>
> MR HYAMS: The problem is, your Honour, adducing evidence after someone has been cross-examined is not really how this works.
>
> JUDGE CLARKE: No, I think your opportunity to adduce evidence has passed, really. It is important, as I say, that you do not discuss your evidence with anybody. So if we can limit only conversations with your legal counsel to identification of architects' plans, you will have the opportunity then of course to give further instructions after your evidence has finished tomorrow."

11. Despite the judge's warning, overnight Mr Jarvis sent to his solicitors and to Ms Toman a number of emails. We have not examined the content of the emails because, for reasons I will come to, it is not relevant. The following morning counsel told the judge that Mr Jarvis had sent the emails but that she had not read them and had simply replied to him by email saying that he must not communicate with her whilst under cross-examination. There is a possible issue between Mr Jarvis and his then solicitors as to the circumstances in which he came to send the emails. He says that he sent them after being requested to do so by his solicitors. But we have refused Mr Jarvis permission to adduce further evidence about this because, for reasons which I will explain, it is not necessary for us to take these circumstances into account for the purpose of disposing of these appeals. The new evidence may also prove controversial given that Mr Jarvis is in dispute with his solicitors about their fees and they have now ceased to act for him.

12. After Ms Toman had disclosed to the judge the existence of the emails, Mr Jarvis continued to be cross-examined. In his evidence-in-chief he had indicated that if HJL failed to obtain vacant possession of the Flat it was likely that the company's lenders would step in to demand repayment of their loans, would re-possess the site and

probably sell it in its existing state in order to recoup the loans. This would also apply to charges over his house given to secure some of HJL's borrowings and might even lead to his bankruptcy. But when asked by Mr Hyams to clarify the position Mr Jarvis said that the lenders including Limecourt would probably step in to complete the development at their own expense and would then sell it in order to recoup their loans. This would leave HJL with no profit from the development and would probably cause him to have to sell his home in order to repay the loans secured on it. But he said that it would not necessarily lead to his bankruptcy.

13. Towards the end of the morning Mr Jarvis was re-examined about this by Ms Toman and asked why his evidence had changed. He volunteered that overnight he had spoken to a Mr Shaun O'Neill who worked as an adviser to Limecourt. He had asked him, as he put it, what would be his options in the event that the claim for possession failed. The judge reminded Mr Jarvis that she had told him not to discuss his evidence with anybody during the adjournment. The thrust of Mr Jarvis's replies was that he was only seeking clarification of what the position of Limecourt would be if vacant possession could not be obtained. The judge asked Ms Toman what she should do and counsel said that the judge should finish hearing Mr Jarvis's evidence and then consider over the short adjournment how to deal with the fact that he had spoken to Mr O'Neill, not least because she (Ms Toman) would not be able to discuss the matter with her client until his evidence had been completed. Mr Hyams said that Mr Jarvis had committed what he described as a very serious contempt in an attempt to perfect his evidence. The judge then adjourned the hearing until 2.00 pm but indicated to Ms Toman that as Mr Jarvis was still giving evidence he could not discuss the matter with either her or his solicitors. He was also required to hand over his mobile phone to the court clerk.

14. When the hearing resumed the judge did not continue to hear Mr Jarvis's evidence but instead invited both counsel to address her as to how she should deal with Mr Jarvis. Ms Toman said that she had not had the opportunity to take instructions from Mr Jarvis but the judge said that she wanted to hear submissions as to whether the emails and Mr Jarvis's communications with Mr O'Neill amounted to a contempt of court.

15. Ms Toman submitted to the judge that she should not proceed to determine whether Mr Jarvis was in contempt without first giving him the opportunity to put in evidence. But the judge said that she was satisfied that the sending of the emails and the conversation with Mr O'Neill did amount to contempt:

> "because they breached the explicit order that I made and I find them to be wilful disobedience of the court order. Mr Jarvis said, 'Oh well, you know, I didn't really know, I was just clarifying'. He is an intelligent man, he is a successful property dealer, I am satisfied that those are contempt."

16. That of course left the judge with having to decide what order to make. She said to Mr Jarvis that he was eligible for legal aid but that there would be no conflict involved if his counsel and solicitors continued to act for him in relation to his possible committal. She directed that a hearing to determine sentence should take place the following morning which would have been the third day of the trial and that it would not be necessary for the matter to be heard by a different judge:

> "It is not the type of contempt of court where Mr Jarvis has shouted abuse at the judge, unfortunately that happens from time to time. I have no personal involvement or interest in it".

17. But despite that indication, the judge proceeded to remand Mr Jarvis in custody until the hearing the following morning. The reasons (still less the justification) for this are far from obvious. It was not suggested by Mr Hyams (or by the judge herself) that Mr Jarvis was unlikely to attend court for the sentence hearing not least because Mr Hyams had indicated by then that the adjourned committal hearing would be followed by an application to strike out the claim on which both Mr Jarvis and HJL would clearly wish to be heard. When Ms Toman said to the judge that to remand Mr Jarvis in custody was not something which she should do lightly and that it would deprive him of any proper opportunity to give instructions, the judge replied as follows:

> "I have not done it lightly, I have done it with some consideration, but this has happened in my courtroom today, I cannot ignore it and it demands an immediate response. My immediate response is to remand him in custody, as in fact I wanted before lunch, I was considering doing over the lunch period, I have made the findings of contempt that I have made. Of course he will have the opportunity before the bus leaves at 4 o'clock, for whichever prison he is going to tonight, to take legal advice from you and from the solicitors and of course tomorrow morning as well."

18. Ms Toman rightly persisted saying to the judge that it would not be possible for Mr Jarvis to obtain criminal legal assistance by the following morning and that his imprisonment was not necessary. The judge responded:

> "This is not about preventing further harm, this is about marking the seriousness of what has happened. I have made my decision about remanding him in custody and I do so because I do not yet know what is happening with this claim. I cannot trust Mr Jarvis not to effectively interfere with his own evidence by speaking to other people and that is the reason why I am doing that. So, if he wants more time before sentencing, that is fine, he will be remanded in custody while that happens. I am very happy after I hear the application to dismiss the claim tomorrow, to have a further discussion about whether it is appropriate to sentence him then and there or whether that should be adjourned until 2 o'clock or to another day and for an application for bail to be made or for release from remand in custody can be made at that point. This is the proposal that I am going to do for today and for tomorrow morning."

19. Mr Jarvis was therefore remanded in custody in prison until the following morning even though the judge had yet to hear any submissions about the appropriate sentence or any explanation or analysis of what had occurred. By then criminal counsel (Mr Granger) had been instructed to represent Mr Jarvis on the committal but Ms Toman continued to act for Mr Jarvis and HJL in relation to the defendant's strike out

application which had been issued that morning. The application sought an order either under CPR 3.4(2) or under the inherent jurisdiction "by reason of the Third Party's contempt of court". Ms Toman asked the judge to adjourn the hearing of the strike out application and to give directions for the filing of evidence and skeleton arguments. As part of the strike out application it would be necessary, she said, for the court to consider whether there could be a fair trial of the action and counterclaim and Mr Jarvis should be given the opportunity of explaining what he did and what he had understood the judge's warning to mean. The judge's response to this submission was as follows:

> "It doesn't matter for the purposes of my consideration of whether this trial can now be heard fairly what Mr Jarvis thought I meant at the time, it makes no difference to how I assess his credibility or his reliability or make a decision about whether a fair trial can continue."

20. Despite further submissions from Ms Toman that she would be unable properly to prepare in time for an effective hearing of the strike out application that afternoon, the judge refused an adjournment and proceeded to hear both that and the adjourned committal. Having heard the parties' submissions, she made an order striking out the claim and the defence to counterclaim and entered judgment for the defendant on his counterclaim. Mr Jarvis and HJL were ordered to pay the costs of the claim and counterclaim on an indemnity basis. The judge said that she accepted that the sending of the emails had not affected the trial but that the contact between Mr Jarvis and Mr O'Neill was different. It was not possible, she said, to separate the infected evidence from the other evidence of Mr Jarvis in a way which would enable a fair trial.

21. The judge then proceeded to hear submissions about the order she should make on the committal application. Having heard the effect which being remanded in custody had on Mr Jarvis and after taking into account his previous good character, the judge sentenced him to 14 days' imprisonment suspended for 3 months.

22. Mr Jarvis appeals as of right against the orders made by the judge for his committal and he and HJL appeal with the leave of Arnold J against the judge's orders made on the strike out application. Although the latter appeal lies to the High Court, it has been transferred to the Court of Appeal to be heard with Mr Jarvis's appeal against the committal orders.

Committal

23. Witnesses are commonly given warnings by the trial judge not to discuss their evidence until after it has been completed. The purpose of the warning is to protect the witness from any attempt by a third party to influence their evidence and also to ensure that, so far as possible, the evidence which the witness gives is his or her own best recollection unassisted by any other person. Compliance with the warning both protects the witness and the effectiveness of the trial process.

24. If however a witness, as in this case, fails to comply with the judge's warning, it is necessary for the judge to make an assessment of the damage which that has caused. If the witness has attempted, for example, to obtain information about something by

email but the email was not responded to then, whatever else may be the position, no damage has in fact been caused to the integrity of the trial process. The judge recognised that this was so in the present case in relation to the emails which Mr Jarvis sent so that the only issue for her in relation to them was whether they amounted to a contempt. As regards the conversation or conversations with Mr O'Neill, the judge took the view that this was a deliberate attempt by Mr Jarvis to improve his evidence and that it meant that she could not treat any of his evidence as either credible or reliable. But, for reasons which I will expand on when I come to consider the orders made on the strike out application, the judge's conclusion is a non-sequitur. By the end of the first day of the trial and before he had spoken to Mr O'Neill, Mr Jarvis had already given his evidence-in-chief and had been cross-examined on a considerable part of it. This included evidence relevant to the counterclaim. Although Mr Jarvis should not have spoken to Mr O'Neill when he did, the only purpose of the conversation was to ascertain Mr O'Neill's opinion about whether the lenders would step in and complete the development before selling it, in the event that HJL failed to obtain a possession order against Mr Searle. This was opinion evidence from a third party on an issue on which Mr Jarvis had previously been asked a hypothetical question and had expressed his own view. Mr Jarvis attributed his own change of opinion to what Mr O'Neill had told him; in other words he identified the source of his new evidence; and the judge was free to attach either some or no weight to that evidence given that Mr O'Neill was not going to be called as a witness. But that did not mean that the evidence was untrue, still less that all the other evidence which Mr Jarvis had given could not be believed or relied on. Mr Hyams criticised Mr Jarvis for attempting to improve his evidence which is perhaps more accurate. But it is relevant to observe that the change in his evidence was in fact favourable to Mr Searle because it acknowledged that, whilst the failure of the possession claim might make the development unprofitable for HJL, it would not lead to the bankruptcy of Mr Jarvis. It was for this reason that Ms Toman chose to re-examine her client on the point leading to the disclosure of his conversation with Mr O'Neill.

25. The other point to make at this stage is that none of what Mr O'Neill had said touched on any of the issues on the counterclaim so that the only basis on which the judge could treat Mr Jarvis's evidence on those issues as unreliable was to infer that because Mr Jarvis had sought clarification of the position about the lenders stepping in to complete the development he was somehow to be treated as having given false evidence on every other issue. One has only to state the issue in those terms to see that the judge's conclusion was both unjustified and wrong. It seems to me that there was no proper basis for the judge to draw any such inference, particularly in the light of the fact that Mr Jarvis had been quite open about how he obtained the new information and where it came from. He was doing no more than relaying to the court in terms what Mr O'Neill had told him.

26. I have spent a little time in summarising what needed to be analysed in relation to the effect of the conversations with Mr O'Neill because this was also highly relevant to the argument that those contacts amounted to a contempt. One would have thought that the judge might have wanted to know precisely what were the limits and purpose of the conversations which took place and to have given Mr Jarvis the opportunity, if he wished to take it, of putting in some evidence about what occurred. Instead, the judge took the course of dealing with the alleged contempts herself and adopted a

summary procedure which deprived Mr Jarvis of the opportunity to obtain any considered legal advice on his position or of further explaining himself in evidence.

27. Mr Jarvis appeals against the committal order both on jurisdictional and on procedural grounds. The order under appeal recites that the judge had made an order on 25 April that Mr Jarvis should not "communicate with his legal representatives or speak to anybody about his evidence in these proceedings while he remained under oath" and that the order was breached by the sending of the emails and the telephone conversations with Mr O'Neill on the morning of 26 April.

28. Although, as I have said, trial judges frequently warn witnesses not to discuss their evidence whilst still under oath, I have never regarded that as amounting to an order as such nor, in my view, can it be treated as one in this case. The judge (in the passages I have quoted) explained to Mr Jarvis why it was important that he did not discuss his evidence but she did not warn him that if he did discuss his evidence he would be in breach of an order and in contempt of court. An order was never drawn up in the terms of the recital and the language of the alleged order quoted in the recital was not in fact the language used by the judge when she warned Mr Jarvis not to discuss his evidence with anyone. The obvious sanction open to a judge who discovers that a witness has communicated with some third party about his evidence during the course of the trial is to ascertain what was discussed and, if appropriate, to discount or give no weight to the evidence. It is difficult to envisage why it would ever be necessary or appropriate for the judge to make an order in such terms. But if the judge here had wanted to make her warning to the witness an order of the court which if breached could lead to the witness's committal for breach of the order, it was incumbent on the judge to spell out to the witness not only the precise terms of the order which was being made but also the consequences (in terms of committal) which could follow from a breach. None of this was done in the present case.

29. The second point to make is that even if what the judge said to Mr Jarvis is to be construed as an order then it was limited to an embargo on his speaking about or discussing his evidence during the adjournments. I have set out the terms of the judge's warning in the passages quoted earlier and nowhere does the judge say that Mr Jarvis is prohibited from sending emails and documents to his legal representatives. I do not regard the sending of such emails as amounting to a discussion of his evidence given that they were not responded to. On this basis alone there was no contempt involved in the sending of the emails.

30. Mr Hyams, who told us that he was neutral in relation to the appeal against the committal order (but was not in fact neutral when asked by the judge about this at the trial), submitted to the judge that the emails and the telephone conversation amounted to a serious contempt. But he does not seek to support the judge's order for committal on the basis that Mr Jarvis was in breach of any order. He submitted, as is apparent from some of the judge's exchanges with counsel, that she really regarded Mr Jarvis's breach of the warning as amounting to a contempt in the face of the court which the County Court has jurisdiction to deal with under s.118 of the County Courts Act 1984 ("CCA"). It is therefore useful to summarise at this stage what powers the County Court has to punish various types of contempt which occur in the course of its proceedings. At this point I am confining myself simply to the issue of jurisdiction.

31. The County Court has jurisdiction to commit for a breach of its own orders. Section 38 CCA confers power on the court to "make any order which could be made if the proceedings were in the High Court". So it may therefore deal with civil contempts involving a breach of one of its orders subject to observing the procedural requirements set out in CPR 81 which I will come to later.

32. In relation to criminal contempts, its jurisdiction is much more limited. Superior courts have an inherent jurisdiction to impose penalties for contempts "in the face of the court" but the jurisdiction of the County Court (as an inferior court of record) has been clarified by s.118 CCA which now provides an exhaustive statement of the powers of the County Court to deal with this species of criminal contempt: see *Manchester County Council v McCann* [1999] QB 1214 at 1218 E-F. So far as relevant, s.118 provides.

> "(1) If any person—
>
> (a) wilfully insults a judge of the county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or
>
> (b) wilfully interupts the proceedings of the county court or otherwise misbehaves in court;
>
> any officer of the court, with or without the assistance of any other person, may, by order of the judge, take the offender into custody and detain him until the rising of the court, and the judge may, if he thinks fit,—
>
> (i) make an order committing the offender for a specified period not exceeding one month to prison, or
>
> (ii) impose upon the offender, for every offence, a fine of an amount not exceeding £2,500 or may both make such an order and impose such a fine.
>
> (2) A judge of the county court may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge."

33. The judge did not consider these provisions because she treated Mr Jarvis's conduct as a breach of an order. But it is clear that she had no jurisdiction to deal with the alleged contempt as one committed in the face of the court unless it could be said that it amounted to Mr Jarvis interrupting the proceedings of the court within the meaning of s.118(1)(b). Mr Hyams submitted that one should give the statutory provisions a purposive construction that was broad enough to encompass any conduct which might interfere with the trial process. I reject that submission for two reasons. The first is that even a generous, purposive construction is not capable as a matter of language of turning a failure by a witness to heed a judge's warning not to discuss his evidence into what can fairly be described as the witness interrupting the proceedings. Read in context, s.118(1)(b) is directed to conduct which actually disrupts the proceedings and

which is therefore a contempt committed in the face of the court. Nothing which Mr Jarvis did by speaking to Mr O'Neill during the adjournment interrupted the proceedings, although the aftermath did undoubtedly result in the wasting of a considerable amount of court time.

34. The second reason is that it is not necessary to stretch the meaning of s.118 in this way in order to protect the proceedings of the court. The law recognises a wider species of criminal contempt involving an interference with the due administration of justice. This may take many forms and can include conduct both before and after the trial as well as during it. Reported instances include a solicitor advising his client to give false evidence and the unauthorised publication of information relating to proceedings which take place in private. A witness who knowingly lies during his evidence may commit a contempt of court as well as an offence under the Perjury Act 1911. It is also a contempt to make a false statement in a document such as a claim form verified by a statement of truth without an honest belief in its truth: see *Malgar Ltd v R E Leach Engineering Ltd* [2000] FSR 393; and CPR 32.14(1). Likewise it would be a contempt for someone to threaten or interfere with a witness in order to deter them from giving evidence or in order to persuade them to change their evidence: see *A-G v Butterworth* [1963] 1 QB 696.

35. There is no reported case in which a witness has been held to commit a contempt of this kind by discussing his evidence with a third party during an adjournment but the concept of interference with the administration of justice is a wide one and I would not exclude the possibility of a witness being held to be in contempt for discussing his evidence particularly if he or she did so with a view to providing the court with a recollection of events which the witness did not have or to providing false evidence. Whether what occurred amounted to a direct interference with the administration of justice would obviously depend on what was discussed, the reasons for it and the effect which it had on the trial process. In this case I am not persuaded that on the facts known to the judge there had been a criminal contempt of this kind.

36. But in any event, the judge had no jurisdiction to deal with that species of contempt. Committal applications relating to an interference with the due administration of justice in connection with proceedings are governed by Part III of CPR 81 and in the case of proceedings in an inferior court like the County Court require the prior permission of a High Court judge: see CPR 81.12(1); 81.13(1)(d).

37. The judge therefore had no jurisdiction to deal with the alleged contempt except as a breach of an order of the County Court and, for the reasons which I have given, there was no order which Mr Jarvis breached. But the way in which the judge dealt with the alleged contempts was also, in my view, wrong procedurally.

38. Where committal is sought for breach of an order of the court the procedure is governed by CPR 81: see 81.1(3). In the case of orders directed to one or other party in the proceedings, restrictions are imposed by CPR 81 on the circumstances in which a breach of such an order may result in committal proceedings. CPR 81.4–10 therefore contains detailed provisions for the service of the relevant order and any order fixing the time for compliance; for the affixing on the order of a penal notice; and for the making and service of a committal application.

39. A County Court judge does have jurisdiction to commit a person for breach of a court order of the Court's own motion (*ex mero motu*): see *A (A Minor) (Contempt of Court: Committal of Court's own Motion)* [1999] Fam. 263 at [16]. But the power to do so should not be exercised unless no other course is open to the judge in order to protect the process of the court and the proper administration of justice. One reason for this was given by Lord Denning MR in *Balogh v Crown Court at St Albans* [1975] QB 73 which concerned an attempt by college students to disrupt a criminal trial. He said:

> "a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in R.S.C., Ord 52. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well."

40. The other reason is that the adoption of a summary procedure removes from the would-be contemnor many of the protections granted to him by the CPR 81 procedure. It will also deprive the judge of the opportunity for reflection on whether the conduct of the contemnor does amount to a contempt and, if so, how it should best be dealt with. The need for caution on the part of the judge in relation to a jurisdiction which may deprive an individual of his liberty informs both the rules and the Practice Direction under CPR 81. Even when the conduct amounts to a contempt in the face of the court and therefore the type of case most likely to call for swift action by the judge, the guidance is not to act precipitously. 81PD 5 states:

> "4.1 Where the committal proceedings relate to a contempt in the face of the court the matters referred to in paragraph 4.3 should be given particular attention. Normally, it will be appropriate to defer consideration of the respondent's actions and behaviour to allow the respondent time to reflect on what has occurred. The time needed for the following procedures should allow such a period of reflection.
>
> 4.2 A Part 8 claim form and an application notice are not required for contempt falling under Section 5 of Part 81, but other provisions of this Practice Direction should be applied, as necessary, or adapted to the circumstances.
>
> 4.3 The judge should—
>
> (1) tell the respondent of the possible penalty that the respondent faces;
>
> (2) inform the respondent in detail, and preferably in writing, of the actions and behaviour of the respondent which have given rise to the committal application;
>
> (3) if the judge considers that an apology would remove the need for the committal application, tell the respondent;

(4) have regard to the need for the respondent to be—

(a) allowed a reasonable time for responding to the committal application, including, if necessary, preparing a defence;

(b) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;

(c) given the opportunity, if unrepresented, to obtain legal advice;

(d) if unable to understand English, allowed to make arrangements, seeking the court's assistance if necessary, for an interpreter to attend the hearing; and

(e) brought back before the court for the committal application to be heard within a reasonable time;

(5) allow the respondent an opportunity to—

(a) apologise to the court;

(b) explain the respondent's actions and behaviour; and

(c) if the contempt is proved, to address the court on the penalty to be imposed on the respondent; and

(6) where appropriate, nominate a suitable person to give the respondent the information. (It is likely to be appropriate to nominate a person where the effective communication of information by the judge to the respondent was not possible when the incident occurred.)

4.4 If there is a risk of the appearance of bias, the judge should ask another judge to hear the committal application.

4.5 Where the committal application is to be heard by another judge, a written statement by the judge before whom the actions and behaviour of the respondent which have given rise to the committal application took place may be admitted as evidence of those actions and behaviour."

41. In *DPP v Channel Four Television Co Ltd* [1993] 2 AER 517 at 521, Woolf LJ said:

"a judge should only act of his own motion in a matter of contempt if (a) the contempt is clear, (b) the contempt affects a trial in progress or about to start, (c) it is urgent and imperative to act immediately in order to prevent justice being obstructed and undermined and to preserve the integrity of the trial and (d) no other procedure will do if the ends of justice are to be met."

42. It seems to me that the judge completely lost sight of these principles in deciding to proceed as she did. Although she was told by Mr Jarvis about the extent of his contact with Mr O'Neill and also that the emails had not been read, she decided to bring the proceedings to a halt and to deal with the committal almost immediately without giving Mr Jarvis or his legal representatives any time properly to prepare for a committal hearing or to take instructions. Mr Jarvis was not given any opportunity to apologise or to explain why he acted as he did. Instead, the judge seems to have regarded the fact that Mr Jarvis acted in breach of her instruction not to discuss his evidence as conclusive of all issues relating to his committal. His committal to prison overnight was in my view particularly unfortunate and was a completely disproportionate reaction by the judge to the situation with which she was faced. If, as the judge apparently thought, the seriousness of the contempt justified bringing the trial to an end then there was in those circumstances no reason for her not to follow the usual CPR 81 procedure and to adjourn any committal proceedings to a further hearing with appropriate directions for evidence. Her failure to observe and apply these safeguards led to a hearing which was neither fair nor impartial and I would for those reasons alone set the committal orders aside.

Strike out

43. The Court has jurisdiction to strike out a statement of case or a defence to a claim where the pleading amounts to an abuse of process or is otherwise likely to obstruct the just disposal of the proceedings: see CPR 3.4(2)(b). This was the jurisdiction which the judge purported to exercise in the present case. The judge was referred to the decision of the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] UKSC 26 which concerned an application to strike out a claim for damages for personal injury at the conclusion of the trial on the ground that the claimant had given false and exaggerated evidence about the scale of his injuries. The Supreme Court held that the power contained in CPR 3.4(2) should be exercised at the end of a trial only in very exceptional circumstances having regard to the need for the court to act proportionately and that it would normally be appropriate to dismiss such a claim by a judgment on the merits. In his judgment Lord Clarke approved a passage from the judgment of Colman J in *National Westminster Bank plc v Rabobank Nederland* [2007] 1 All ER (Comm) 975 at [27]-[28] where the judge said:

> "27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR rr 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.
>
> "28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR rr 3.4 or 24.2 and determined well in advance of the trial."

44. Two examples of where the court was asked to strike out a claim during the trial rather than proceeding to a determination of the merits can be found in the decisions of this Court in *Masood v Zahoor (Practice Note)* [2010] 1 WLR 746 ("*Masood*") and

the earlier case of *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 ("*Arrow Nominees*"). Both concerned cases where the claimant had engaged in fraud and forgery to an extent which was said to make a fair trial impossible. In *Masood* the claimant had forged documents and given false evidence to support his claim. The judge said that it had made his task unmanageable. In *Arrow Nominees* the petitioner had as part of discovery produced forged documents and then lied about the circumstances so that there remained a serious risk that other documents had also been forged.

45. In *Arrow Nominees* the respondents appealed against the refusal of the trial judge to strike out the petition at the start of the trial. The Court of Appeal allowed the appeal and struck out the petition. In his judgment (at [54]-[56]) Chadwick LJ said:

> "54. It would be open to this Court to allow the appeal against the judge's refusal to strike out the petition on that ground alone. But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited (The Times, 5 March 1988)* that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes

> subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.
>
> 56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents - and in the interests of the administration of justice generally - to allow the trial to continue. If he had considered that question, then - as it seems to me - he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

46. In *Masood* the application to strike out was made near the end of the trial and was refused by the judge. The Court of Appeal upheld his order. Mummery LJ (at [71-[73]) referred to the decision in *Arrow Nominees* and said:

> "71. In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In the *Arrow Nominees case [2000] 2 BCLC 167* , the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which

> (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. There is a valuable discussion of the principles by Professor Adrian Zuckerman in his Editor's Note entitled "Access to Justice for Litigants who Advance their case by Forgery and Perjury" in (2008) 27 CJQ 419 .
>
> 72. We accept that, in theory, it would have been open to the judge, even at the conclusion of the hearing, to find that Mr Masood had forged documents and given fraudulent evidence, to hold that he had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them. We say "in theory" because it must be a very rare case where, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.
>
> 73. One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and determining the issues in the usual way. If he finds that the claim is based on forgeries and fraudulent evidence, he will presumably dismiss the claim and make appropriate orders for costs. In a bad case, he can refer the papers to the relevant authorities for them to consider whether to prosecute for a criminal offence: we understand that this was done in the present case."

47. Although as these judgments make clear, the exercise of the strike out power contained in CPR 3.4(2) does involve as a relevant consideration wider questions such as the use of court time, the proper exercise of the jurisdiction will usually depend upon conduct by the claimant or other party which makes the conduct of a fair trial and therefore a judgment on the merits practically impossible. In *Arrow Nominees* where the petition was struck out the forgery of the disclosed documents coupled with the petitioner's own false evidence made it impossible for the trial judge to distinguish between forged and authentic evidence and created a real risk of substantial injustice.

48. The judge considered these authorities but rejected Ms Toman's submission that a fair trial was still possible. She said:

> "17. Secondly, Ms Toman submits that a fair trial is also still possible, despite the finding of contempt relating to Mr. Jarvis speaking to Sean O'Neill of Lime Court Finance, as the court may simply disregard the relevant parts of Mr. Jarvis's evidence which have been tainted by that conversation. I do not consider that I can. First of all, I accept Mr. Hyams submission that the

> court cannot be entirely satisfied that it knows the full extent of the conversations with Mr. O'Neill, what was said, how many conversations there were and who instigated them and therefore how it can properly identify the evidence which has been tainted and which has not. He makes the fair point that if the mere fact of Mr. Jarvis speaking to Mr. O'Neill about the proceedings in order to, as Mr Jarvis put it, 'clarify the evidence' he gave the day before adversely affects my view of him as a credible and honest witness, which it does, and if my view of his reliability is also affected because by speaking to Mr. O'Neill he sought to change the evidence he had given the day before, then how can I accept his evidence about the extent and the content of that conversation?"

49. This, I think, ignores the fact that any difficulties created by not knowing enough about the scope of the conversations with Mr O'Neill were largely of the judge's own making. Mr Jarvis had given an explanation about what had been discussed. He was not cross-examined about it nor was he invited or given any further opportunity by the judge to put in more detailed evidence about it. It is also clear, as explained earlier, that Mr O'Neill was only able to provide his own opinion about what the lenders would do in the event that the possession action failed. He had no other involvement with the development still less with the issues relating to the scope of Mr Searle's tenancy and the counterclaim. He could not have given Mr Jarvis any obvious assistance on those points even if (hypothetically) he had been asked about them. The judge's view that she could not regard Mr Jarvis as a credible and reliable witness because of his contacts with Mr O'Neill was therefore unjustified.

50. Ms Toman specifically addressed the judge on the issue of the counterclaim but the judge rejected her submissions. She said:

> "20. Fourthly, Miss Toman submits that Mr. Jarvis's evidence is, in fact, of very little relevance to the counterclaim and so I can disregard it entirely and still determine the counterclaim. In relation to the claim, to the extent that I am not satisfied that I can ring fence any tainted evidence, she submits that I can draw adverse inferences against Mr Jarvis's credibility and reliability and be cautious of accepting any of his evidence except where it is supported by contemporaneous documentation. She submits that since his evidence is of limited relevance on the counterclaim, I should allow the trial to continue and permit her to cross-examine Mr. Searle and test his evidence.
>
> 21. Mr. Hyams describes Ms Toman's submission that Mr Jarvis's evidence was of very little relevance to the counterclaim, as 'unusual'. He reminds me that the counterclaim is supported to a significant extent by the single joint expert, and that the claimant and Mr Jarvis simply put Mr. Searle to proof of it, so it is difficult to understand how Mr Jarvis's evidence is not important now. I accept that submission. Mr Jarvis's evidence would be important and is relevant, but as the tribunal in *Chidzoy* found, I cannot trust it given Mr Jarvis's

> flagrant disregard of my repeated orders not to discuss his evidence with anybody else, particularly given his statement that he spoke to Mr Neill in order to clarify the evidence he had given the day before, and did change his evidence in cross-examination as a result of that conversation. For those reasons I am satisfied of the first limb in *Chidzoy* , namely that Mr Jarvis has conducted the proceedings unreasonably."

51. The judge therefore seems to have treated her finding that Mr Jarvis had acted in what she refers to as flagrant disregard of her orders as determinative of the issue of his credibility. But that was also in my view an overreaction by the judge not justified by the circumstances. Mr Jarvis was open about his contacts with Mr O'Neill. He volunteered the information and explained why he had done it. The only change in his evidence was to give a modified answer to a hypothetical question about the possible consequences of the dismissal of the possession claim. None of this was factual evidence. It was, as I have said, the presentation of the view of a third party on a question of opinion. The judge was right to say that the effect of the conversation was to allow Mr Jarvis to improve his evidence about the lenders' position in the sense of providing what may be a more accurate view of what would happen if the claim failed. But this attempt to obtain additional evidence on the point does not provide any support for the suggestion or inference that all of Mr Jarvis's other evidence was falsified or dishonestly given. In fact it suggests the contrary.

52. The judge then turned to consider whether there could be a fair trial. She said:

> "22. Turning to the second limb – is it possible for there to be a fair trial? I have set out the difficulties in trying to excise the infected evidence from other evidence given by Mr Jarvis and I am satisfied I could not do so in a way that would enable a fair trial. What would be the effect if I was to refuse the strike out application and allow the trial to continue, but make the adverse inference that I must inevitably, in the circumstances, make against Mr. Jarvis, namely that I cannot trust his evidence as either credible or reliable? It became clear during his cross-examination that there is no documentary evidence in support of his key evidence about the suitability of the proposed alternative accommodation, in particular details of the room sizes, garden, and parking. In any event, he appeared to resile during the course of yesterday morning from some of that key evidence that he had given the day before. In those circumstances it seems that the claim must inevitably fail. Accordingly the only purpose in refusing the strike out of the claim and the counterclaim, therefore, would be to preserve the right of Mr. Jarvis to have his counsel cross-examine Mr. Searle in order to try and undermine his case on the counterclaim. Is that a fair trial? It is not, in my judgment, it is merely trying to salvage whatever can be salvaged from the damage caused by Mr Jarvis's actions, for the benefit of Mr Jarvis and the claimant. The second issue which is highlighted by *Masood v. Zahoor* is whether, in fact, despite the

> misconduct the court should try and prevent the further waste of precious resources. Because of Mr Jarvis's conduct we have now wasted an entire day of a three day trial and there is no way in the time remaining, which is half a day, that we could get through cross-examination of the defendant and his two witnesses, it is not possible. This would have to come back for at least another day, and possibly a day and a half. In my judgment the fairness of the trial has been materially jeopardised by Mr Jarvis's actions.
>
> 23. I remind myself that strike out is draconian and a last resort. I have considered Miss Toman's submission, found at the end of her skeleton argument, relating to the evidence that Mr. Jarvis has given about the potentially disastrous consequences for the claimant company and for him personally in the event that these proceedings are not successful. She submits that those consequences are such that it would not be just and proportionate to strike out the claim and the defence to counterclaim. My difficulties with this submission are three-fold. First, the evidence I have heard is confused and contradictory and has changed during the course of Mr Jarvis's cross-examination, the start of his re-examination and what he has said afterwards. Second, this evidence is, in my judgment, tainted by his conversation with Mr. O'Neill yesterday. Third, the consequences may well be disastrous for the company and for Mr. Jarvis personally - I cannot know if they are or not - but if they are, they are entirely of Mr. Jarvis's own making.
>
> 24. I remind myself, per *Masood v. Zahoor* , that the fairness of the trial is a central factor but not the only one: where a claimant is guilty of extremely serious misconduct, as I am satisfied Mr Jarvis is in this case, I may strike out the claim and counterclaim if it would be an affront to the court to permit him to continue. I have considered this carefully and I am satisfied that it would be an affront to the court to permit the claim and counterclaim to continue when, in my judgment, the purpose of Mr Jarvis in speaking to Mr. O'Neill was in effect to jeopardise the fairness of the trial because it was to seek, as he put it himself in re-examination, to clarify and change the evidence that he had given the day before. That was, in my judgment, an attempt to strengthen his and the claimant's position to the detriment and prejudice of the defendant."

53. The judge's conclusion that it would be an affront to justice to allow even the counterclaim to be defended is, to say the least, surprising. Not only does the counterclaim affect a third party (HJL) which has its own separate creditors and interests but it also concerns allegations on which Mr Searle bears the burden of proof. At the time when the judge considered the strike out application he had yet to give any evidence on allegations which also turned on his own credibility.

54. But the judge's assessment of whether there could be a fair trial of the claim was also flawed. It was based on her treatment of all of Mr Jarvis's evidence as unreliable which I have already commented on and in [22] of her judgment there is a suggestion that, because the case on suitable alternative accommodation was not properly supported by adequate evidence, it was likely to fail. The judge suggests that in those circumstances it would be unfair and, by implication, unnecessary for the trial to continue. Insofar as this provisional view about the merits and strength of the possession claim was taken into account by the judge as somehow justifying a strike out order then she was, with respect, in error. Cases are not struck out half way through a trial because the judge considers that they may not succeed. If that is the only issue then the proper course is for the judge to hear all of the evidence and then to decide (and, if appropriate, dismiss) the claim on the merits.

55. One has only to refer to the factual position that existed in *Arrow Nominees* and *Masood* to see that this case was a very long distance from the type of case where an order striking out the claim or defence is the only course left to the trial judge to avoid the risk of substantial injustice. For the reasons I have explained, the situation faced by the judge, whilst undesirable, was in fact manageable had the judge allowed herself and the parties time to investigate the facts and to make a more informed assessment of the damage which the telephone conversation with Mr O'Neill had caused. Instead, the judge, I am afraid, completely overreacted and made an order which cannot be justified.

56. For these reasons, we indicated at the end of the hearing that all of the appeals would be allowed for reasons to be given later. We have therefore made an order to that effect and have dealt with the costs issues which arise. The claim and counterclaim will be transferred to the Central London County Court for any necessary directions to be followed by a new trial in front of a different judge in that court.

Lord Justice Leggatt :

57. When, as occasionally happens, an incident occurs during a trial which gives the trial judge cause for concern that the integrity of a witness's evidence might have been compromised, a measured approach is called for. The aim should almost always be to investigate the facts as far as necessary but otherwise to complete the trial with as little interruption as possible, leaving any question of whether there has been a contempt of court or whether any further action is warranted to be considered at the end of the proceedings after judgment has been given. That was, regrettably, not the approach which the judge adopted in the present case. The judge's response to Mr Jarvis's disclosure that he had spoken to somebody while the case was adjourned overnight about a matter touching his evidence could well serve as a case study in how not to deal with such a situation. As set out by Patten LJ, the judge found that Mr Jarvis was in contempt of court without following a fair procedure and first giving him a proper opportunity to explain himself. She then proceeded to make a committal order which she did not have jurisdiction to make and for which there was in any event no reasonable basis, once again without following a fair procedure. She also struck out HJL's claim and its defence to Mr Searle's counterclaim – a course of action which, for the reasons that Patten LJ has explained, was likewise unjustified.

58. Most regrettable of all, in my view, was the judge's action in remanding Mr Jarvis in custody overnight before deciding whether to make a committal order. The reasons

which the judge gave for adopting this extraordinary course were contradictory. On the one hand, she said (in the passage quoted at paragraph 18 above) that she was remanding him in custody because "I cannot trust Mr Jarvis not to effectively interfere with his own evidence by speaking to other people". But that explanation was obviously flawed. Even if there had been a reasonable basis for such mistrust – which in my view there was not – the risk was of the judge's own making: it was only because she did not allow Mr Jarvis to complete his evidence that any possibility of "interfering with his own evidence" arose. On the other hand, the judge also said (in the same passage) that "[t]his is not about preventing further harm, this is about marking the seriousness of what has happened". This acknowledged that the purpose of the order was not preventative but punitive, but involved punishing Mr Jarvis by committing him to prison before hearing any evidence or submissions on whether a committal order was justified. Furthermore, the very act of remanding him in custody overnight impaired his ability to give instructions or otherwise prepare for the committal hearing which the judge had peremptorily insisted should take place the next day.

59. Even if the judge had had jurisdiction to make a committal order, Mr Jarvis's conduct could on no reasonable and considered view have justified depriving him of his liberty for any length of time, let alone doing so in the circumstances and manner in which it was done in this case. Put shortly, the judge's action in remanding him overnight in custody was a misuse of judicial power.

60. I agree with everything that Patten LJ has said and hope that, if any similar situation should occur in future, reference to his judgment will avoid any risk of repetition of any of the many errors made in the handling of this case.

Lady Justice Nicola Davies :

61. I agree with both judgments.