**Neutral Citation Number: [2011] EWHC 2172 (Ch)**
Claim No. OBM30307

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

The Priory Courts
Bull Street
Birmingham
B4 6DS

Date: Friday, 1st April 2011

B e f o r e :

**MR JUSTICE VOS**

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**MALCOLM BERNARD PROSSER** — **Claimant**

**- and -**

**RICHARD KENNETH JOHN PROSSER** — **Defendants**

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**Mr. Guy Tritton (instructed by Messrs. Madderson ) for the Claimant/Applicant.**
**Mr. David McIlroy (instructed by Messrs. Winckworth Sherwood ) for the Respondent.**

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**HTML VERSION OF JUDGMENT**

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**Mr Justice Vos:**

**Introduction**

1. This case started out as an unfortunate dispute between Mr. Malcolm Bernard Prosser (whom I shall call "Mr. Malcolm Prosser" or "the claimant") and Mr. Richard Kenneth John Prosser (whom I shall call "Mr. Prosser" or "the defendant"). Mr. Prosser is now aged 81 but will shortly be 82. The dispute has now developed into something rather more serious in that Mr. Prosser is accused of a contempt of court in failing to comply with a Consent Order that he agreed to on 10th March 2010. This is Mr. Malcolm Prosser's application to commit his brother, Mr. Prosser, to prison for that contempt of court.

2. In the briefest of outline what is alleged is that an Order dated 10th March 2010 (which I shall call the "10th March Order") provided that if Mr. Prosser's only property at 1 St. Mary's Close, Welwyn Village, Hertfordshire AL6 9RL ("the property") were sold:-

> *"[Mr. Prosser] shall instruct his solicitors acting on the sale that the proceeds of sale are to be remitted to the nominated bank account forthwith".*

3. It is common ground that Mr. Prosser did not comply with that Order. Instead, when the property was sold on 19th April 2010 for £475,000, Mr. Prosser was sent the money by his conveyancing solicitors, Messrs. Ewart Price, and he arranged for it to be transferred into three accounts in Hong Kong. It is Mr. Prosser's case that the money has now disappeared and that he is unable to recover it. Mr. Malcolm Prosser alleges that Mr. Prosser has simply spirited the money away so as to defeat the claims against him in this action. I heard Mr. Prosser cross-examined for a full day at the first hearing of this committal application on Monday 20th

September 2010 and for some time at the adjourned application hearing on Thursday 25th November 2010 and I heard further evidence from him yesterday, Thursday, 31st March 2011. Formally, as I say, this is the hearing of Mr. Malcolm Prosser's application to commit dated 2nd June 2010.

**Issues**

4. In due course I shall have to decide the factual issues relating to the alleged contempt but there are also legal issues that have been raised by Mr. David McIlroy, counsel for Mr. Prosser, which he contends mean that the application to commit Mr. Prosser cannot succeed. The main issues that arise, as I perceive them to be can be summarised as follows:

   Issue (1): does a consent order need to be served prior to be enforced by Committal?

   Issue (2): if so, does the court have jurisdiction to dispense with service of this Consent Order ?

   Issue (3): does section 4 of the Debtor's Act 1869 prevent the Order being enforced by committal unless its conditions are satisfied?

   Issue (4): should the court dispense with service of the Order on the facts of this case?

   Issue (5): is the defendant in contempt of court?

   Issue (6): if so, what facts are proved concerning the contempt?

   Issue (7): how should the defendant's contempt be punished?

**Factual Background**

5. I shall start by setting out the factual chronology as it has appeared from the evolving evidence from the papers that have been placed before me. Unfortunately, the chronology cannot be shortly stated. That is partly because matters have developed speedily during the hearings that I have conducted but also because Mr. Prosser's conduct in response to the allegation of contempt is important to some of the issues that I have already adumbrated.

6. Mr. Prosser was born on 29th April 1929. Prosser Brothers, Waltham Cross Ltd. ("the Company") was incorporated on 15th November 1963. Eventually, after a third brother, Barry Prosser, died in 1992, Mr. Prosser held 70% of the shares and Mr. Malcolm Prosser, his brother, held 30% of the shares in the Company. Mr. Malcolm Prosser was, so to speak, a sleeping partner or sleeping shareholder. The Company traded as a freight haulage company.

7. By 2003 the business was dormant but owned a leasehold haulage yard. In early 2003 the Company sold the haulage yard for some £450,000 even though the claimant had offered £500,000 for it. Following the sale the 2004 accounts of the Company showed net assets of some £431,000. In January 2005, however, Mr. Prosser informed Mr. Malcolm Prosser that the Company had no assets and in 2006 the Company went into compulsory liquidation with debts of £200,000. In July 2009 - relevantly for the chronology but not for the business of Mr. Prosser and his brother - Mr. Prosser's partner, Ms. Joy Hewetson, died. On 28th February 2010 Mr. Malcolm Prosser obtained a Deed of Assignment from the liquidator of the Company, a Mr. Duncan Peet, of the Company's causes of action against Mr. Prosser for breaches of his fiduciary duties as a director.

8. On 4th March 2010 Mr. Malcolm Prosser issued his claim form in these proceedings and also an application for an inter partes freezing order returnable on 10th March 2010. The claim form alleges fraud and breach of fiduciary duty in Mr. Prosser's conduct of the affairs of the Company. On 10th March 2010 the freezing order was granted by consent by Mr. John Jarvis QC sitting as a Deputy Judge of the High Court. It was ordered that Mr. Prosser should instruct his solicitors acting on the sale of his property that the proceeds were to be paid to a nominated bank account held by the claimant's solicitors, Messrs. Maddersons. Both sides were represented by solicitors: Mr. Prosser by Mr. Tom Edwards of Veale WasbroughVizards and counsel James Dawson, but Mr. Prosser was not personally present at court. Mr. Prosser accepts, however, that he was on

the telephone to his lawyers whilst the Consent Order was being negotiated and that he gave instructions for it to be agreed by telephone.

9. In pertinent part the Consent Order provided as follows:

> *"It is ordered by consent ... preservation of assets*
>
> *4 In the part of the Order the following terms are defined.*
>
> *4.1 'The property' shall mean 1 St. Mary's Close, Welwyn Village, Herts, AL6 9RL*
>
> *4.2 'Proceeds of Sale' shall mean any moneys paid by purchaser of the Property for the Property but subject to the following deductions:*
>
> > *(i) professional expenses incurred relating to the sale of the property including estate agents' fees; and (ii) the Sanders' moneys.*
>
> *4.3 Sanders moneys shall mean any moneys owing to James Albert Sanders and Kathleen Elizabeth Sanders which are secured against the Property by registered charge dated 6th March 2002 ...*
>
> *4.4 The nominated bank account shall mean a UK bank account of whom the account holder is Maddersons, the claimant's solicitors, and which is nominated by Maddersons to hold the proceeds of sale.*
>
> *5. Until judgment on the application notice or further order in the meanwhile the defendant shall not enter into any arrangement or agreement whereby further loans are secured against the property and/or further charges or mortgages are granted over the property.*
>
> *6. If the Property is sold, the defendant shall instruct his solicitors acting on the sale that the proceeds of sale are to be remitted to the nominated bank account forthwith.*
>
> *7. The defendant shall be entitled to draw the following moneys from the nominated bank accounts:*
>
> *7.1 reasonable living expenses including, if appropriate, the provision of nursing home services which shall be agreed in advance between the parties or, in the absence of agreement, either party shall have liberty to apply to the court;*
>
> *7.2 reasonable living expenses incurred in relation to the defending of these proceedings.*
>
> *8. The defendant shall swear an affidavit setting out all his assets exceeding £1,000 in value whether in his own name or not and whether solely or jointly owned giving the value, location and details of all such assets and serve such affidavit on the claimant by 4.00 p.m. on 23rd March 2010. ..."*

10. There followed a period of negotiation between the solicitors on both sides as to what reasonable living expenses Mr. Prosser should be allowed under paragraph 7.1 of the Order that I have just read out.

11. On 15th March 2010 Mr. Prosser met with Mr. Tom Edwards of Veale Wasborough Vizards now of Winckworth Sherwood (whom I shall call "Mr. Edwards") who explained the Consent Order to him as Mr. Prosser accepted at paragraph 12 of his affidavit of 20th August 2010. An unredacted copy of Mr. Edwards' note of his meeting with Mr. Prosser was produced yesterday after some argument as to whether parts of it were properly to be redacted or not. The note is important and I shall read out part of it as follows. It records that Mr. Edwards had met not only with Mr. Prosser but also with Mr. Ted Barham (whom I shall call "Mr. Barham") and to whom I shall make further reference in due course. The note records:

*"TGE [Mr. Edwards] attending at Mr. Barham's home where TGE met Mr. Barham [TB] and Mr. Prosser [RP]. TGE explained to RP in further detail the proceedings, said that the claim form had been issued but we were still awaiting the particulars of claim ... Then went on to read in detail the freezing injunction. Agreed that we would meet on Wednesday of next week at 2.00 p.m. to take further details but in particular to go through the bank statements so we can come up with an explanation as to how the money had been dealt with. Explained that the freezing injunction would be in place until such time as we had the final hearing. This would be the first open day after 20 April. However, RP might be content to leave the freezing injunction in place and if so that meant that we would not have to file any evidence and effectively disclose our hand at this stage. RP said that he was not in a desperate position to sell. He could stay where he is for about one year. RP's concern is that he has given his word to an elderly gentleman that he will sell to him and feels that he might let him down.*

*It was agreed that TGE would telephone RP's conveyancing solicitor in the morning to explain where we are and say it will be a little bit clearer next week as to whether or not we will be able to proceed. TGE went on to explain that if the property was sold the net proceeds of sale would be paid to the solicitors and RP would be able to draw reasonable living expenses which would include provision of nursing home services. ..."*

12. At the end of a lengthy note, two pages later, it is recorded as follows:

    *"RP said at that time he just did not wish to lose TB as a purchaser. TB said that he believes a Mr. J. Ellis may have recently purchased the yard for £750,000."*

13. On 16th March 2010 the defendant acted in compliance with paragraph 8 of the order by disclosing his assets. Mr. Edwards wrote to Maddersons saying that he had been advised that Mr. Prosser's assets and liabilities were as follows:

    *"1. Assets*
    *1.1 His property*
    *1.2 approximately £4,000 in the bank - Barclays Bank, Welwyn*
    *1.3 Bentley motor vehicle approximately £7,500*
    *2. Liabilities*
    *2.1 Moneys due to Mr. and Mrs. Sanders*
    *2.2 Barclays Bank loan approximately £13,000 outstanding."*

14. Also on 16th March 2010 Mr. Edwards telephoned a Mr. Graham Tooze ("Mr. Tooze") of Ewart Price who was acting for Mr. Prosser on the intended sale of his property. Mr. Edwards's file note records as follows:

    *"TGE telephoning GT [Mr. Tooze] at Ewart Price informing him that we were acting for Mr. Prosser who was in litigation with his brother. There was a freezing order. TGE said for the time being could he [Mr. Tooze] please put a hold on the sale of the property and if he could explain to the prospective purchaser that there was this problem but we are hoping to resolve it and proceed next week. TGE told GT [Mr. Tooze] that the reason he was calling him was because that Mr. Prosser was concerned that he did not want to let the prospective buyer down."*

15. Also on 16th March 2010 Mr. Edwards e-mailed Mr. Tooze at 10:04 as follows:

    *"Dear Graham,*

    *I refer to our telephone conversation this morning when I gave you brief details of Mr. Prosser's dispute with his brother and the freezing injunction. This should all become clearer next week. In the meantime would you please notify the buyer's solicitors. Thanks. Tom Edwards."*

16. On 19th March 2010 the 10th March Order was stamped and entered by the court. It had been drawn up as a Consent Order without a penal notice endorsed upon it.

17. On 25th March 2010 Mr. Prosser swore an affidavit of his assets in compliance with the 10th March Order

detailing the assets in a very similar fashion to that contained in the letter which I have already quoted. Mr. Prosser says at paragraph 11 of his first statement on 22nd July 2010 that on 5th April 2010 he was telephoned by Mr. Tooze who told him that Ewart Price had received a form of discharge from Mr. and Mrs. Sanders' accountant and that "I could now safely go ahead and sell the property".

18. On 7th April 2010 the particulars of claim were served. The claim was brought by Mr. Malcolm Prosser as assignee of the Company's claims from the Liquidator. The main allegations made were that Mr. Prosser dissipated the assets of some £430,000 belonging to the Company and that he sold the leasehold property of the Company (the haulage yard) at an undervalue losing the Company some £70,000. In round terms, therefore, the claim amounts to something in the region of half a million pounds without interest and costs. It appears from the claim form that the claim was assigned to Mr. Malcolm Prosser for the sum of £5,000 plus 30% of net realisations. So Mr. Prosser himself will potentially, but perhaps only in theory, obtain some benefit as a 70% shareholder from that 30% of the proceeds that would go back to the Liquidator if the claim were successful after costs and expenses of the liquidation had, of course, been paid.

19. On 9th April 2010 Mr. Prosser exchanged contracts for the sale of the property. The sale was dealt with for Mr. Prosser, as I have said, by Mr. Tooze of Ewart Price.

20. On 13th April 2010 Mr. Malcolm Prosser's solicitors, Maddersons, wrote to Veale Wasbrough Vizards asking about the progress of the sale of the property as they had understood that exchange and completion was imminent and indicating that they wanted a completion statement showing the moneys that were to be transferred to their client account in accordance with the 10th March Order. On 14th April 2010 Maddersons received the 10th March Order from the court.

21. On Friday 16th April 2010, according to Mr. Prosser's evidence to me on 20th September 2010 in relation to something that he said for the first time in evidence on that occasion, Mr. Prosser said that he was called by a Mrs. Fitzgerald of Ewart Price who told her she would be sending him the cheque on the Monday. It is perhaps useful to read out precisely the evidence that Mr. Prosser gave on that occasion. Mr. Prosser said this in the course of cross-examination:

> *"(Q) So something must have happened, Mr. Prosser, for him to send the money directly to you? (A) Something did happen. On 15th April Mr. Tooze was on holiday. What was her name? A Scottish name. This lady, anyhow, rang me up to say, 'Come over and sign up. It's all happening on Friday ... Monday, the 19th', so the words I said to her 'I'll get a cab over and then the cab driver can help me up the stairs'. She said, 'Don't do that, I'll come down to you.' So I signed. She came down and the exact words she said to me were, 'I shouldn't be talking to you.' I said, 'What's the problem?' She said, 'I'm an Arsenal supporter and I know who you are'. Anyway, the form was signed. On the Friday she rang me and said, 'Everything's happening on Monday. I'll be sending the cheques out on Monday'.*
>
> *(Q) Is this your conveyancing solicitor, Mrs. Fitzgerald?*
>
> *(A) Mrs. Fitzgerald.*
>
> *(Q) Mrs. Fitzgerald, yes?*
>
> *(A) This is on the Friday. She rang me up and said, 'I'm making out the cheques' she said. 'We want £1,000. The estate agents want four and a half thousand pounds and the Land Registry wants some money.' I went to see my bank on Friday to borrow £6,000 to pay for my six months' rent up front which they refused me after being with Barclays for 58 years. So I just said to the lady, 'You might just as well make the cheque out for my rent'. She said, 'That's no problem. Give me the details of their bank' which I did. She sent £6,000 for my rent for six months.*
>
> *(Q) You agreed to that?*
>
> *(A) Yes, I had to. I had no money.*
>
> *(Q) You knew, Mr. Prosser, at that time that the money should go directly to Maddersons, did*

*you not?*

*(A) I didn't know, no. I haven't finished. Then I said to her, 'Where's the rest of the money going after this?' She said, 'To your account.' I said, 'To my account?' She said, 'Yes.' I rang my bank at half past three and said 'Have I had a deposit?' She said, 'Yes.' She said to me, 'What are you going to do with it for security?' I didn't know what she meant by 'security'. When I knew it was in my bank I thought that's it. I thought it was, you know, the same as I got lifted with selling the place.*

*(Q) What, you had a discussion with Mrs. Fitzgerald and you thought, because of that discussion, that somehow or another you did not need to send the moneys to Maddersons?*

*(A) No. I thought everything was all right and that's right."*

22. The phone records that have now been produced to the court would seem to indicate that Ewart Price in fact called Mr. Prosser on Thursday, 15th April 2010 rather than Friday, 16th April 2010 although the date may not be particularly relevant. It is worth noting at this point in the chronology that between the 17th and 21st April 2010 Mr. Prosser and Mr. Barham (to whom the Haulage Yard and business of the company appears to have been sold) seemed to have spoken on the telephone on several occasions. The relevance of this will appear in due course. Mr. Prosser also said in evidence that on Friday 16th April he called the land line of a Mr. I. Khan (whom he knew as Karney) to ask him how he should invest the £475,000 he was about to receive. Mr. Prosser said that he obtained that land line number from a visiting card that he had been given by Mr. Khan in 1988, some 22 years before. Mr. Prosser told me on the 25th November 2010 when he gave evidence on that occasion that he recalled that the number was an 01 407 number which is or was a number in the West Ham area of London. He says that he converted that number from that shown on the visiting card to the more modern dialling regime making it 0208 407 followed by the remaining digits which he has forgotten. Mr. Khan, apparently, according to Mr. Prosser's evidence, suggested investing the money in Hong Kong to obtain a return of 8% per annum. I believe that he also said that the investment was to be for a 12-month period. Mr. Khan allegedly gave Mr. Prosser his mobile telephone number on that occasion. Mr. Prosser, in the course of his various pieces of evidence, first said that he had called Mr. Khan from his land line number at the property. Then, in evidence later, he said that he called him from his car telephone in the Bentley, to which I have already referred. More recently, he suggested or rather inferred that he might have used Ms. Hewitson's (his now deceased partner) old mobile phone which he had discovered with £17 credit on it when he was packing up his house to move. It is now common ground, however, from all the phone records that have been obtained and analysed, that no call was made by Mr. Prosser on any of those lines - including Mr. Prosser's ordinary mobile line - to any such number in the relevant period.

23. That Friday, the 16th April 2010, as I have already indicated, Mr. Prosser was packing up his house in readiness for completion of the sale on Monday, 19th April 2010. He intended to move to a rented (sheltered, I believe) flat, at Flat 1, 8 Wendover Lodge, Church Street, Welwyn, Herts, AL6 9RL. He told me that he had many things to do that day including selling some garden tools and packing up Ms. Hewitson's old phones in a bag to give to a friend. Mr. Prosser's evidence was that on Saturday, 17th April 2010 Mr. Khan sent him a package of papers by courier in respect of the intended investment in Hong Kong. On Sunday 18th April 2010 Mr. Prosser's evidence was that the visiting card showing Mr. Khan's London telephone number was stolen together with some £500 in cash with which it was wrapped up, again in the course of his preparation for his moving house the following day. Accordingly, Mr. Prosser cannot now say precisely what Mr. Khan's land line number was that he says he called on 16th April 2010. There is evidence of the theft that Mr. Prosser alleges from a third party witness, a friend of Mr. Prosser, who did not attend for cross-examination who is called Mr. Nigel Pine-Gilbert.

24. On Monday 19th April 2010 Mr. Edwards telephoned to Mr. Barham who had introduced Mr. Prosser to him. He asked him (that is Mr. Barham) for some information that he was having difficulty obtaining from Mr. Prosser himself. Mr. Barham told Mr. Edwards, as Mr. Edwards' file note records, that he thought that the sale of the property was imminent. The same file note then records that Mr. Edwards called Mr. Prosser and it says:

*"He said he has not yet exchanged. [Mr. Edwards] asked him not to do so as he was using this as a bargaining chip to see if he could get £1,200 per month agreed."*

25. This is a reference to the ongoing negotiations between Maddersons and Veale Wasbrough Vizards for the amount that Mr. Prosser should be allowed by way of reasonable living expenses under the 10th March Order. Mr. Edwards thought that Maddersons wanted the money from the property in their client account rather than the money being locked up in bricks and mortar and that they would be more likely to agree a higher figure for living expenses whilst the property remained unsold.

26. In evidence on 31st March 2011 both Mr. Prosser himself and Mr. Edwards accepted that Mr. Prosser had lied to Mr. Edwards when he told him that he had not yet exchanged contracts in this conversation on 19th April 2010. Also on 19th April 2010 the completion of the sale of the property did in fact take place to a Mr. and Mrs. Beattie for the price of £475,000. The net proceeds of that sale, amounting to some £450,000, were transferred by Ewart Price into Mr. Prosser's bank account at Barclays Bank. Also on 19th April 2010 Mr. Prosser says that he entered into a deed with Mr. Khan in respect of the supposed investment in Hong Kong. In fact the deed was a deed of loan. The deed purports on its face to be a deed of loan, to lend Mr. Khan the £450,000 for 12 months at a rate of 1.25% per month.

27. The deed is important and provides as follows:

> *"This Deed is made 19th April 2010 BETWEEN (I. Khan of (244 Barker Road, London E13 8HR) ('the Borrower') of the first part and (R. Prosser) of (Flat 1, Wendover Lodge, Church Street, Welwyn, AL6 9RL) ('the Lender') of the other part. NOW THIS DEED WITNESSES AS FOLLOWS:*
>
> > *1. In consideration of the sum of (four hundred and fifty thousand pounds (£450,000) (hereinafter called the 'Loan') this day loaned to the Borrowers by the Lender, the receipt of which sum the Borrower hereby acknowledges) the Borrower hereby covenants with the Lender to repay to the Lender the Loan within 12 months of the date hereof. If the Loan is paid in full within 7 days of the date hereof (the legal redemption date) then this will be accepted by the Borrower in full repayment without interest. If the Loan or any part of it is paid at any time after the said 7 days from the date hereof, the Loan or the balance of the Loan for the time being remaining unpaid shall bear interest at the rate of 1Â¼% (1.25%) per month (calculated on a daily basis) such interest to be payable monthly in arrears ...*
>
> *The Borrower acknowledges that they have been advised to seek independent legal advice before signing this document. The Borrower confirms having received a copy of this document."*

The document is then signed in manuscript with words that look like "I. Khan" and concludes with the following:

> *"Signed as a Deed by the said Borrower in the presence of"*

And then in manuscript:

> *"Mr. S. Wilson, 19 Gordon Road, London E18 1DW".*

And then a signature which does not appear to be I. Khan but could be that of the supposed witness, Mr. Wilson.

28. It appears from Mr. Prosser's evidence that he did not meet Mr. Khan at any stage over the weekend of the 16th to 19th April 2010. Mr. Prosser, according to his evidence, had not met Mr. Khan for some 22 years since they had known one another when they were both involved with Tottenham Hotspur Football Club. Efforts were made by Mr. Edwards's brother, who is a taxi driver, to trace Mr. S. Wilson, the witness, at 19 Gordon Road, but the Spanish lady at that property denied all knowledge of him. It appears from the researches made by Mr. Edwards that there is no Barker Road in London E13 so that the address given for Mr. Khan on the Deed which I have read out seems to be entirely fictitious.

29. On Tuesday 20th April 2010, the 10th March Order was served on the defendant's solicitors without a penal notice being endorsed on the front. On Wednesday, 21st April 2010 Mr. Prosser attended at Barclays Bank to transfer £150,000 to each of three accounts in Hong Kong, thereby transferring the entirety of the £450,000

which he had received by way of the proceeds of sale from the property. Mr. Prosser, it appears, asked Barclays Bank for their priority service to transmit the money to three named accounts in Hong Kong as follows. I have been shown three Barclays International payment forms. I have also been shown the customer copy of three Barclays International Payment forms which seem to show that the three payments of £150,000 each were made to an account of "Raffles Traders" at Standard Chartered Bank in Hong Kong; secondly to an account of "Naina SM Sathakku Thambi AL" at an account of HSBC at 80 to 82 Nathan Road, Hong Kong; and thirdly to an account of "Heera Bloom" at HSBC at 80-82 Nathan Road, Kowloon, Hong Kong.

30. In evidence on 20th September 2010 Mr. Prosser said that he had known the names of those three payees from a piece of paper that he had written them on when he had been told who the moneys were to be paid to by Mr. Khan. On that occasion he thought that he still had the piece of paper on which he had written the names at home but when he later returned to give evidence he was unable to produce any such document. Also on Wednesday, 21st April 2010 Veale Wasbrough Vizards wrote again to Maddersons as follows. They wrote again to Maddersons in relation to the negotiations concerning the reasonable living expenses as follows:

> *"Our client's pension is £151 per week after tax. Our client confirms that he has the personalised number plate RKP 1. Our client has no information as to the value of this number plate. Our client believes that the value of the Bentley would not exceed £75,000. If your client requires a formal garage valuation, would they please go ahead and do so at his own expense. With regard to the sale of the property this is still on hold until such time as we are able to agree Mr. Prosser's weekly living expenses. As we said previously, Mr. Prosser in his old age does not wish to see himself short of money and therefore we suggest that the payment of £1,200 per week is not unreasonably (sic) particularly as regards to the value of the assets being frozen. ... "*

31. Mr. Prosser had obviously not informed Mr. Edwards that the property had been sold even by this stage on the 21st April 2010. Nor had he told Mr. Edwards, as it appears, that the proceeds of sale had been removed to Hong Kong.

32. On 30th April 2010 Mr. Edwards wrote to Mr. Prosser a letter which Mr. Prosser admits receiving saying that he had agreed with Maddersons that the sale proceeds would go into Madderson's account and would be safe, and dealing with the expenses allowance. It appears that Mr. Prosser did not telephone his solicitor, Mr. Edwards, to tell him that the property had been sold and that the proceeds had been placed overseas but did nothing on receipt of this letter one week after the money had gone abroad.

33. From 7th May 2010 Mr. Prosser's mobile phone records show that he started making calls to a mobile telephone number at 07674 640923 which he maintains to be the mobile number given to him for Mr. Khan. There is no evidence of any calls being made by Mr. Prosser to that number before 7th May 2010 but he did make several calls thereafter. According to his evidence he found the number unobtainable or simply receiving messages. Since this date Mr. Prosser has not heard, on his evidence, from Mr. Khan save to be told when he telephoned that number that he was sick and had gone to India.

34. On 18th May 2010 Mr. Edwards wrote to Mr. Tooze saying he had been having trouble getting instructions but that he had just spoken to Mr. Prosser who did not sound very well and asking whether the property had been sold and, if so, the whereabouts of the sale proceeds. He also asked whether he had a current address for Mr. Prosser. Mr. Edwards' evidence as to his conversation with Mr. Prosser was that he suspected something was not right and that, as he put it, his "antennae were up". That was his explanation for why he wrote to Maddersons asking about the sale. It is said by Mr. Guy Tritton, counsel for Mr. Malcolm Prosser, that Mr. Prosser was deliberately confusing his solicitor knowing that he had violated the terms of the 10th March Order.

35. In cross-examination on 20th September 2010 Mr. Prosser said this:

> *"(Q) And it is clear from this letter, Mr. Prosser, that what Mr. Edwards is concerned about and most interested in is have you sold the property, where are the sale proceeds and indeed seems to want to know if Mr. Tooze has a current address for Mr. Prosser. So in that conversation you had with your solicitor you plainly did not tell him, did you, that you had sold the property and-*

*(A) No.*

*(Q) - that you had received the sale proceeds and that you had sent them abroad?*

*(A) Yes.*

*(Q) You did not tell him that, did you?*

*(A) No.*

*(Q) You did not tell him that again, Mr. Prosser, I suggest to you, because you did not want your solicitor to find out what you had done with the proceeds because you knew that would put him in difficulties. Do you have any comment on that?*

*(A) No, no comment.*
*(Q) I suggest to you, Mr. Prosser, that for this whole period you are deliberately suppressing telling your solicitor that you have sold the property, taken the proceeds and sent them abroad. If you had not, he would have found out a lot earlier than he did.*

*(A) I told you earlier Mr. Tooze, I thought, was the solicitor selling my property and Mr. Edwards was my sort of legal solicitor."*

36. On 19th May 2010 Maddersons phoned Mr. Edwards to say that they had obtained Office copy entries and that the property had been sold on 19th April 2010. On 20th May 2010 Mr. Edwards wrote to Maddersons as follows:

*"It would appear that the property was sold on 19th April and the transfer in favour of the transferees was registered on 30th April. We did not know the property had been sold until you telephoned us yesterday. We had previously written to the conveyancing solicitors asking for an update and for details of the sale. We are awaiting a response.*

*With regard to service of the Order we note that this was received by our firm on 20th April."*

37. On 21st May 2010 Mr. Edwards spoke to Mr. Prosser on the telephone. Mr. Edwards told him that he had stirred up a hornet's nest and that he was just told the other day that the property had been sold. Mr. Edwards asked him if the money was still with the conveyancing solicitor and Mr. Prosser replied that it was not. Mr. Edwards then asked him for details and Mr. Prosser said he had woken him up and could Mr. Edwards give him 15 minutes to pull himself together and he would call back.

38. When he called back Mr. Edwards made another file note of the conversation as follows:

*"Long conversation with him. Mr. Prosser said he thought it was in order to go ahead and sell the property. He said about 5th April he was telephoned by the conveyancing solicitor. The conveyancing solicitor said he had received the form of discharge from Mr. Sanders and, in the circumstances, asked Mr. Prosser if he could go ahead and deal with the sale of the property. Mr. Prosser thought matters had been agreed because he did not think the solicitor would be able to telephone to say to go ahead if the freezing injunction was still in place. He said he was later telephoned by Mrs. Fitzgerald from the conveyancing solicitors who told him that they were going ahead with the sale to be completed on 19th April.*

*He said that the moneys were then sent to his bank account in the village. [Mr. Edwards] asked him if the moneys were still available and Mr. Prosser said, No, he had invested them. Mr. Prosser said he thought it was all right to do so as he did not believe the solicitor would have told him to proceed with the sale if the freezing injunction was still in place. He said the moneys had been invested in Hong Kong in three tranches of £150,000 each at 8%.*

*[Mr. Edwards] asked him if he had today been served with any papers and Mr. Prosser said he had. Initially the process server put some papers under the door and then came back about 15*

*minutes later and he has been served personally. ...*

*[Mr. Edwards] said he really did not know at this stage what to do and he will think about it over the weekend and come back to him, contact him on Monday."*

It will be noted that in the course of this lengthy conversation Mr. Prosser did not tell Mr. Edwards about Mr. Khan. Mr. Prosser did not say that he had been trying to call Mr. Khan repeatedly and without success since 7th May 2010 to find out if his money was safe and Mr. Prosser did not say that he feared the money was lost, which is all what I was told by Mr. Prosser in the course of his evidence.

39. On 21st May 2010 the order of 10th March 2010 was served on Mr. Prosser endorsed with a penal notice in accordance with Order 45 rule 7 as recorded in the file note which I have already read out.

40. On 2nd June 2010 the claimant issued an application to commit the defendant to prison. The statement in support of the application to commit has been prepared by Maxine Madderson of Maddersons. It says that the committal is sought because:

> "by paragraph 3 of a Consent Order dated 10th March 2010 of Mr. Jarvis QC ... the respondent was ordered to pay the proceeds of sale from [the Property] into a bank account held in the name of Maddersons Solicitors if the Property was sold."

41. This statement was inaccurate in that the 10th March order had not required the defendant to pay the proceeds into the nominated bank account but had ordered Mr. Prosser to instruct his solicitors that the proceeds should be paid into the nominated bank account.

42. On 4th June 2010 the application to commit was served personally on Mr. Prosser. On 9th June 2010 Mr. Edwards met with Mr. Prosser. It was on that occasion that Mr. Prosser showed him the Deed entered into with Mr. Khan which I have already recited and the three bank transfers to which I have already referred. It was also on this occasion that Mr. Prosser told Mr. Edwards about Mr. Khan for the first time. Mr. Edwards' first affidavit had said that Mr. Prosser was shocked when Mr. Edwards told him that the Deed did not record an investment but a loan. When, however, Mr. Edwards was cross-examined on this point he explained that Mr. Prosser was of the "old school" and was not, as he put it "dramatically shocked". He also accepted that Mr. Prosser "could be an actor".

43. On 10th June 2010 Mr. Prosser filed his defence in these proceedings pleading, perhaps most notably, that "the defendant cannot now recall the precise way in which the Company's assets were dissipated". On 21st June 2010 Maddersons asked Mr. Edwards why Mr. Prosser had breached the freezing injunction. Mr. Edwards made no response despite the chasing enquiry on 5th July 2010 and said in evidence that he did not feel obliged in effect to dance to the tune of the claimant's solicitors. On 22nd June 2010 Master Moncaster adjourned the committal application to the judge.

44. On 22nd July 2010 Mr. Prosser's draft witness statement came in for the first time dealing with what I may call the "Khan story". I will not recite the entirety of Mr. Prosser's first draft witness statement but will seek to summarise it and recite only the most pertinent parts. Mr. Prosser said that he was in ill health and described his position in that regard saying this:

> *"I am in ill health. I suffer with blood pressure, diabetes and irregular heart beat. I have difficulty walking and I am on prescribed medication of approximately 17/18 tablets each day. I attach at RKJP1 copies of a medical report dated 12th June 2010 from Dr. Lakshminarayak and 16th July 2010 from Dr. N. Uchenwoke."*

45. He then deals with the arrangements for his sale of his property and the loan from Mr. and Mrs. Sanders and continues as follows at paragraph 10:

> *"10. I was not in court when the freezing injunction was made but my solicitors had made me aware of it and I was told that my property could not be sold.*
> *11. On or about 5th April 2010 I was contacted by my conveyancing solicitors and informed that they had received the form of discharge from Mr. and Mrs. Sanders' accountant Montpelier and*

*that I could now safely go ahead and sell the property.*

*12. I wrongly assumed that this meant that I could sell the property without the effect of the freezing injunction and in this respect matters had been sorted out.*

*13. I exchanged contracts for the sale of the property on 9th April 2010 and completion took place on 19th April 2010.*

*14. Following completion I was contacted by Mr. Tooze's assistant, a Mrs. Fitzgerald, who confirmed the sale and that they were in a position to forward the proceeds of sale to me.*

*15. I asked whether or not it was possible for her to make a payment of £5,970 to Mid-Herts Executive Relocation in respect of six months' rent in respect of the new premises where I am now living. She confirmed that this was acceptable.*

*16. Following receipt of the proceeds I was in contact with a friend of mine, a Mr. Khan, who is an Indian gentleman whom I have known since 1985 when he was introduced to me at Tottenham Hotspurs when I was in all but name a director.*

*17. Mr. Khan advised me to invest the money in Hong Kong where he said I would get the best rate of interest, 8%.*

*18. Mr. Khan arranged for the various papers to be forwarded to me which I completed and for the investment to be made.*

*19. My instructing solicitor has asked me whether or not I can make arrangements for those moneys to be returned and I assume that I can. I have telephoned Mr. Khan almost on a daily basis but he has not responded. My solicitors have also telephoned Mr. Khan asking him to call back, but he has not yet returned their calls either.*

*20. My financial position at present is that as previous, apart from the fact that the credit in my account with Barclays at the moment is approximately £3,000. Again, this must be offset a loan from Barclays."*

46. Mr. Prosser's evidence now is that he does not think that he will be able to get the money back from Hong Kong because he has not been able to trace Mr. Khan despite attempts by both him and his solicitor to do so.

47. Mr. Edwards also made a witness statement exhibiting the Deed and the transfers and repeated the story that he had been told by Mr. Prosser.

48. On 23rd July 2010 Warren J adjourned the committal application for the cross-examination of Mr. Prosser. On 20th August 2010 Mr. Prosser served further evidence. Again, I do not think that I need set out the evidence in very much detail. It largely repeated the points that had been made in the first draft statement but on this occasion it was a sworn affidavit. In addition, in this affidavit Mr. Prosser dealt with the alleged theft of the £500 and the business card of Mr. Khan and with obtaining the mobile telephone number of Mr. Khan and with his surprise at being told that the money that he had sent to Hong Kong had not been an investment at 8% as he had thought. He concluded by saying at paragraph 41:

*"I am now very concerned that I have been duped by Mr. Khan and that I have lost the whole of the investment of £450,000. The £450,000 is not under my control and I am not in position to deposit these moneys with the claimant's solicitors."*

49. On 20th September 2010 the application to commit was brought on before me. Mr. Prosser gave evidence for most of the day. I ordered that the defendant produce documents that had been referred to in the course of his evidence, in particular, certain telephone records and "the documents referred to in the defendant's oral testimony which were sent by Mr. Khan in or around 19th April 2010 to the defendant setting out the details of the bank accounts into which the defendant was to pay £450,000." At the end of the hearing I said this:

*"I am bound to say - and I say this only in order to help the parties and to hear submissions - I have not reached any concluded view. I have not had the chance to digest the evidence that has been given and I would like to be provided with a transcript when you get it. But certainly, shall we say this. It has raised some very significant doubts about the veracity of the transaction involving Mr. Khan and indeed the existence of Mr. Khan.*

*One of the ways of dealing with the contempt, a serious contempt application of this kind, is for the contempt to be purged. Mr. Prosser is, I am sure, listening to this and I understand that his present case, as expressed in evidence today, is that he cannot purge his contempt. He might like to know that provisionally I will be taking an extremely serious view of the failure to inform the police; the failure to ask Barclays to check where the money has gone; the failure to ask HSBC where the money has gone in Hong Kong (which can be done by Mr. Edwards who is a perfectly competent solicitor. He does not actually need to involve Mr. Prosser at all); also Standard Chartered as one of the three entities to which money was apparently sent.*

*As I say, if this money is returned and placed as the Consent Order required with Maddersons, then of course any contempt that is found will be visited with a rather different kind of penalty than the kind of penalty that would follow if this money has genuinely been spirited away or I were to find the money has been spirited away in the way that Mr. Prosser's evidence might lead me to believe ...*

*I say this. If no such investigations are initiated by the next time then I am afraid, obviously, there will be a much greater weight to the submission that I am sure you are going to make, Mr. Tritton, that it is to be inferred that this is a scam and that the money has simply been spirited out of the jurisdiction to avoid the consequences of the order.*

*I think it is really useful that we have had to have this break to give Mr. Prosser and his solicitor the opportunity to make the investigations which really ought to have been made and for him to have had an opportunity to see whether there was anything more that can be done."*

50. On 27th September 2010 Maddersons wrote to Mr. Edwards' new firm which was by this time Winckworth Sherwood LLP asking for disclosure of Mr. Prosser's bank accounts saying that they were very keen to be involved in the investigations that were being undertaken by the defendant and that it was their view that if both parties collaborated then they would be more likely to retrieve the funds. In addition they told Mr. Edwards that in order to assist with his investigation Mr. Steven Prosser, the son of Mr. Malcolm Prosser, had asked them to pass on information about how to report fraud in Hertfordshire.

51. On 28th September 2010 Mr. Edwards replied to Maddersons saying that they would "tomorrow arrange for letters to be sent to the banks and the telephone companies". On 1st October 2010 Mr. Edwards wrote again saying:

*"We have been speaking with enquiry agents who have informed us that they believe that they may be able to find out whether or not the three accounts in Hong Kong still have the £450,000. We propose to instruct the enquiry agents to make these enquiries. However, we are reluctant to do so if you are pressing ahead with a return date and this information will not be available at the time of the adjourned hearing."*

52. On the same date Mr. Edwards said to Maddersons in a further letter that he was just about to write to the various banks and the police:

*"However it occurs to us that it would probably be sensible to wait until the enquiry agents have completed their enquiries. We would not wish to alert or scare anyone off. Would you please let us know if you agree?"*

53. On 6th October 2010 Maddersons responded confirming the listing for 24th and 25th November 2010 and again strongly suggesting collaboration. In answer to the request about notifying the police they said:

*"In your letter dated 1st October you have suggested that the police and banks should not be*

*informed until the enquiry agents have completed their negotiations. However, we have been informed by Mr. Steve Prosser that enquiry agents use discreet methods to access accounts and therefore we see no reason why there should be any continued delay in reporting this matter to the respective authorities."*

54. They then referred to some statements that I had made in the course of the hearing and asked for confirmation that enquiry agents had been formally instructed, whether they had completed the investigation, that the fraud had been formally reported to the police, that letters had been sent to the three banks, the results of the investigations and crime reference numbers.

55. On 15th October 2010 Mr. Prosser's enquiry agents eventually reported. Mr. Edwards' file note of his conversation with "Chris from Phoenix" records as follows:

*"1. Telephone Number He said that they're having difficulty finding out the name behind the telephone number. He said there is something peculiar about this number and that the level of security around it goes beyond what is normal. Did not elaborate. [The number in question was Mr. Kahn's mobile phone number.]*

*2. Hong Kong accounts He said very little at the moment is coming out of Hong Kong. Their first impression is that these accounts could be dormant. If they are not successful with regard to the HSBC accounts they will have a look at the Standard Chartered accounts."*

56. On 19th October 2010 Maddersons chased for a response to their letter of 6th October. On 26th October further results were obtained from the enquiry agents recorded in a file note prepared by Mr. Edwards saying:

*"He said that despite extensive efforts they have not been able to get behind the Hong Kong accounts although he did confirm they are still live. We then discussed Mr. Khan's mobile telephone number. He said that it definitely does not belong to Mr. Khan but said that the level of security around this number indicates that it is someone with Government contacts."*

57. On 12th November 2010 Mr. Edwards wrote to Maddersons with a certain amount of information concerned with mobile phone records and concluding:

*"We are now arranging for this matter to be reported to the police and the Fraud Department at Barclays Bank."*

58. On 18th November 2010 Mr. Prosser served a further draft affidavit saying in particular that he had not called Mr. Khan from his land line because he had packed up the handset of that land line in preparation for his move.

59. On 18th November 2010, just prior to the last hearing, Winckworth Sherwood wrote reporting the alleged fraud to Barclays Bank's Victim of Fraud Department, to HSBC and to Standard Chartered Bank.

60. On 25th November 2010 Mr. Prosser again gave evidence. It was pointed out to him that still no report had been actually made to the police. It was suggested to him that the reason he had not wanted to report matters to the police was that he knew he would be risking prosecution for wasting police time or possibly attempting to pervert the course of justice.

61. On 26th November 2010 Mr. Edwards filed a new affidavit. That was the second day of the hearing before me on that occasion. Mr. Edwards' affidavit, which was eventually sworn on 30th November, dealt with a number of matters including the following:

*"3. During the course of the committal I have sat and listened in dismay as inferences and suggestions have been made in respect of the defendant's actions which may have resulted from my conduct of this litigation.*

...

*5. I met with the first defendant on 15th March 2010 and have a file note which records: '... Then*

*went on to read in detail the freezing injunction ... explained that the freezing injunction would be in place until such time as we had a final hearing. This would be the first open day after 20th April 2010 ...'*

*7. On 25th November 2010 I checked my files and could not find a letter or note where I informed the defendant of the consequences of his breaching the order. Even though my notes say on 15th March 2010 'I read in detail the freezing injunction', I now fear that I may have given the defendant the impression that he could not sell his property, as opposed to saying that he could sell it albeit it that he must additionally 'instruct his solicitor acting on the sale that the proceeds of sale were to be remitted to the Nominated Bank Account'. This is where the confusion may have arisen.*

*...*

*9. At paragraph 35 of my previous affidavit I made reference to the Deed. On 9th June I met with the defendant and he gave me a copy of the Deed. When I explained its content and effect to him it was clear to me that the defendant was shocked as he clearly thought he made an investment which would give him a return of 8% per annum as opposed to a loan. However the defendant was aware that the money was tied up for 12 months."*

62. He then dealt with efforts to chase the money and reporting the matter to the banks and to the police, effectively taking blame for any dilatoriness in those activities.

63. At the end of the hearing on 26th November 2010 the parties applied for an adjournment to allow further documents to be obtained and to allow the police to investigate the report that had, by then, been made or was about to be made. The order that I made in response to the parties' consent included the following: first of all, a freezing injunction in relation to assets up to £450,000; secondly a requirement that by 4.00 p.m. on 5th December 2010 Mr. Prosser should disclose copies of all bank statements of every bank account that is or was at any time under his control for specified periods; thirdly, that Mr. Prosser should use his best endeavours to obtain and disclose by 4.00 p.m. on 17th December 2010 detailed records of all outgoing and ingoing calls on all telephones, whether land line or mobile, which were in any time in his possession or control for the relevant period; fourthly, that Mr. Prosser should file a complaint with the appropriate Metropolitan Police Authority by 30th November 2010 in relation to the alleged disappearance of £450,000 and that he should "use his best endeavours to pursue the complaint and ensure that the complaint is investigated with expedition, vigour and diligence by the Serious Organised Crime Agency and/or any other appropriate Police Authority, subject always to the relevant Agency or Authority deciding to do so" and that he should keep the claimant informed of progress and give the claimant authority to conduct his own investigations at his own expense.

64. In the course of the hearing I again made certain comments directed at Mr. Prosser as follows:

*"Let me tell you, for both sides' benefit, the way my mind has been going in this, if it was not clear from yesterday which I rather suspect it was. It is pretty clear to me that Mr. Prosser knew about the order and decided nonetheless, perhaps or not I will have to determine, either deliberately or not, but knew there was an order and decided to invest the money overseas. That much is clear. He did not tell his own solicitor of what he was doing which was obviously a bad thing. Whether it is wilful or what level of blame attaches is another matter and how confused he was, are all matters I will have to determine. But he did that and he did it I think for the reason that he wanted not to have the money here that his brother could get his hands on. That much is pretty clear.*

*What is not clear is whether he has been duped (to use his own words) or whether he is now able to get the money back. The view that I take of any penalty that is to be imposed, which is a matter of the greatest gravity, is going to depend upon whether all this is found to be, as you say it is, a scam, a pack of lies or whether he has been duped. He is in the most unfortunate position albeit having done something he should not have done, having now found himself in a position where there is nothing he can do. If that were truly the position, and at the moment we are really in the dark about it, I have to make inferences on the basis of whether I believe Mr. Prosser or*

*not, which is not the best position to be in and which is why I adjourned the matter last time.*

*...I have made it perfectly clear that I regard this as a very serious case, but I am not in the business of sending 81-year old people to prison unless there is a very serious contempt to be dealt with that must be marked in that way."*

65. Then a little later in the hearing:

*"If it is the case in fact that the story about Mr. Khan is not correct, let us put it more neutrally, and that there is more to be told as to how £450,000 came to be transferred on Wednesday, 21st April 2010 to three unknown named institutions in Hong Kong, if that is the case and Mr. Prosser knows more and he discloses that material to you and eventually to the court, I will not be holding it against him specifically. I am not guaranteeing I will not hold the whole events against [him], but it is far more likely that I would take a beneficial view of his having come clean than I would have his having not come clean, and it being established by third party mechanisms that the story he told was not correct.*

*...*

*Plainly it does not cost any money to ask the police to pursue an enquiry. What I would like to see frankly is a great deal more co-operation between the parties, and a great deal more co-operation aimed at establishing what really happened to this money. It cannot be beyond the wit of man to ascertain whether there is a thief who has stolen the money or not. It may not be possible to identify the thief, but it can be pretty clear from circumstances that can be discovered that there has been a theft."*

66. On 30th November 2010 Winckworth Sherwood wrote to Maddersons enclosing the proposed letter to be sent to the police. I need not read out the terms of the letter itself, but it was Mr. Edwards's evidence that he and a representative from Maddersons sat together in his offices and made the report on the internet in the way it had previously been discussed between them. On 2nd December 2010 Maddersons wrote to Winckworth Sherwood giving them details of how to report matters to the police. On 7th December 2010 Winckworth's file note records a call from Barclays saying that there was nothing they could do to help and that Mr. Prosser had "willingly signed the transfers".

67. On 14th December 2010 Maddersons sent an e-mail to Mr. Edwards of Winckworth Sherwood setting out a number of concerns at Mr. Prosser's compliance with the order that I made of 26th November 2010. On 15th December 2010 Mr. Edwards responded to those concerns. After Christmas on 10th January 2011 Maddersons sent a letter to Mr. Edwards complaining that Mr. Prosser was in wholesale breach of my order as he had failed to provide the claimant with the telephone records, the bank statements for April, an update on the police investigations and chaser letters to the telephone company.

68. On 18th January 2011 Mr. Edwards sent some of the telephone records to Maddersons. On 27th January 2011 he sent an update on progress on obtaining the remaining telephone records. On 8th February 2011 Maddersons requested a further update in respect of various aspects of the order. On 18th February 2011 there was a telephone call in which Maddersons queried whether Mr. Prosser was spending more than £400 a week. Later in February 2011 Maddersons confirmed receipt of the telephone records from BT and on 25th February 2011 Mr. Edwards wrote to Maddersons giving them an update on the correspondence that had taken place with Detective Inspector Gordon McCullough of the Hertfordshire Police Force who was in fact investigating the complaint. The correspondence that was enclosed with that letter reveals that the mobile phone number which was alleged to be that of Mr. Khan was an unregistered, prepaid mobile phone number.

69. Finally, on 28th March 2011, shortly before this hearing began yesterday, Mr. Edwards received an e-mail from Detective Inspector McCullough which said as follows:

*"I have been to see Mr. Prosser today to confirm the details of his account of dealings with Mr. Khan. He agreed that he had met Mr. Khan informally at the Spurs Football Club Boardroom in 1985 on a few occasions and had kept his business card. He confirmed he had not had any contact with Mr. Khan until he telephoned him using the land line telephone number on his old*

*business card for advice about investing moneys from the imminent sale of his bungalow. He agreed that the number on the card was 01 407 ... and that he had converted the number to the new London format to make the call. He originally told me that he had dialled 0207 but today said he was believed he had dialled 0208. He confirmed that he had not used his land line telephone as he had his telephone handsets packed up ready for his move to Wendover Lodge. He agreed that he believed he had used his late partner's mobile telephone to call Mr. Khan (07949 374527).*

*He confirmed that he telephoned Mr. Khan on or around 16th April 2010 and arranged to invest £450,000 in Hong Kong banks at a return of 8% per annum. He said he received a package by courier on Saturday 17th April 2010 which contained blank Barclays Bank transfer forms, information about where to send the money and a mobile telephone contact for Khan written on an envelope. He also confirmed that the Deed was enclosed.*

*I have obtained call data for all of the telephones Mr. Prosser had access to in April 2010 i.e. his late partner's ... his own mobile ... his car phone ... and land line ... None were used to contact a London number around the middle of April 2010.*

*Taking into consideration the financial intelligence about Mr. Prosser, the circumstances of the current court case involving his brother and the lack of evidence of the Mr. Prosser ever having contacted Mr. Khan in April 2010, leads me to conclude that his account of being the victim of fraud is untrue. I have informed him that I intend to make an application to have this fraud crime classified as being a non-crime.*

*With regard to points 2 below, the Deed is dated 19th April 2010. Mr. Prosser tells me he received it 17th April 2010. This also tends to show that his account is inconsistent and unlikely.*

*With regard to points 3, 4 and 5 we know the three Hong Kong accounts exist and that moneys were transferred from Mr. Prosser's Barclays Account as described by him.*

*Given my conclusions about the accuracy of Mr. Prosser's account of being the victim of fraud, I have not made enquiries to see if the £450,000 is still in the three accounts or if and where it has been transferred to. To action such enquiries the police have to go through a Specialist Home Office Department via the CPS to request the Hong Kong Police Authorities to carry out enquiries on our behalf. This incurs not insignificant translation fees. We also need to give details of the crime we are investigating. As said, I do not believe that one has been committed. It will not be possible/appropriate therefore to carry out such enquiries."*

**Order 45 of the Rules of the Supreme Court**

70. Order 45 rule 5 of the Rules of the Supreme Court deals with "Enforcement of judgment to do or abstain from doing any act". It provides as follows:

> "(1) Where -
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under a court order or CPR rule 2.11 ; or
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say -
>
> ...
>
> (iii) subject to the provisions of the Debtors Act 1869 and 1878 , an order of committal against that person or ..."

71. Order 45 rule 7 provides under the heading "Service of copy of judgment etc., prerequisite to enforcement under rule 5 " as follows:

> "(1) In this rule references to an order shall be construed as including references to a judgment.
>
> (2) Subject to paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless -
>
> > (a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and
> >
> > (b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.
>
> ...
>
> (4) There must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in the case of an order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible.
>
> ...
>
> (6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the court is satisfied that pending such service, the person against whom or against whose property is sought to enforce the order has had notice thereof either -
>
> > (a) by being present when the order was made; or (b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.
>
> (7) The court may dispense with service of a copy of an order under this rule if it thinks it just to do so."

72. The notes to RSC Order 45 rule 7 include the following:

> "The court has a discretion under O.45 r.7(6) to dispense with the failure to incorporate a penal notice in a judgment or order requiring a person to abstain from doing an act but it has no such discretion to dispense with the penal notice where the judgment or order requires the person to do an act ( Dempster v. Dempster, The Independent, November 9, 1990 Court of Appeal ). Nevertheless, as liberty of the subject is involved, strict compliance with the rule is desirable and it is unwise to rely on this discretion.
>
> Practitioners should take care to ensure that the requirements of O.45 r.7(4) are met and that a penal notice is 'prominently displayed on the front of the copy of an order served'. In Moerman-Lenglet v. Henshaw, The Times, November 23, 1992 Chadwick J held that there was no discretion to dispense with this requirement. However, in Gill v. Darroch [2010] EWHC 2347 (Ch) Vos J exercised the power to dispense with service under O.45 r.7(7) where the defendant had been served but the penal notice was endorsed on the second page of the order.
>
> Dispensing with service of documents
>
> Paragraph (7) embodies the former practice under which the court has power to dispense with the service of the requisite documents in order to found an order for sequestration or committal.

The principle is that the Court will not make an order of committal of a person for disobedience to an order requiring him to do an act within a given time unless there is clear evidence that the person knew what he was required to do. That evidence is normally proof of personal service of a properly endorsed order upon him. The Court is likely to exercise its powers to dispense with service where the defendant who not been formally served nonetheless has notice of the order or has been served with an order which is technically defective. In Gill v. Darroch [2010] EWHC 2347 (Ch) (where all authorities are reviewed) Vos J dispensed with service of an order which had the penal notice in the wrong place but was satisfied the defendant clearly understood what was required of him."

**The nature of this application**

73. Before dealing with the evidence that I have heard and the issues that I have set out, I should deal with the nature of this application and the burden and standard of proof. Mr. McIlroy submitted by reference to the case of R. v. Ayub Lashari [2010] EWCA Crim 1504 as follows:

> 1. The claimant had to prove the contempt to the criminal standard of proof.
>
> 2. That by analogy with the principles applied to a Newton hearing in criminal cases, where the court is deciding on the level of culpability of the contempt, the burden of proof remains on the claimant and the standard remains the criminal standard.
>
> 3. That extraneous matters of mitigation need only be proved by the defendant to the civil standard.

74. These propositions were supported by a dictum of Lord Phillips MR in Gulf Azov Shipping Company Ltd. v. Chief Humphry Irikefe where the Master of the Rolls said at paragraph 16:

> "Before turning to the relevant issues of fact I would refer to the standard of proof. As to that the judge said at paragraph 10 of his judgment:
>
> '... it was common ground that the standard of proof is that which applies in criminal proceedings and therefore the applicant, on whom the burden of proof lies, must make the sure of the facts which are alleged to constitute the contempt. This much was common ground, but the principle goes further than that. When the court is concerned with the circumstances in which a contempt has been committed and thus with the gravity of the defendant's conduct, it must be satisfied to the point of being sure of any matters which it would regard as adverse to the defendant or which would tend to lead it to view his action in a more serious light and so affect its view of the appropriate penalty: See Z Bank v. D1 and Others [1994] 1 Lloyd's Rep. 656 , 667.'
>
> Mr. Bhalla accepts that this was indeed the test that the judge should have applied but he has submitted that when the evidence is considered the judge cannot have applied that test ..."

75. The submission is also supported by the dictum of Colman J in Z Bank v. D1 and Others [1994] 1 Lloyd's Rep. 656 at page 667 first column where he said:

> *"But in evaluating the gravity of the contempt it is common ground that if I am to find wilful disregard of the court's order I must be satisfied beyond all reasonable doubt that such was the case, just as I must be satisfied to that standard of proof that contempt was committed. Mere suspicion is not sufficient."*

76. I accept Mr. McIlroy's submissions and the dicta that I have cited which are of some importance on the facts of this case. First, the contempt itself, is the failure to give instructions to Ewart Price to place the proceeds of sale of the property on deposit with Maddersons. That much is admitted and therefore proved. Secondly, however, if I were to hold that a committal were a possible option - to which I shall come in a moment - I would have to decide what Mr. Prosser had done in relation to the contempt and what level of culpability attaches to his conduct. Four crucial questions would arise as follows:

> 1. Has it been proved that Mr. Prosser deliberately paid the money away?

2. Has it been proved that Mr. Prosser paid the money away in the full knowledge of the fact that what he was doing was in breach of the court order?

3. Has it been proved that the story about Mr. Prosser being duped by Mr. Khan is a complete fabrication?

4. Has it been proved that Mr. Prosser is still in control of the money so as to be able to purge his contempt?

77. In my judgment these questions must all be proved to a criminal standard of proof if I am to take them into account in relation to any sentence that I might impose. As to the questions of mitigation, like Mr. Prosser's health, age and infirmity, these matters need to be proved by Mr. Prosser only to a civil standard.

**Mr. Prosser's evidence**

78. I have heard Mr. Prosser give evidence orally on three separate occasions. I should say that he strikes me as a very alert and savvy 81-year old. He is plainly not in particularly good health but seems to bear his medical problems with fortitude. I should start by saying what those problems are. They have been listed in a report from the Anglesey Medical Centre as follows:

1. Type 2 Diabetes Mellitus;

2. Atrial fibrillation;

3. Ischemic Heart Disease;

4. Gout;

5. Diabetic Neuropathy;

6. Impaired Left Ventricular Function;

7. Peripheral Vascular Disease NOS;

8. Intermittent Claudication. "

79. In addition to these items, information has been put before me to indicate that he suffers also from diverticular disease and has recently undergone a cataract operation. It is plain that the diverticular disease in particular is incapacitating in that there is evidence that he experiences urinary leakage and faecal soiling if he is unable to relief himself quickly on any particular occasion. I have already cited from Mr. Prosser's own assessment of his medical condition in his first draft statement that was placed before the court.

80. I now turn to my view of Mr. Prosser's evidence. Mr. Prosser has admitted a most serious lie to his solicitor which goes to the heart of this application, so I cannot say that I regard him as either as a truthful person or a truthful witness. In answering questions he was often evasive and unhelpful. Whilst I would be reluctant to rely on much of what he said without corroboration, I remind myself that one should not assume that because a witness has been dishonest in one respect that he is dishonest in all that he says: life is more complex than that.

81. There were striking examples, however, of Mr. Prosser's untruthfulness in evidence, for example, where he answered two questions by saying that Mr. Barham had not financed his legal expenses before admitting that he had when I intervened. I did not accept Mr. Prosser's attempts to excuse his conduct by saying that he thought, when he was told by the solicitors undertaking the conveyancing that the sale could go ahead, that everything was OK and the freezing injunction had been sorted out. I did not accept his evidence that he was confused or did not know what he was doing in relation to the steps he took in relation to the proceeds of sale. The steps that he personally took to speed the money to Hong Kong and the lie that he told his solicitor persuade me that Mr. Prosser knew exactly what he was doing. It is perhaps sufficient to cite just three lines

from his evidence on 25th November where he said:

> *"(Q) Just so I understand your evidence, until the 19th April you believed that the money was going to have to go into Maddersons Solicitors?*
> *(A) Yes."*

82. The fact of the matter is that Mr. Prosser deliberately delayed telling Mr. Edwards that he had completed the sale and disposed of the money which he knew full well he was not permitted to do under the terms of the freezing injunction with which Mr. Edwards was dealing on his behalf. I heard evidence also from Mr. Edwards much of which I accepted although not in every respect. Mr. Edwards took an indulgent view of his client, as he was entitled to do as his solicitor, and was keen to offer explanations for his conduct in mitigation, at least, of what had occurred.

83. In the result, however, I found great assistance from Mr. Edward's careful file notes which did not in any way seek to conceal the position and were, if I may say so, commendable examples of their kind. It would be quite wrong for Mr. Edwards to suggest that he was incompetent as he tried to do in order to excuse his client. I have seen no evidence of any such incompetence and it seems to me that Mr. Edwards has represented his client carefully and competently throughout.

84. I do not accept Mr. Prosser's explanation that there is any relevance in the fact that he sold the property because he did not wish to let down the 91-year old man who wished to move into it. That may well be the reason why he was keen to go ahead with the sale, but it has no relevance whatsoever to how he dealt with the proceeds.

85. It seems to me that the explanation for Mr. Prosser's conduct is really quite clear. Put bluntly, he could not believe his luck when his solicitor called to say that he could have the proceeds of sale and at that point, or very shortly thereafter, he resolved to get the money offshore and out of the reach of his brother at the greatest possible speed. Mr. Prosser is not a sophisticated man in matters of finance but he has run a business for much of his life. I am quite sure that he needed help to get the money out of the country and I am sure that he received it. It is mostly likely on the exiguous evidence that I have heard that he received that help from Mr. Barham rather than from Mr. Khan. But precisely what happened is not clear at all. I shall return to this question when I come to deal with the issues in due course.

86. I turn now to deal with the legal questions that have been raised by Mr. McIlroy on Mr. Prosser's behalf.

**Issue 1: does a Consent Order need to be served prior to being enforced by committal?**

87. It had been suggested by Mr. Guy Tritton that a Consent Order , like an undertaking, did not need to be served before it was enforced. The authority for the proposition that an undertaking does not need to be served prior to being enforced is contained in the well-known case of Hussain v. Hussain [1986] Fam 134 where Sir John Donaldson, MR explained why it is that when a person gives an undertaking to the court, rather than submits to an order, it is not necessary for that undertaking to be served upon him before enforcement proceedings can be taken. I do not need to read in detail from Hussain v. Hussain but the passages of Sir John Donaldson MR's judgment at page 140 repay consideration.

88. It is now conceded that a Consent Order is different from an undertaking and it is also conceded that a Consent Order does need to be served in accordance with the rules in order to be enforced. But Mr. Tritton still submits that the true distinction is between something that is volunteered and something that is imposed and that I should therefore take this into account when deciding whether to waive the strict requirements of Order 45 rule 7 . That said, there is no authority to the effect that a Consent Order can be enforced without regard to the provisions of Order 45 and I am entirely satisfied that Order 45 applies to Consent Orders of the kind in issue in this case. I do accept, however, as Mr. Tritton has submitted, that the question of whether the discretion should be exercised under Order 45 rule7(7) may be affected by the fact that there is a Consent Order rather than an order which was made without agreement.

**Issue 2: if so, does the court have jurisdiction to dispense with service of this Consent Order?**

89. It has been suggested in many cases over the years that the court does not have the power to dispense with the strict requirements of Order 45 rule 7 in cases where the order is mandatory as opposed to negative.

Indeed it will be noticed that there was an inconsistency in the notes to the CPR (which I set out above) notwithstanding the decision in Gill v. Darroch which was referred to twice and negated the first statement of the law.

90. Blair J has recently reviewed the authorities in a careful judgment in the case of Munib Masri v. Consolidated Contractors International Company SAL and Others [2010] EWHC 2458 (Comm) . He distilled the authorities which he set out in detail and elaborated the following principles as regards the committal of directors or other officers of companies in the situation in issue in that case. The distillation, nonetheless, applies in cases of personal committal as well, particularly in paragraphs 40(8) to (11) which I cite as follows:

> "(8) However the case law establishes that the power of dispensation is not limited to the circumstances dealt with in r.7(6). By r.7(7), the court may dispense with service of a copy of an order if it thinks it just to do so. This power is general and is exercisable as regards mandatory orders as well as prohibitory orders ( Davy International Ltd v Tazzyman [1997] 1 WLR 1256 , Morritt LJ)."
>
> (9) Since the court has power to dispense with service of the order, it has power to proceed to consider a proper notice of application to commit notwithstanding the absence of a penal notice ( Jolly v Hull [2002] 2 FLR 69, CA , at p. 75C, Judge LJ, Knowlden v Tehrani [2008] EWHC 3636 at [13], Lewison J).
>
> (10) The modern approach is that such discretion must be exercised in a way which in all the circumstances best reflects the requirements of justice ( Nicholls v Nicholls [1997] 1 WRL 314 at 326, Lord Woolf MR, Bell v Tuohy [2002] 1 WLR 2703 at [47], Neuberger J). This is reflected in paragraph 10 of the Practice Direction to RSC O.52, by which 'the Court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect'.
>
> (11) In principle however the jurisdiction should not be exercised too readily, lest what should be a dispensing power for use in exceptional cases may gradually undermine the express requirements of the rule" ( Jolly v Hull , ibid, p.75D, Judge LJ).

91. In the case of Gill v. Darroch (to which I have already referred and which is mentioned in the CPR ) I had to deal with the question of whether the court could dispense with the requirement to put a penal notice on the front page of an order where the order was a positive not a negative one. I too held that such jurisdiction existed having reviewed the authorities which were extensively cited to me. The case of Benson v. Richards [2002] EWCA Civ 1402 was not cited to me in Gill but it reinforces what I held and adds much to the debate. I cite paragraphs 40 to 41 from the judgment of the court delivered by Carnwath LJ as follows:

> "40. As we have noted, the Judge took a limited view of her discretion to dispense with the requirement for service before the time fixed for compliance. With respect to her, we think this was too narrow a view of the wide discretion conferred by paragraph (7). Unfortunately, the Judge's attention does not seem to have been drawn to a decision of this court ( Davy International -v- Tazzyman [1997] 1 WLR 1256 ), which makes quite clear the "unfettered" nature of the discretion conferred by that paragraph, even where it is exercised 'retrospectively'."
>
> 41. No doubt, the Court must be careful before concluding that it is 'just' to dispense with service, in a case not covered by the specific rules of sub-section (6). However, when considering the impact of the various orders, the Court is entitled to have regard to the realities of the matter. Subject to one point of detail, to which we shall come, all these orders were designed to achieve a single purpose namely the removal of the fence erected as long ago as 1995. To that extent it is wholly artificial to talk of 'retrospectively' waiving the requirements for service in relation to the orders of July 2001. The power to fix a new time for compliance with a mandatory order (see RSC Ord 45 r 6 ) is intended to assist the enforcing claimant, not to put a procedural minefield in his way. There was no injustice to Miss Richards in proceeding on the basis that these later orders were simply reinforcing and continuing the effect of the order granted on 8th May 1998, and in dispensing with the technical lapses of service along the way.

As the Judge found, there was no doubt that at all times she knew perfectly well what was involved and what its consequences were. Any other view is an encouragement, as this case shows, for a persistent offender to use technicalities to defeat the purpose of the orders."

92. In my judgment there is power to dispense with service of this order and to make an order for committal notwithstanding the fact that the order was not served with a penal notice endorsed on its face. I shall turn, in due course, to consider whether it is just to waive the requirements in line with the authorities that I have cited.

**Issue 3: does section 4 of the Debtors Act prevent the order being enforced by committal unless its conditions are satisfied?**

93. Section 4 of the Debtors Act 1869 provides as follows:

*"With the exceptions herein-after mentioned, no person shall ... be arrested or imprisoned for making default in payment of a sum of money.*
*There shall be excepted from the operation of the above enactment:*

*...*
*(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control ...*

*Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."*

94. It is now common ground that the proviso limiting imprisonment to one year would not apply here since none of the six exceptions apply in this case (as is also common ground). In the circumstances, therefore, the only question that was argued before me and which I have to decide is whether the first sentence of section 4 prevents Mr. Prosser being committed for his breach of the 10th March order.

95. There are three primary authorities to which I have been referred which bear upon this question. First, in Bates v. Bates [1888] 14 Probate Division 17 the Court of Appeal held in a wife's petition for judicial separation where the husband was ordered to pay a sum of money into court as security for her costs that the order was not "default in payment of a sum of money within section 4 of the Debtors Act and that the husband was therefore liable to attachment for disobeying the order of the court". It will be noted in passing that the remedy of attachment has now been abolished and committal is the only option these days. Cotton LJ gave the leading judgment of the court and it is important to understand what precisely he was deciding to set out his judgment at a little length. It can be seen, however, from the first part of the report that the order that had been made by Butt J was that the husband should

"within the same time pay into court £40 estimated by the Registrar as sufficient to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause or give a bond under the hand and seal of the respondent and of two sufficient coherent sureties for £80 for payment of the costs of the petitioner not exceeding the sum of £40".

Cotton LJ said this:

"The attachment in this case was ordered for non payment by the appellant to the solicitor of the petitioner of the sum of £41.3.5d for taxed costs and for not paying into court a sum of £40 for estimated costs of the hearing of the cause or giving a bond to secure that amount. It was conceded by the counsel for the petitioner that the first part of the order could not be supported. It must therefore be varied in that respect. Then came the question whether the order was right as to the other part which directed the attachment to issue for default in lodging £40 in court or giving a bond for £80. It was admitted that this part of the order was in accordance with the practice of the Divorce Court and that its regularity was expressly declared in Lynch v. Lynch .

> But it was said that it was in violation of the fourth section of the Debtors Act which enacted that no person should be imprisoned for making default in payment of a sum of money with certain exceptions which do not apply to the present case. In my opinion the order for attachment was not in violation of the Debtors Act because it was not for default in payment of a sum of money within the meaning of that section. The object of the Act was to prevent the imprisonment of persons for non payment of ordinary debts. No doubt the words used in the Act are very wide, but we must consider what was really meant by 'the payment of a sum of money'. This order was not for the payment of a sum of money to the respondent, nor was it simply an order for the appellant to pay a sum of money into court. But there was an alternative: he was either to pay the money or to give a bond. It was argued that the mention of a bond was only subsidiary to the order for the payment of money but that the order was in effect simply an order to pay the money. I do not take that view. If the appellant had given the bond he would have complied with the order. The bond might have produced nothing, but the order would have been complied with. Even if the appellant was not able to pay the money, he might have given the bond. It must have been mere wilfulness on his part which prevented him from doing so. The order was an order to give security and, as such, was not within the fourth section of the Debtors Act and in my opinion the court was quite competent to order the attachment to issue ..."

96. Lindley LJ gave a short judgment as follows:

> "I am of the same opinion. The question turns upon the words of the fourth section of the Debtors Act . It is said that the appellant is within the protection of the Act because he has made default in payment of a sum of money. What do the words 'payment of money' in this section mean? In my opinion they do not mean depositing a sum of money in court to abide an order to be subsequently made. If the appellant has been ordered to pay the money to the receiver of the court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here. He is to deposit the money in court or to give security for it. That is not within the meaning of the words of the Act therefore the appellant is liable to be arrested for contempt of court and for not having complied with the order. The latter part of the order appealed from is right and must be affirmed. The former part appears to have been made by an oversight and the order must be varied in that respect."

Bowen LJ said: "I am of the same opinion.

97. There has been much debate in argument as to whether Cotton LJ and Lindley LJ were actually in agreement or not. It seems to me that they were pretty well in agreement notwithstanding a dictum in the later case of Graham v. Graham [1992] 2FLR 406 from Purchas LJ indicating that the reasons they gave were rather different for their decision. But whether or not they agreed does not seem to matter to me in this case since the order that was made here was not an order for the payment of money into court, it was not an order for the payment of money to the claimant, it was an order that the defendant should give instructions to his solicitors to pay the proceeds of sale into what was effectively an escrow account in the name of the claimant's solicitors. Effectively the defendant was being ordered to give security for the claim by giving those instructions to his solicitors just as the husband in Bates v. Bates was being ordered to give security either by the payment of a sum of money or by the putting up of a bond.

98. Mr. McIlroy, however, has relied upon the case of Farrant v. Farrant [1957] P 188 as demonstrating that what I have just said is not justified. In Farrant v. Farrant which was a case at first instance before Sachs J (as he then was) the learned judge had to consider whether a husband who had been ordered to pay school fees could be committed in the light of section 4 . The judge said this at pages 190 to 191:

> "Of the various cases which have been decided on particular points relating to the above section, it is to be noted that attachment cannot lie in respect of an order for costs awarded by this court (see Leevis v. Leevis per Hill J) but that, on the other hand, in order to give security for costs can be the subject of an attachment' see Bates v. Bates where emphasis was laid on the fact that the order related also to the giving of the bond ... The position today is that the wife seeks to employ a procedure of a penal nature which impinges on the liberty of the subject and unless therefore she can strictly establish that she is entitled to avail herself of that procedure, her application must fail."

99. It does not seem to me that anything said by Sachs J is doubting or indeed distinguishing the decision of the Court of Appeal in Bates v. Bates nor, since it did relate directly to the payment of the sum, does it have any bearing on the matters which I have to decide.

100. The third and final case to which I should refer is Graham v. Graham [1992] 2 FLR 406 which was again a matrimonial case which, as Mr. McIlroy points out, concerned section 5 of the Debtors Act 1869 rather than section 4 of the Debtors Act 1869 . Purchas LJ in the Court of Appeal did, however, deal with section 4 of the Debtors Act in an admittedly obiter section of his judgment. I do not propose to set out the judgment at pages 414 to 415 in detail. What Purchas LJ did, however, was to set out parts of Cotton LJ's judgment (which I have already cited) and Lindley LJ's judgment and said this about them as follows:

> "Reading into that judgment [that of Cotton LJ] it does appear that had there not been an alternative open to the contemnor to give a bond, then Cotton LJ would have held that the order for the payment of a sum into court was payment of a sum of money falling within section 4 of the Debtors Act , but Lindley LJ appears to have taken a different view ..."

101. He continued at page 413E by saying that if he were forced to choose between the reasoning of the Lords Justices he would prefer the reasoning of Lindley LJ and would have been prepared to base his judgment on the proposition that to order a litigant to bring money into court as security for the future determination of the liability to pay is not an order for the payment of a sum of money falling within section 4 of the Debtors Act .

102. It seems to me that in reality, as I have said, there was probably very little between the two Lords Justices in Bates v. Bates . Both of them were saying in effect that where there is an order for the payment of money or the giving of security, but not the payment of an ordinary debt and not the payment of money directly to the claimant, then section 4 of the Debtors Act is not engaged. As it seems to me, that is the ratio of Bates v. Bates which I must follow and nothing that Purchas LJ says in Graham v. Graham casts any doubt whatever upon it.

103. For the reasons then that I have shortly tried to give, I hold that section 4 of the Debtors Act does not apply to the order that was made in this case. In addition, the proviso to section 4 does not apply. This was an order to give instructions to solicitors to place money in a deposit account when they arose by way of proceeds of sale from the sale of the property and the Debtors Act has no application and any breach of the order can, as a matter of law, be enforced, in my judgment, by committal.

**Issue 4: should the court dispense with the service of the order on the facts of this case?**

104. I need now to consider whether to exercise my discretion bearing in mind the strictures in the authorities that I have referred to and the gravity of the proceedings in which I am engaged, to dispense with service and with the need for a penal notice endorsed on the face of the order. There is no doubt that at the time of the contempt, that is at the time of the breach of the order, Mr. Prosser had not been served with a copy of the order endorsed with a penal notice. Indeed, the only order that had been served had been served on his solicitors and had been served without any penal notice at all in any part of the order. Only after the contempt had happened was he personally served with a copy of the order endorsed with the penal notice as I have already indicated. That, of course, was too late for compliance with Order 45 rule 7 and leads therefore to the need for me to consider the exercise of my discretion to dispense with service.

105. In my judgment the court should have regard to the realities of this case. There are, of course, some similarities between an undertaking and a Consent Order but what needs to be considered, first and foremost, in a case of this kind, is whether the defendant understood the order and understood what he should and should not do thereunder and whether its terms and effects were properly brought to his attention so that he knew that if he failed to comply with it, he would be defying the order of the court and liable to some penalty in that regard. It would only be just to dispense with service and to dispense with the requirement for a penal notice if the evidence of that knowledge was very clear. As has been made clear in a number of authorities, these requirements are made for a good purpose: because it is desirable that orders should always be served on a person who is required to do something under an order or required to abstain from doing something under an order and it is extremely important that the consequences of non-compliance should be drawn specifically to their attention.

106. I have, however, already held that Mr. Prosser was fully aware of the terms of the order. That is clear from Mr. Edwards' file note of 15th March 2010. I do not accept Mr. Edwards' latterly expressed concern that he may have given Mr. Prosser the impression that the order simply prevented a sale rather than provided for the proceeds of sale to go into Maddersons' account. Put shortly, in my judgment, Mr. Prosser was not confused. Mr. Prosser was fully aware of what was going on and he knew very well that he was obliged by this order to pay the proceeds of sale of the property into an account with Maddersons. He could not, as I have said before, in my judgment, believe his luck when he received a phone call from the assistant at Ewart Price who said that he could have the money.

107. In this situation, therefore, was he entitled nonetheless to have the order endorsed with a penal notice served upon him personally before contempt proceedings are brought? Mr. Edwards rightly said that he would have taken Mr. Prosser through the consequences of breach had there been a penal notice and he did not do so. But I have no doubt that Mr. Prosser understood that breaching the order was a serious matter. He took the trouble to lie to his own solicitor about what he was doing and he took the trouble hurriedly to dispatch money overseas which he told me was something he had never - in 81 years - done before. The question here, therefore, is not so much about dispensation of service (because it was a Consent Order of which Mr. Prosser was fully aware as I have held and as he accepts) but whether the service of the order with a penal notice should be dispensed with?

108. I have had some hesitation about this and I have recently reviewed the extensive authorities to which I was referred in Gill v. Darroch . Ultimately, however, I have reached the conclusion that it is just and appropriate to dispense with service of the order in the circumstances of this case. It is right to dispense with service of the order and right to dispense with the need for the endorsement of a penal notice. I have already effectively given the reasons. This was a Consent Order . Mr. Prosser had it explained to him in full detail. Mr. Prosser fully understood it and he was not sufficiently naÃ¯ve and did not even suggest that he thought that he could flout such an order with impunity or that a breach of the order would not have very serious consequences indeed. None of his evidence was directed to that aspect of the matter and I do not believe that he could have truthfully said anything to that effect.

109. In the result, although this is no part of my reasoning as to the requirements of Order 45 rule 7 , Mr. Prosser has, as I have already indicated, deliberately flouted the order in circumstances to which I shall come in a moment. It seems to me, though, having considered and weighed up the justice of the case, that it is appropriate to waive the strict requirements for service in the unusual circumstances of Mr. Prosser's case and I do so.

**Issue 5: is the defendant in contempt of court?**

110. It is clear from what I have said that Mr. Prosser has been guilty of a serious contempt of court. I find that contempt proved beyond reasonable doubt. He deliberately failed to give Ewart Price instructions to place the proceeds of sale of the property in the client account as he had agreed to do in agreeing to the 10th March Consent Order .

**Issue 6: if so, what facts are proved concerning the contempt?**

111. This, of course, is now a very important issue. I have to consider the four questions that I have set out earlier and to which I shall come in a moment. My consideration of these questions turns, to a large extent, on my assessment of Mr. Prosser's evidence about which I have already given an introduction. It seems to me that it is proved beyond reasonable doubt that Mr. Prosser knew precisely what he was doing, that he knew he was breaching the court order and intended in sending the money overseas to defeat his brother's claims if he possibly could. But that is not the end of the matter. I have then to consider whether Mr. Prosser could now get the money back.

112. Mr. Tritton has submitted that Mr. Prosser has put forward a false story and pinned his colours to the mast of that false story and because it is now proved that no phone call was made to Mr. Khan on the number 0208 407, I should not speculate on the events that may have happened. But it seems to me that this submission cannot be conclusive. It is true that there was no phone call to Mr. Khan. It is therefore true that there are some parts of the story about Mr. Khan which are proved beyond reasonable doubt to be false. But it does

not follow that Mr. Prosser has not in some way been duped and even less does it follow that Mr. Prosser can get the money back. In my view the submission made by Mr. Tritton was effectively a non sequitur. In reality the facts that Mr. Tritton or the claimant have established do not establish beyond reasonable doubt that Mr. Prosser can now get the money back. In the circumstances, therefore, what I have concluded is that I have not been told the full story of what happened on the long weekend of the 15th to 20th April 2010. I am sure that Mr. Prosser was very reluctant to involve the police. I cannot say whether that was because he feared being charged with wasting police time or perverting the course of justice or for some other reason. But that does not really matter. Mr. Prosser knew that the story he was telling about Mr. Khan was not the whole story and may not have been a true story at all and he will have known that, even if there may have been some germ of truth in it which is now impossible to discern.

113. In the end, what precisely happened does not matter for the purposes of this hearing. I am quite sure that Mr. Prosser did what he did deliberately. He sent the money away to frustrate his brother's claims. I cannot say whether he can now get it back. He may be able to, but I have given him two adjournment opportunities over some months and made it very clear that he should purge his contempt if he could and he has not done so. This affects the way in which I should approach sentencing.

114. I should just say this about Mr. Tritton's submissions that Mr. Prosser may be the kind of man who regards it as worthwhile to serve a prison sentence in order to get away with £450,000, a very large sum of money, and in effect his entire life savings. It is impossible for me to form a view about that. What I have to focus on is the four questions which I dealt with earlier. I will deal with those each in turn.

115. As regards the first I find that it has been proved that Mr. Prosser deliberately paid the money away. I am not in any way persuaded, as I have said, that he was confused or did not know what he was doing or misled by either of his solicitors' firms.

116. I find also that it has been proved that Mr. Prosser paid the money away in the full knowledge of the fact that what he was doing was in breach of the court order. Again, I am entirely satisfied that Mr. Edwards competently and appropriately explained the court order to him in the way that his file note establishes beyond any reasonable doubt.

117. As to the third and fourth questions, however, it seems to me that I am forced to conclude that it has not been proved beyond reasonable doubt that the story about Mr. Prosser being duped by Mr. Khan is a complete fabrication. Likewise, it has not been proved beyond reasonable doubt that Mr. Prosser is still in control of the money so as to be able to purge his contempt.

118. I should elaborate a little on these findings. I find the whole story about Mr. Khan and "Karney" to be incredible and surprising, but I do not think that Mr. Prosser could have put the money offshore without help and I cannot discount the possibility that whoever helped him has now in fact duped him. Moreover, I strongly suspect that Mr. Barham was involved. There was evidence that Mr. Barham has spent some time in prison, possibly for robbery. He is clearly close to Mr. Prosser and Mr. Edwards told me that he has underwritten his legal fees in this case or at least on this application. There was clear evidence that Mr. Prosser and Mr. Barham were in close telephonic contact at the relevant time. It seems to me that Mr. Barham may have underwritten the legal fees because he feels guilty about having got Mr. Prosser into something as serious as this contempt. But I do not know any of this; I only suspect it. What I know is that Mr. Prosser has not told the truth. The story about Mr. Khan is either incomplete or wholly fabricated, but I cannot with certainty say which.

119. I have already taken into account in reaching these findings all the matters already stated including the absence of a call to Mr. Khan from any of Mr. Prosser's phones on the dates alleged; the police's finding that there was no crime; the reluctance to report the matter to the police or the banks; and the opportunities that I have given to Mr. Prosser to purge his contempt. But with all that, I cannot say beyond reasonable doubt that Mr. Prosser still has the ability to get this money back. He may very well have that ability but equally he may not. I am left in doubt and I shall consider the appropriate penalty allowing Mr. Prosser the benefit of that doubt.

**Issue 7: how should the defendant's contempt be punished?**

120. The Court of Appeal in Hale v. Tanner [2000] 1 WLR 2377 identified two objectives in sentencing for contempt: first, to mark the court's disapproval of the disobedience to its order; and, secondly, to secure compliance with that order in the future. The appellant in that case breached a non molestation order against his former cohabitee. He was given a six months' suspended sentence. The Court of Appeal allowed the appeal and substituted a sentence of 28 days. Hale LJ (as she then was) said the following at page 2380:

> "24. Furthermore, I would not wish to suggest that there should be any general principle that the statutory provisions relating to sentencing in ordinary criminal cases should be applied to sentencing for contempt. The circumstances surrounding contempt cases are much more various and the objectives underlying the court's actions are also much more various. There are, however, some points which it may be worth making.
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> 25. In making those points I would wish to emphasise that I do so only in the context of family cases. Family cases, it has long been recognised, raise different considerations from those elsewhere in the civil law. The two most obvious are the heightened emotional tensions that arise between family members and often the need for those family members to continue to be in contact with one another because they have children together or the like. Those two factors make the task of the court, in dealing with these issues, quite different from the task when dealing with commercial disputes or other types of case in which sometimes, in fact rarely, sanctions have to be imposed for contempt of court.
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> 26. Having said that, firstly, these cases have to come before the court on an application to commit. That is the only procedure which is available. Not surprisingly, therefore, the court is directing its mind to whether or not committal to prison is the appropriate order. But it does not follow from that that imprisonment is to be regarded as the automatic consequence of the breach of an order. Clearly it is not. There is, however, no principle that imprisonment is not to be imposed at the first occasion: see Thorpe v Thorpe [1998] 2 FLR 127 , a decision of this court. Nevertheless, it is a common practice, and usually appropriate in view of the sensitivity of the circumstances of these cases, to take some other course on the first occasion.
>
> 27. Secondly, there is the difficulty, as Mr Brett has pointed out, that the alternatives are limited. The full range of sentencing options is not available for contempt of court. Nevertheless, there is a range of things that the court can consider. It may do nothing, make no order. It may adjourn, and in a case where the alleged contemnor has not attended court, that may be an appropriate course to take, although I would not say so in every case. It depends on the reasons that may be thought to lie behind the non-attendance. There is a power to fine. There is a power of requisition of assets and there are mental health orders. All of those may, in an appropriate case, need consideration, particularly in a case where the court has not found any actual violence proved.
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> 28. Thirdly, if imprisonment is appropriate, the length of the committal should be decided without reference to whether or not it is to be suspended. A longer period of committal is not justified because its sting is removed by virtue of its suspension.
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> 29. Fourthly, the length of the committal has to depend upon the court's objectives. There are two objectives always in contempt of court proceedings. One is to mark the court's disapproval of the disobedience to its order. The other is to secure compliance with that order in the future. Thus, the seriousness of what has taken place is to be viewed in that light as well as for its own intrinsic gravity.
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> 30. Fifthly, the length of the committal has to bear some reasonable relationship to the maximum of two years which is available.
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> 31. Sixthly, suspension is possible in a much wider range of circumstances than it is in criminal cases. It does not have to be the exceptional case. Indeed, it is usually the first way of attempting to secure compliance with the court's order.

> 32. Seventhly, the length of the suspension requires separate consideration, although it is often appropriate for it to be linked to continued compliance with the order underlying the committal."

121. Whilst Hale LJ did say that her guidance was only to be applied in Family cases, it seems to me that some of it is applicable by analogy in a case of this kind as is made clear by the other authorities to which I now refer. In Crystal Mews v. Metterick [2006] EWHC 3087 (Ch) Lawrence Collins J (as he then was) set out seven factors to be taken into account. The defendant breached a freezing order which was limited to £200 million. He, along with his wife, also breached a separate freezing order limited to £600,000. The husband was committed for eight weeks, his wife was also committed for eight weeks but her sentence was suspended provided she reimbursed money into her account and made regular monthly payments. Lawrence Collins J said this:

> "In contempt cases the object of the penalty is both to punish conduct in defiance of the court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to do (see Lightfoot v Lightfoot [1989] ... Robinson v Robinson [2001] ... Hale v Tanner
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> ...
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> 13. The matters which I may take into account include these. First, whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated."

122. He then held that the breaches of the freezing orders by both defendants were deliberate and in the knowledge of both orders although the money had gone to finance a property which no doubt could have been recovered.

123. The other cases to which I have been referred include the case of In re Barrell Enterprises [1972] 1 WLR 19 where the appellant failed to hand over certain documents in breach of a disclosure order. Brightman J declined to release her after she had served five months of her sentence. The Court of Appeal allowed the appeal saying:

> *"In our view six months is by no means excessive, but (representing as it does the equivalent of nine months' sentence in a criminal court with full remission) it is sufficient."*

124. In Pospischal v. Phillips The Times 20th January 1988 , the appellant had sold and dissipated assets in flagrant defiance of a Mareva injunction. At first instance he was committed to prison for 10 weeks and the Court of Appeal substituted a sentence of six weeks' imprisonment.

125. We see in the case of Hudson v. Hudson the rationale for that decision. I shall come to that case in a moment. Pospischal was the first case that I have referred to after the enactment of the Contempt of Court Act 1981 which imposed a maximum term of two years' imprisonment for a civil contempt of court. In Lightfoot v. Lightfoot [1989] 1 FLR 414 , a case upon which Mr. Tritton placed particular reliance, the husband disobeyed an order to pay money into a joint bank account. He had received £30,000 which he did not pay into the joint account but instead withdrew most of it and said that he had gambled it away. He was committed to prison for 18 months. The Court of Appeal dismissed the appeal and Sir John Donaldson MR at page 416 said this:

> *"The question which then arises is whether the sentence of 18 months' imprisonment was appropriate in the circumstances. As Mr. Brookes has reminded us, each case has to be dealt with on its own facts but it is difficult to see any extenuating circumstances whatever in this case if, as the judge found, knowing of the court order and knowing that the money was to be paid into a joint account pending a decision as to how much should be paid to his wife and how much he should retain for himself, he simply hid it. The judge thought that the appropriate sentence*

*was 18 months' imprisonment. For my part I cannot see that that can possibly be faulted but I would like to say a word about sentences of this sort. Sentences for contempt really fall into two different categories. There is the purely punitive sentence where the contemnor is being punished for a breach of an order which has occurred but which is a once and for all breach. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category. There is a second category which I might describe as a coercive sentence where the contemnor has been ordered to do something and is refusing to do it. Of course a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing. But nevertheless it also has a coercive element. It would be consistent with the previous practice of the courts and give full effect to the modification required by statute if courts considering imposing a two-year sentence when the contemnor was in continuing and wilful breach of court orders. Whilst there might be cases in which such a sentence would be disproportionately severe, any wilful defiance of the court and its orders is necessarily a very serious offence and if the contemnor is aggrieved he has a remedy in his own hands. He can seek his immediate release by ceasing his defiance, complying with the order and thereby purging his contempt."*

126. In Hudson v. Hudson [1995] 2 FLR 72 the husband dissipated £20,000 in breach of an injunction backed by a penal notice that he must not dispose of any part of the severance payment. At first instance the husband was committed to prison for nine months, the judge having found that this was about as bad a case of contempt as one could imagine. The judge found the husband was hoping to get away with it. The judge was not satisfied with his account of where the money had gone. The Court of Appeal dismissed the appeal on the grounds that, per Ward LJ at page 76:

> *"The judge made no error of principle. I cannot see any respect in which he failed to exercise his discretion judicially. I cannot point to any factor to which he did not give sufficient weight and I am not satisfied the sentence is manifestly excessive."*

127. He also referred to Pospischal v. Phillips . He said:

> "We were referred also to Pospischal v. Phillips (unreported) 18th January 1988 . Again it was a Mareva order which the husband had broken but the essential difference there was that he was able to bring the money into court from other sources which would have effected the protection that the order was intended to achieve. His 10 weeks' imprisonment was reduced to six."

128. It can be seen from these cases that the very short sentences tend to be meted out in cases where there has been a breach but it is within the power of the defendant to rectify that breach either by the payment of money or by purging his contempt.

129. I should next refer to the case of Ricardo Fontes which deals with the question of poor health. It is reported at [2005] EWCA Crim 2103. There a 75-year old man in poor health was sentenced to 7Â½ years' imprisonment for importing cocaine. The Court of Appeal allowed the appeal and substituted a sentence of five years. Nelson J said at page 404:

> *"The judge who had and he makes it clear during his sentencing remarks 11 or 12 in mind as the appropriate tariff starting point, must have made a further allowance of either six months or indeed nothing for the further mitigation of old age and poor health depending on which figure he took as his starting figure. Whichever it was, either six months or nothing, it was in our view insufficient to take into account the fact that the appellant was then aged 75 and also in ill health. We, like the judge, have accepted the information that we have been given. There was no medical report before us today either that this appellant suffers from hernias, one of which may well be treated by surgery in accordance with the information we have been given today from the medical authorities at the prison hospital. ... The risk of the appellant becoming ill in prison or indeed so ill that he is unable to return home or indeed even of dying in prison is one which must be taken into account by the court. It seems to us to be right to reflect the age and health in a substantially greater discount than the court has given in spite of the seriousness of this offence. We consider that a sentence of five years would meet the justice of the case in this particular matter ..."*

130. In ABC v. CDE [2010] EWCA Civ 533 the appellant committed five breaches of a freezing order preventing him from disposing of any of his assets up to a value of $4 million and in particular of selling a property in Latvia. At first instance he was given a sentence of 12 months' imprisonment suspended until the conclusion of the substantive proceedings. The Court of Appeal allowed the appeal but only to the extent that it substituted more precise and more complex terms of the suspension.

131. In Lexi Holdings v. Luqman [2010] EWCA Civ 1116 the appellant had committed a number of serious contempts including a breach of a freezing order, disclosure order and passport order. Briggs J in this Division sentenced the appellant to an effective 18 months', six months of which for the breach of the passport order. Stanley Burnton LJ in the Court of Appeal described the judge's judgment as "a careful judgment" and said that he had taken account of all relevant matters and that the court would not interfere with the sentence.

132. I turn, then, to deal with the sentence that is appropriate in this case. There is no doubt that this was a very serious contempt indeed, done as it was deliberately with the intention of taking the money away from his brother's grasp. Indeed, Mr. Prosser may have been successful in that respect. If so, this may be the last effective opportunity to punish the defendant for his breach. As I indicated at the last hearing, Mr. Prosser may in effect have frustrated this action and left his brother with no sensible commercial prospect of pursuing his claims. That said, the purpose of this sentence cannot now be to persuade Mr. Prosser to purge his contempt. I am not satisfied and I have not found it proved as Mr. Prosser's ability to get the money back. It may be that Mr. Prosser cannot get the money back, in which case there would be no purpose in imposing a sentence designed to persuade him to purge his contempt. I therefore put that aspect of the matter out of my mind and have arrived at a sentence based upon the marking of the serious nature of the contempt, the marking of the displeasure of the court at the serious nature of the offence that Mr. Prosser has committed but without taking into account that he may be able to purge his contempt and bring the money back into the jurisdiction.

133. I take into account in fixing a penalty that the order was not served with a penal notice until after the contempt. But since I am in no doubt that the defendant was fully aware of the need to comply with the order and that he was deliberately spiriting the money away in defiance of what he had consented to, this does not much reduce the penalty in my judgment. When I adjourned the matter on 26th November 2010 I said that whether or not Mr. Prosser had been duped was relevant to penalty. I take it seriously into account but I have not found it proved that his being duped was a complete fabrication.

134. I have considered carefully, first, what sentence I would have arrived at had Mr. Prosser been a healthy and younger man and not affected by the infirmity which I have described and by his age. Had he been fit and healthy and neither elderly nor infirm, I would have thought that this was a serious contempt but not as serious as if I had been able to hold beyond reasonable doubt that he could have brought the money back and has wilfully failed to purge his contempt. Since I am uncertain about that, it would not be appropriate to impose on a healthy man a sentence at the top end of the available power of two years. Had Mr. Prosser been fit and healthy then I would have imposed a sentence of 10 months.

135. I have to consider what affect his age and infirmity should have. I take into account specifically the dictum of Nelson J to which I have referred in relation to the effect of his age. I take into account that Mr. Prosser will be more seriously affected by a term of immediate imprisonment than a younger man would be. He does indeed have a number of disorders but many of them are disorders that elderly men commonly suffer from. He is not very mobile but he is able to walk with a stick at a reasonable pace. He does suffer from a measure of incontinence although I am not satisfied that that incontinence prevents me imposing a prison sentence.

136. I do, however, think that the prison sentence of 10 months that I would otherwise have imposed should be substantially reduced taking into account his age. Nonetheless, the court must still mark the gravity of the contempt in this case and it seems to me that I should impose a sentence of immediate imprisonment of five months. I have considered whether there could be any suspension of that order so as to allow him to purge his contempt but, in the circumstances that I have described, that would serve no useful purpose.

137. In the circumstances, therefore, I will order that Mr. Richard Prosser be committed to prison for five months.