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[2022] EWHC 635 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

No. QB-2019-001740

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 3 February 2022

Before:

MASTER DAGNALL

B E T W E E N :

JAMAL HIJAZI

(Via his litigation friend Abdulnaser Youssef)

Claimant/Part 71 Applicant

- and -

STEPHEN YAXLEY-LENNON

(AKA TOMMY ROBINSON)

Defendant/Part 71 Respondent

MR I. HELME (instructed by Burlingtons Legal LLP) appeared on behalf of the Claimant/Part 71 Applicant.

THE DEFENDANT/PART 71 RESPONDENT did not appear and was not represented.

A P P R O V E D J U D G M E N T
(via Hybrid Hearing)

MASTER DAGNALL:

1 This is my judgment in relation to a particular aspect of this matter, as to whether or not the court should now make an order under CPR 71.2 for the judgment debtor, Mr Yaxley-Lennon, to attend court to provide information about their means, and any other matter about which information is needed to enforce the judgment or order. Under sub rule (6) it is provided that the court can make an order that the relevant person:

> "(a) attend court at the time and place specified in the order;
> (b) ... produce at court documents in their control which are described in the order; and
> (c) answer on oath such questions as the court may require."

2 This matter has a history, the application having been issued on 12 January 2021, and it being listed for a hearing before me on 16 March 2021 where I assumed that an initial order for attendance had actually been made. But having heard from counsel for the claimant/judgment creditor and Mr Yaxley-Lennon, the judgment debtor in person, I adjourned the matter and made an order which recited that an order had been previously made for examination and attendance under CPR 71.2 on 12 January 2021 (the order said 2020) and adjourn the oral examination hearing to 28 May 2021. It provided that the provisions of the order, which I thought had been made on 12 January 2021, should continue to apply, including with regards to Mr Yaxley-Lennon attending court and producing certain documents.

3 I also included in that order that, as had been agreed by Mr Yaxley-Lennon, notice of the adjourned hearing, which generally has to be served personally unless the court otherwise

orders under CPR 71.3, should be served on Mr Yaxley-Lennon by email to a particular email address.

4 That order, as I say, adjourned the matter to 28 May 2021. However it was then agreed that that hearing should be adjourned and I made an order on 26 May 2021 adjourning the hearing and giving the judgment creditor a limited period of time to decide whether or not they wished to proceed with the examination order and process. I provided again that the provisions of what I thought was the original examination order should apply and provided again that notice of any further hearing should be served by the creditor upon the debtor by email to the relevant email address. What has happened, as I am satisfied from the affidavit of Dominic Holden of 2 February 2022, is that the claimant/judgment creditor, having restored the matter for this particular date, gave the appropriate notice of the hearing to Mr Yaxley-Lennon by the appropriate email, and thus he has been validly served with notice of this hearing taking place.

5 The initial difficulty which has arisen is that it is unclear as to whether or not an order was ever made under CPR 71.2 for Mr Yaxley-Lennon to attend and to provide information, be examined and provide documents. The judgment creditor is unable to produce a copy of such an order. Looking on the court's electronic documents file I cannot see any reference to such an order having actually been made.

6 To be balanced against that is, firstly, the almost invariable practice of this court when considering an application for a Part 71 order to actually make such an order on the basis that it can be challenged by the judgment debtor as the eventual hearing. The court makes the order on a without notice basis. Secondly, that I must have been provided with some set or bundle of papers for the earlier hearing and it seems to me very surprising if I had made

the orders, which I did make, without having actually seen an examination order. Also thirdly, that counsel, who is not Mr Helme who is appearing before me for the judgment creditor today, and Mr Yaxley-Lennon had agreed a wording for a recital in the orders which I did make which referred themselves to an examination order having been made.

7 Nonetheless, in the particular circumstances of this case and where Mr Yaxley-Lennon has apparently chosen not attend today, and where the remedy insofar as there is one that can be said to be a remedy for - or at least a consequence of – his not complying with an examination order is that the court, in the form of a Master, can only under CPR 71.8 refer the matter to a High Court Judge, and where a High Court Judge might simply regard the matter as being uncertain, it seems to me to be sensible to proceed on the basis that what I should be asking myself today is not as to what are the consequences of non-compliance with an existing CPR 71.2 order. Rather the question for me today is simply whether I should be making such an order either by way of continuance of a previous order or by way of a fresh order, and to proceed on what is effectively a protective basis.

8 Mr Helme, for the judgment creditor, fairly submitted that that was the appropriate thing for me to do and bearing in mind that there is a substantial question, to which I come in a moment, as to whether the making and continued existence of a Part 71 order is appropriate in this particular case, it seems to me that that is the correct procedural way to proceed. I effectively ask myself "should I be making a Part 71 order for Mr Yaxley-Lennon to attend?" Any such order can then be served on him and if he does not attend the next hearing then presumably - although I do not determine this in any way - the CPR 71.8 referral to a High Court Judge to consider whether to make an order for committal to prison will apply.

9 However, I then come on to the second and indeed primary question as to whether a CPR 71 order is appropriate in this case. The difficulty which exists in this case is that following the institution of the proceedings, which were for defamation, and probably following the determination of a preliminary issue in favour of the claimant which resulted in the costs order which was the foundation of the judgment debt, and which is relied upon in relation to this application, Mr Yaxley-Lennon was made bankrupt on his own application, by way of an adjudication under Chapter A1 of Part 9 of the Insolvency Act 1986.

10 That bankruptcy is continuing as I understand it, and, although it seems to me that this is of limited relevance, Mr Yaxley-Lennon has not yet obtained the discharge from the bankruptcy. Initially the official receiver was standing in the place of the trustee in bankruptcy, but in fact the joint trustees in bankruptcy have apparently been appointed, being a Mr Sinclair and a Ms Barclay.

11 As far as the effect of Mr Yaxley-Lennon having been made bankrupt is concerned, in principle under the provisions of the Insolvency Act 1986 that vests all the limited exceptions of his property in the trustees in bankruptcy. Land is slightly more complicated because legal estates remain vested in the bankrupt, although equitable interests vest in the trustee in bankruptcy. Under s.311 of the Insolvency Act the trustee is required to:

> "... take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings)."

12 Under s.285 of the Insolvency Act 1986 it is provided as follows:

> "(1) At any time when proceedings on a bankruptcy application are ongoing or proceedings on a bankruptcy petition are pending or an individual has been made bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
>
> (2) Any court in which proceedings are pending against any individual may, on proof that **[**a bankruptcy application has been made or**]** a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.
>
> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall –
>
> > (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
> > (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.
>
> (6) References in this section to the property or goods of the bankrupt are to any of his property or goods, whether or not comprised in his estate."

13 Section 285(1) gives power in the court to impose a stay on proceedings generally, which includes with regards to "or other legal process," and which Mr Helme accepts includes the CPR Part 71 process. As far as s.285(3) is concerned that prevents a creditor, such as the claimant, in respect of a debt provable in the bankruptcy having any remedy against the property or person of the bankrupt in respect of that debt. Subsection (3)(b) does not strictly apply here because these proceedings were commenced prior to the making of the bankruptcy order itself.

14 Mr Helme accepts that the debt which is the costs order, which is the subject matter of these proceedings, is a debt provable in the bankruptcy. The claimant has in fact obtained various later judgments against Mr Yaxley-Lennon and although those matters are not, strictly

speaking, before me, I think that Mr Helme accepts, and which would be my immediate view in any event, that those judgments likewise are debts which are provable in the bankruptcy.

15 I also bear in mind that, under s.281 of the Insolvency Act 1986, on Mr Yaxley-Lennon's eventual discharge he shall be released from all bankruptcy debts, i.e. debts provable in the bankruptcy, subject to certain exceptions, but where Mr Helme does not, at least at this hearing, seek to argue that any of those exceptions would apply.

16 As far as the effect of these provisions are concerned Mr Helme has taken me through the decision in *Reid v. Price* [2020] EWHC 594, and in particular paras. 15, 16 and 17:

> "15.: "This case has another feature which was not present in *Sloutsker v. Romanova* [2015] EWHC 545 (QB) or Brett Wilson LLP v. Person(s) Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69: the defendant is a bankrupt. A witness statement of the claimant's solicitor, Mr Gir, dated 5 March 2020 informs me that the defendant was made bankrupt on 26 November 2019 (the day before the order of Master Davison). This means that the case engages the following provisions of s.285 of the Insolvency Act 1986:
>
> '285 Restriction on proceedings and remedies
> (1) At any time when … an individual has been made bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
> (2) Any court in which proceedings are pending against any individual may, on proof that … he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.'
>
> 16. These provisions envisage that once a person becomes bankrupt a claim already commenced against them will continue, and execution may be levied against the bankrupt's property or person, unless the Court decides to impose a stay. It is clear that the defendant's Trustee in Bankruptcy is aware of these proceedings. Mr Gir's evidence is that the Trustee has told him that the defendant is not engaging with that process, and has failed to attend three appointments with the Official Receiver to establish her assets and liabilities. There has been

no application by the defendant, the Trustee, or the Official Receiver for any stay of this action.

17. On the evidence and information before me I am satisfied that it is right to proceed, and to hear the trial, on the express condition that the judgment will not, without further order, be enforceable against the defendant otherwise than by proof in the bankruptcy, and that any process of execution is accordingly stayed, until further order.

(1) The requirements of HRA s.12(2) are met, as in my judgment the claimant had taken all practicable steps to notify the defendant of this hearing. The hearing date was identified in a letter of 13 June 2019, sent by recorded delivery and by email. Mr Gir's second statement records that correspondence to the defendant went unanswered in November 2019 and that the same was true when notice of this hearing was given to the defendant by letter and email on 3 March 2020. The contact details used included the email address which the defendant had given the court when giving notice of change in March 2019, and there is no reason to doubt that the mailing address used was correct. I cannot identify any other method that could have been used to make contact with the defendant.

(2) The defendant has made no application or request for an adjournment. She has not explained her absence. She has not communicated with the Court at all. Indeed, the record shows that the defendant has not engaged with these proceedings at any time since March 2019. She did not attend before Master Gidden, when directions were given. She did not attend before Master Davison, when he struck out her Defence and entered judgment against her.

(3) Looking at the matter overall, the bankruptcy may be a partial explanation for the defendant's inactivity. But it cannot fully explain it. The defendant was not bankrupt when the directions hearing came on before Master Gidden. Nor was she bankrupt when the time came to give disclosure and exchange witness statements for trial pursuant to the directions he gave. Looking at the overall position, the inference I draw is that, at some point after service of the Defence, the defendant made a deliberate decision not to engage further with these proceedings, and she has persisted in that attitude, with knowledge that this hearing is going ahead.

(4) Mr Williams accepts, on behalf of the claimant, that any award of damages 'is potentially academic', but invites me to make an award, to bring an end to these

> proceedings and vindicate the claimant's rights. It seems to me that there is no compelling need or reason to impose a stay on these proceedings. The claimant's wish to conclude the proceedings with a decision and order on quantum is a legitimate one. To stay the proceedings now would involve a waste of the time and costs taken up by the claimant and his legal team in preparing for this hearing.
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> (5) Section 285(3)(a) of the 1986 Act provides that after a bankruptcy order is made:-
> 'no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall (a) have any remedy against the property or person of the bankrupt in respect of that debt.'
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> The object of that subsection has been described as 'to prevent one creditor getting his hands on part of the bankrupt's estate to the actual or potential detriment of the general body of creditors': *Heating Electrical Lighting and Piping Limited (in Liquidation) v. Ross* [2012] EWHC 3764 (Ch) [39]. This provision may have the effect of automatically preventing enforcement of this judgment, otherwise than by proof in the bankruptcy. Counsel's argument at the hearing, supplemented by written submissions afterwards, suggests that this judgment will create a debt provable in the bankruptcy: see s.382(1)(b) and (2) of the 1986 Act. But it is also suggested by Mr Williams that 'elements of the judgment may survive the bankruptcy process' by virtue of s.281(5), unless the Court directs otherwise. That is, as I understand it, on the footing that the damages are, to some extent, 'damages in respect of personal injuries …' within the meaning of that sub-section. I do not think these are issues that it would be appropriate for me to determine at this stage. I do not propose to make a direction under s.281(5). I do consider it safest to guard against any risks of unfair prejudice to the defendant or to her creditors by means of the limited stay that I have mentioned."

17 In para.16 Warby J first states that notwithstanding a person becoming bankrupt, a claim commenced against them will continue and execution may be levied against their property or person unless the court decides to impose a stay. At first sight that sentence might seem to suggest that Warby J, as he then was, was saying that as long as the civil proceedings were being commenced prior to the bankruptcy order being made, the bankruptcy did not cause any problems with regards to execution of any eventual judgment against the bankrupt's property. However, Mr Helme did not argue that that is what Warby J was

saying, and it seems to me that Mr Helme was right to do so because not only of the wording of s.285(3) itself, but more particularly because Warby J then considered that wording in para.17(5) of his judgment. He referred to the fact that s.285(3) might have the "effect of automatically preventing enforcement of [this judgment] otherwise than by proof of the bankruptcy." However, Warby J only suggested that that might not be the case if one of the exemptions in s.281 applied, and which as I have already said Mr Helme, at least at this hearing, contending to be the case.

18 Thus the effects of s.285 seem to me to be firstly that, as far as enforcement against the property of the bankrupt is concerned, the effect of the bankruptcy order made by the adjudicator is that the debt upon which the claimant/judgment creditor relies cannot be enforced against that property; or at least not by way of an enforcement process. Secondly, that under s.285(1) the court also has a power to stay any aspect of the civil proceedings, which are before me, and specifically any application under - and for that matter any order made under - CPR Part 71.

19 At first sight that then raises a potential questions as to whether or not a jurisdiction nonetheless exists under CPR Part 71 and, if so, as to whether or not the resulting discretion should be exercised to make, or continue to have applied an examination order in circumstances where the judgment creditor is seeking information, at first sight, to aid enforcement, but also in circumstances where the judgment creditor cannot themselves enforce against Mr Yaxley-Lennon's property, because s.285(3) says that they cannot. Moreover the underlying policy and procedure of the Insolvency Act effectively leaves such matters up to the trustee in bankruptcy.

20 Mr Helme, however, submits firstly that there is no jurisdictional bar in these particular circumstances and, secondly, that in the circumstances of this case this is not a case for a stay to be imposed, but it is a case for a Part 71 order to be made and the process to continue.

21 Mr Yaxley-Lennon, as I have said, is not here to contest such matters himself. It does not seem to me that I should simply adjourn this hearing because of his not appearing, notwithstanding that there is a real doubt as to whether any examination order was ever made. It seems to me that the wordings of my previous orders were that this hearing was going to take place and it was going to consider, as I have set out particularly in both an order and in the email, the question as to whether or not the Part 71 process should continue notwithstanding the bankruptcy. Mr Yaxley-Lennon having been properly served with the notice of hearing, and the relevant orders, seems to me to be fully on notice that I would be considering should Part 71 continue, notwithstanding the bankruptcy question, at this hearing and has, at least apparently, chosen not to attend.

22 It therefore seems to me that at first sight I should just simply continue the hearing and decide the question. Mr Yaxley-Lennon will effectively have an ability, whether under CPR 23.9 or 23.10 or otherwise, to seek to have the hearing relisted or o challenge what has happened if he so wishes. Now, obviously, the court may or may not decide to entertain such an application but that is for another day. It seems to me it would be quite contrary to the court's overriding objective not to seek to decide the question at this point, and where, as I say, Mr Yaxley-Lennon does have a protection available to him under the rules.

23 In relation to these points of jurisdiction and discretion, Mr Helme has taken me to three authorities. The first is the decision of *Sucden Financial Limited v. Fluxo-Cane Overseas*

Limited, Mr M. F. Garcia [2009] EWHC 3555 (QB). The question there was whether or not the invocation of the Part 71 process contravened a provision of an order which provided that there would be "a stay on enforcement." Paragraphs 7 to 14 of that judgment read as follows:

> "7. I also declined to grant a stay of execution of the judgment pending any application for permission to appeal on the basis that SHI was in a position to pay the sums awarded because of the funds that were available to it - namely the $896 million transferred at the direction of Mr Vik in October 2008.
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> 8. When the matter came before the Court of Appeal on an application relating to permission to appeal, Tomlinson LJ said the following at paragraphs 25-26:
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> > '25. … I approach this application on the basis that, as the judge himself put it at paragraph 1455 of his judgment, the transfers out of SHI were done both with a view to depleting SHI's assets and with a view to making it more difficult for Deutsche Bank to seek recovery, should it need to do so. In short, SHI has sought to dissipate its assets in order to avoid paying a judgment which it knew DB would have to seek. There was, as the judge found, "a strong element of impropriety in making those transfers".
> >
> > 26. I have already indicated that I accept it as inherent or implicit in the judge's findings that, as at October 2008, SHI had the right to recover its funds. It has not been asserted that the ability to recover the funds has been lost in consequence of subsequent transactions in the ordinary course of business. It follows that if circumstances have changed such that SHI no longer has the right to recover its funds, that can only be because it has carried out further acts of impropriety with a view to avoidance of payment of the judgment which it anticipated would be rendered against it. I can give little weight to VBI's protestation that "under no circumstances will it return money transferred to it by SHI." Beatrice has not replied directly to SHI's letter of 24 January 2014 quoted above. It has however made clear in litigation in New York that it opposes return of the funds. That is hardly surprising.'
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> 9. He went on to say at paragraph 36 that:

> 'It is right to point out that Mr Vik gave no guarantee for the liabilities of SHI to DB, and that is a point which he is entitled to stress and does stress. However there is no evidence to suggest that Mr Vik is not still the sole owner and director of SHI as he was in 2008. SHI apparently observed no corporate formalities. Given the judge's findings as to the manner in which Mr Vik treated SHI and its assets as his own, it is difficult to think that there can be a more appropriate case in which to take into account that he could, if minded to do so, pay the judgment debt. However, it is not in my judgment necessary to go that far. On the basis on which I approach the case SHI could itself pay the judgment debt into court if Mr Vik chose to procure it to do so. That does not involve Mr Vik funding SHI or paying the judgment debt on its behalf. It involves Mr Vik taking steps to restore to SHI what are rightfully its assets.'

10. Additionally, as appears from other evidence, including the tenth and twelfth witness statements of Mr Hart:

> i) SHI disposed of interests in various private equity investments between December 2008 and April 2011 but nothing is known as to the consideration received for such disposals or the whereabouts of such receipts.
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> ii) SHI claims to have disposed of all its remaining assets pursuant to a Sale Agreement 'as of 26 September 2012' which had, as I said in the Non-Party Costs judgment, a number of unusual features and did not specify the assets sold. The identity of the purchaser was not disclosed and the documents gave rise to justified suspicions on the part of DBAG.

11. The whole history of the proceedings against SHI, Mr Vik's creature company, as set out in the previous judgments I have given, reveals attempts by Mr Vik and Mr Johansson to avoid liability, to deceive the court and to conceal the true state of SHI's financial affairs.

12. There is thus, as DBAG submits, on my findings and those of the Court of Appeal, a basis for saying that SHI has assets which could be used to satisfy the judgment against it, although the location of any such assets is currently unknown. These are the very circumstances for which CPR 71.2 was designed.

13. I should add that, following the service of the order made by Teare J under CPR 71 on Mr Vik on 21 July, the evidence from his current solicitor is that on 28 July 2015 he sold his shares in SHI to a company called Rand AS and ceased to a director the same day. Rand AS had been a director since 2 April 2015. From other evidence before the Court it appears that

> Rand AS was controlled by Hans Eirik Olav, a friend and business associate of Mr Vik who was until June 2015 the chairman of Confirmit and who also had been an officer of other companies associated with Mr Vik. No details of this disposal of the shares have been given by Mr Vik but in a witness statement adduced for the purposes of the Non-Party Costs Order appeal, Mr Vik stated on 23 September that Mr Olav had fallen ill and resigned from Rand AS and that he, Mr Vik had no current association with Rand AS or Mr Olav. Mr Vik said that he now has no control over SHI's documents.
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> 14. DBAG contends that Mr Vik's conduct is all of a piece and that these actions are all intended to impede enforcement of the judgment against SHI. It is hard to come to any other conclusion."

24 Teare J considered as to whether or not the provision of the relevant order was contravened by the institution of the Part 71 process. He held that it was not on the basis that Part 71 did not involve enforcement itself, but was a process anterior to enforcement, being one effectively to enable the judgment creditor to decide what, if anything, in terms of execution or other enforcement steps to take.

25 Mr Helme next referred me to the decision in *W. Nagel (A firm) v. Pluczenik Diamond Company NV & Or*s [2019] EWHC 3126; Case LR 2117, at paras.36 to 37:

> " 36. The note does not, however, appear to apply to CPR 71, which is not an enforcement procedure as such, but a process for obtaining information that will help the judgment debtor decide what the best means of enforcement might be - or, indeed, whether it worth attempting enforcement at all. As Sir Jack Jacob put it ('The Enforcement of Judgment Debts' in The Reform of Civil Procedural Law and Other Essays in Civil Procedure (1982) p. 297):
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> > 'In order to enable a judgment creditor to choose more intelligently and more effectively the appropriate mode of enforcement against a judgment debtor, provision is made for what is called discovery in aid of execution, i.e. the oral examination of the judgment debtor as to his circumstances and in particular what his assets, income and property are and what are his liabilities, so that both

> the judgment creditor and the court can see how he stands and the judgment creditor can decide which method he should employ to enforce the judgment in a fruitful and effective way.'
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> The process assists in choosing a mode of enforcement for the future; it is not enforcement in itself.
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> 37. This remains the correct analysis under the Civil Procedure Rules. In Sucden Financial Ltd v. Fluxo-Cane Overseas Ltd and Garcia [2009] EWHC 3555 (QB), Teare J rejected a submission that 'enforcement' included proceedings under CPR Part 71. He said that an order under CPR 71 'is an order which puts the judgment creditor into a position where he might hereafter be able to enforce the judgment but it does not seem to me to be part and parcel of the process of enforcement' (para.7). A Part 71 order is not 'part and parcel of the process of enforcing a judgment. Rather it is, as I have said, anterior to such process,' (para.8)."

26 Again it seems to me that the judge was holding that Part 71 was not enforcement itself. It was merely something which enabled the judgment creditor to obtain information in order to consider their position, and as to whether or not they wished to engage in some sort of, and if so what sort of, enforcement process.

27 Finally Mr Helme drew my attention to my own decision in *Adare Finance DAC v. (1) Yellowstone Capital Management SA & Anor* [2021] EWHC 1680 (Comm), and in particular what I said at paras.46 to 47:

> "46. It seems to me that I can draw from all of that that Part 71 is a mechanism which is anterior; that is to say, prior to enforcement. It is not enforcement itself. The Part 71 power, which extends to both questions and to the provision of documents, is one which is designed to put the judgment creditor in the fullest position of information as to the judgment debtor's means; that is to say, both assets and income, but also, generally, the judgment debtor's possible ability to pay the debt, and which thus extends to such matters as liabilities, which will impinge upon what is available in terms of property and assets, both now and in the future. It does, of course, extend to both assets and income, and all of which may be the subject of

> various processes of enforcement; such as, in this country, attachment or charging orders over assets, real or personal, but also other types of attachment, such as attachments over sources of income and income itself. The aim of and policy underlying Part 71 is that the judgment creditor obtains full information so that the judgment creditor can take informed decisions about what, if anything, to do, and also has the material which will assist them in doing it. Thus, information as to the existence of an asset will assist both in enabling the judgment creditor to decide whether that asset is worth going for, in terms of launching an enforcement procedure, but will also assist the judgment creditor in terms of the enforcement procedure itself, because the judgment creditor will then have proof of the existence and location of the asset. The judgment creditor may also be able to use the other information for other purposes associated with enforcement.
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> 47. However, I also have to bear in mind two matters. First, that this is all about enforcement, and obtaining information as to means directed towards considerations of enforcement. It should not justify the obtaining of information for other purposes. Secondly, that orders for production of documents are ancillary to this process of obtaining information with regards to enforcement, and the examination itself. In other words, the documents can relate to enforcement itself but also to the process of ascertaining information in order to enable the judgment creditor to decide how (a) they might and also (b) how they should take enforcement steps and otherwise approach enforcement."

28 What I made clear in that judgment, as it seemed to me, is that the effect of the preceding authorities is that Part 71 is effectively an information process enabling the judgment creditor to decide what, if anything, to do and in particular in relation to what, if any, enforcement procedures might be launched. I did say that the judgment creditor might also be able to use the information for other purposes associated with enforcement, but also made clear that the purpose of Part 71 - and therefore the purpose underlying any Part 71 order - is and must be that the information is to be directed towards considerations of enforcement.

29 There is a question that has very much been in my own mind as to whether in circumstances that a judgment creditor cannot use any of the ordinary processes of enforcement in relation

to this judgment debt, because those would amount to remedies being sought against the person or property of the bankrupt judgment debtor - which are prohibited by s.285(3) in the Insolvency Act 1986 - as to whether, firstly, the information was being sought for a legitimate purpose and, secondly, as to whether or not there was any point in the Part 71 process being invoked in circumstances where no enforcement could be initiated by the judgment creditor. That leads on to two questions.

30 Firstly, whether in those circumstances there was a jurisdictional bar; that is to say Part 71 simply could not be used. Secondly, as to whether I should, either by way of a stay or simply refusing a Part 71 order, effectively as a matter of discretion. prevent that route being followed.

31 As far as the aspect of the purpose for which the Part 71 order is being sought, a question arises as to whether that question goes to jurisdiction or to discretion, and it seems to me that in a way it does both. As far as jurisdiction is concerned I accept Mr Helme's submission that the existence of s.285 does not, of itself, as a matter of jurisdiction, prevent Part 71 being invoked in these circumstances. As Mr Helme points out s.285 simply does not say that. Section 285(1) says that the court may impose a stay where effectively the bankruptcy process has been commenced - in this case it has actually reached the stage of an order, albeit made by an adjudicator - but it does not require a stay to be imposed. Section 285(3) only deals with remedies against the property of the bankrupt and I accept Mr Helme's submission that the effect of the judgment in *Sucden*, and for that matter in *Nagle*, is that Part 71 is not the seeking of any remedy against the property or person of the bankrupt. It is simply an information gathering procedure.

32 However, it does seem to me that the question as to whether or not the information is being sought for a legitimate purpose may impact on the question of jurisdiction. But that it does not particularly matter because if the information is not being sought for a legitimate purpose, it seems to me that that would be an excellent reason as to why a discretion should not be exercised. Mr Helme however has submitted that the information is both being sought for a legitimate purpose and should be compelled from Mr Yaxley-Lennon as a matter of discretion for a number of separate, albeit somewhat linked, reasons. It seems to me that I should consider them in turn.

33 The first has two limbs and the first limb is to the effect that no one has sought a stay under s.285(1), in particular neither Mr Yaxley-Lennon nor the trustees in bankruptcy. Rather the trustees have written on 31 January 2022 to state that they do not object to the hearing proceeding, and seemingly also that they do not object to a Part 71 order being made subject to there being no attempt to contend that any costs should be cost of, or expense of, or even provable in the bankruptcy.

34 It seems to me that the fact that nobody has applied for a stay is relevant to a degree insofar as it impacts on s.285(1). But only to a limited extent, because it does not seem to me that opposing a Part 71 order, or a bankrupt opposing the making of a Part 71 order, is something which necessarily requires the bankrupt to seek a stay. The provisions and effect of section 285(1) should, I think, treat Mr Yaxley-Lennon as saying, or at least being able to say, that a Part 71 order is simply either not permissible or is not appropriate. Nonetheless I do bear in mind that no stay has been sought.

35 Secondly, as a second limb, Mr Helme submits that it is important that the trustee in bankruptcy does not object and that this is not a situation where the trustee in bankruptcy is

saying "we are going to obtain the information by another route, and therefore a Part 71 application is unnecessary and irrelevant." Again I bear that in mind. But it seems to me that it is more relevant in terms of being a negative point; in that a particular alternative procedure is not being invoked, where if that alternative procedure had been invoked then that might be regarded as sufficient and so that a Part 71 order would not be appropriate; rather than as positive reason for making a Part 71 order.

36 It seems to me that it is very much a matter for the trustees in bankruptcy as to whether or not they regard it as appropriate or necessary, or even just desirable for the exercise of their statutory functions, that the relevant information should be provided to them. From what I have seen so far they do not seem to regard that as being the appropriate course, but that is very much a matter for them.

37 Secondly Mr Helme refers me to the fact that in a standard form, which accompanies an examination order, questions are asked of the relevant judgment debtor as to whether or not there is any bankruptcy process, and as to whether or not there is any extant bankruptcy order. Mr Helme submits that that demonstrates Part 71 can envisage and is envisaged to be capable of operating in parallel to a bankruptcy order. I am not particularly convinced by that.

38 It seems to me those questions are simply part of an information gathering exercise where the creditor may not know the position about bankruptcy. The creditor may be a litigant in person who has not carried out a bankruptcy search and may not know how to do so. The debtor may also be a litigant in person who may also not know about the possible legal effects of a past bankruptcy in relation to an existing judgment debt. It seems to me that those questions are simply part of an information gathering exercise and the form cannot be

regarded as being some sort of approval by the Civil Procedure Rules Committee of a Part 71 process continuing, notwithstanding the existence of a bankruptcy.

39 Next, Mr Helme points out that the oral examination procedure is simply information gathering and does not involve any findings being made against the defendant. That is entirely correct. It is also limited in particular ways. Firstly, there is a discretion in the court to restrict oppressive questions. Secondly, the Part 71 process does not normally enable a judgment creditor to obtain privileged, and in particular legally professionally privileged material, unlike a trustee in bankruptcy's entitlements under s.311 of the Insolvency Act.

40 It does seem to me that that goes some way towards balancing a concern which existed in my own mind as to whether or not the Part 71 procedure, or its invocation, would simply be regarded as oppressive where the judgment debtor/bankrupt had obligations to provide information to the trustee in bankruptcy in any event. Mr Helme also submitted here that the defendant's financial situation did not materially impact on his ability to participate or risk causing him prejudice. It seems to me that that is right as far as it goes.

41 I could be more concerned perhaps with regards to the question as to whether or not Mr Yaxley-Lennon will be prejudiced in terms of costs, bearing in mind that Mr Helme has indicated that his client is going to be seeking certain costs against Mr Yaxley-Lennon. However, it seems to me that that is a matter for another stage. Either a costs order will be appropriate in these circumstances or it will not. It does not seem to me to be a reason against making a Part 71 order in itself.

42 Mr Helme next submitted, by reference to such cases as *Deutsche Bank AG v. Sebastian and Alexander Vick* [2015] EWHC 2773 that Part 71 is intended to be a summary and straightforward process simply allowing information to be obtained. I am not at all sure as to where that actually goes as such, because Part 71 applications can result in very lengthy hearings depending on the relevant assets, as to which I have little knowledge or information. However, it is, I accept, intended to be a simple question and answer session and a simple provision of certain documents. There is a particular problem with regards to the documents here insofar as, to some extent, it is the trustee in bankruptcy to whom the documents should be provided rather than the judgment creditor. But that can be considered in due course if I continue the process.

43 Mr Helme's next point is the procedure could assist in revealing information about Mr Yaxley-Lennon's assets which would assist the trustee in bankruptcy. Although this links to a matter to which I will come which is of importance, that submission itself gives rise to the immediate questions as to why the trustee in bankruptcy is going to be assisted by this information, and as to why the trustee in bankruptcy is not asking for the information themselves from Mr Yaxley-Lennon. Nonetheless, I do accept as a matter of what happens in practice, that there are occasions where trustees in bankruptcy are reluctant to proceed themselves with an investigation on the basis that they regard a particular investigation and process as being potentially an expensive waste of time of cost, but where they may be more inclined to do so if the creditor can actually produce something of substance to say to them that this is not merely a matter of speculation.

44 It may well also be that trustees in bankruptcy's decisions as to whether to take particular steps are often influenced not only by potential financial rewards if they are successful but also by the question as to whether or not somebody from outside, such as a creditor, is

prepared to fund them to take those steps; and that the taking of those steps might be more likely if a judgment creditor (i) obtained what both the creditor and the trustee(s)| regard as particular material information justifying the taking of the steps, and (ii) is prepared as a result of obtaining that information and is prepared to fund the taking of those steps. Thus for the judgment creditor to seek and obtain the information, especially where the trustees are not prepared to expend the time and cost to do so, may well assist the statutory bankruptcy process and the judgment creditor's ability to obtain payment towards their judgment debt.

45 Mr Helme's next submission was counsel's opportunity to cross-examine the defendant under oath, accompanied by documents, would provide for a more detailed analysis of their assets that might be possible through the normal bankruptcy process. In one sense that is true if the trustee in bankruptcy does not seek to have any examination, or requiring of the production of documents by the debtor under s.312 of the Insolvency Act. However it seems to me, having considered the statutory sections, that the trustee in bankruptcy is actually in a better position to do this, both because of the particular provisions of the statute and because the trustee in bankruptcy is actually entitled to more extensive information that would be produced on a Part 71 application. This is in particular because of the absence, as against the trustees in bankruptcy, of the ability of the judgment debtor to say that documents and information prior to the bankruptcy could be withheld on grounds of legal professional privilege.

46 Mr Helme next submitted that a Part 71 regime is a relatively convenient one. It is certainly straightforward.

47 Mr Helme's next submission was that the production of documents was something which was unique to the Part 71 process. However, sections 312 and 311(1) of the Insolvency Act read as follows:

> "Section 312: Obligation to surrender control to trustee.
>
> (1) The bankrupt shall deliver up to the trustee possession of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession.
> This is without prejudice to the general duties of the bankrupt under section 333 in this Chapter.
>
> (2) If any of the following is in possession of any property, books, papers or other records of which the trustee is required to take possession, namely -
> (a) the official receiver,
> (b) a person who has ceased to be trustee of the bankrupt's estate, or
> (c) a person who has been the supervisor of a voluntary arrangement approved in relation to the bankrupt under Part VIII,
> the official receiver or, as the case may be, that person shall deliver up possession of the property, books, papers or records to the trustee.
>
> (3) Any banker or agent of the bankrupt or any other person who holds any property to the account of, or for, the bankrupt shall pay or deliver to the trustee all property in his possession or under his control which forms part of the bankrupt's estate and which he is not by law entitled to retain as against the bankrupt or trustee.
>
> (4) If any person without reasonable excuse fails to comply with any obligation imposed by this section, he is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he may be subject).
>
> Section 311(1): Acquisition by trustee of control.
>
> The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings)."

It seems to me that those sections made it quite clear that the production of documents was very much part of the bankruptcy process and I do not accept that submission of Mr Helme.

48 Paragraph 7(9) of Mr Helme's skeleton argument has a further reference to the *Adare* case and the importance of Part 71 information being provided so that the judgment creditor can be fully informed and consider all their possible options, as I stated in that judgment. He refers also to the fact that the claimant is a judgment creditor who should in principle be entitled to take steps to have their debt paid. Although the information is important, and all the more so for reasons which I will come to, it does not seem to me that that submission necessarily answers the counter-point that once there is a bankruptcy the Insolvency Act has laid down the procedures by which the bankrupt's property is to be collected in and applied to the costs and expenses of the insolvency, and then to a division amongst the creditors.

49 I have been distinctly concerned as to whether or not Part 71 is an appropriate process - and it is a matter going to both jurisdiction and discretion - in circumstances where there is an existing bankruptcy and where the trustee in bankruptcy, the entity appointed under the statutory process to carry the statutory insolvency process into effect, has full and extensive power to have documents produced to them and to seek for there to be either or both of a public or private examination. At first sight it seems those powers seem to be more extensive than a Part 71 process.

50 I have nonetheless though considered that there are a set of powerful reasons as to why Part 71 both remains available and in fact should be invoked in this particular case.

51 Firstly, there is the point that the trustee in bankruptcy seems to be content for the Part 71 process to proceed and does not seem to be seeking to engage their own process. It seems to

me that some respect ought to be given to the relevant statutory entity's views in those circumstances.

52 Secondly, it seems to me that it is important that the civil proceedings were commenced prior to the bankruptcy and indeed this debt came into existence prior to the bankruptcy, and it is not a situation of the claimant trying in some way or other to take over an existing bankruptcy process. I do bear in mind that against that the proceedings were allowed to be continued partly because of the importance of vindication in the defamation proceedings, but nonetheless this is a pre-bankruptcy debt and process.

53 Thirdly, questions are being raised as to whether or not there might be some attempt to set aside the bankruptcy adjudication on the basis that Mr Yaxley-Lennon was in fact solvent rather than insolvent as he claimed to the adjudicator; and also that, if he ended up providing information which revealed that he had substantial assets, then that would assist the judgment creditor/claimant in deciding to make such an application. It seems to me that that is a possibility which cannot be ruled out and that if such a process was to be undergone then that would effectively remove the s.285 bar on enforcement, and which would thus justify the whole process. It seems to me that there is force in that.

54 Next there is the question of the judgment creditor wishing to be able to provide information to the trustee in bankruptcy and possibly also funding the trustee to take septs, along the lines I have already explained, on the back of whatever results from the Part 71 process. It seems to me again that there is force in that contention in circumstances where the trustee in bankruptcy does not seem to be particularly desirous to go down the process themselves.

55 There is also the jurisdiction and provisions which exist under s.423 and following of the Insolvency Act, in circumstances where there has been a transaction at an undervalue by a

person which has been made for the purpose - and it only needs to be a purpose - of putting assets beyond the reach of a particular claimant or in prejudicing the interests of such a claimant and which includes a person who might in the future make a claim against the person engaging in the transaction. Mr Helme has again submitted that that is a possibility and something which the claimant would very much wish to investigate, having been provided with this Part 71 information.

56 I bear in mind that under s.424(1)(a) where there is a bankruptcy, the ordinary applicant in those circumstances is the trustee. But although they require the leave of the court, it is possible for a victim of the transaction - i.e. somebody whose interests had been prejudiced - to bring such a claim, and which definition could, depending on the circumstances, encompass the claimant judgment creditor here. It seems to me again that this is something in which Part 71 information may be important, where the claimant has something of a free-standing right of their own, and where the trustee in bankruptcy is not seeking the relevant information that - for all the reasons which I have given - it is potentially appropriate for the claimant to do seek it by the Part 71 route.

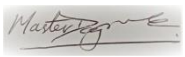
57 All of those various courses, it seems to me, can be regarded as a sort of indirect enforcement of the judgment, and an indirect enforcement of the judgment which both comes potentially within the underlying policy of Part 71 - namely that the judgment creditor should be able to get the information to know what to do - without necessarily infringing the underlying policy of s.285 i.e. that it is for the trustee in bankruptcy to carry out the bankruptcy process of getting in the relevant assets and the dividing them.

58 Although I have found this something of a difficult question, and it seems to me I have not really been assisted by the absence of Mr Yaxley-Lennon, it seems to me that there are

legitimate purposes here which mean that there is no jurisdictional bar to the exercise of the Part 71 jurisdiction, and that in all the circumstances I ought to exercise the resultant discretion.

59 For those reasons I am going to make what is either a continuance of, but in any event is a protective examination order. However, that order has to make quite clear that it is subject to the existing bankruptcy and that it is not to involve, or require Mr Yaxley-Lennon to do anything which is inconsistent with his obligations under the bankruptcy. So, for example, if under s.312 of the Insolvency Act he should be passing documents over to the trustee in bankruptcy, then his obligation, or any obligation to produce them to the court under the Part 71 process, or the judgment creditor, is to be subject to his prior obligations to produce them to the trustee.

60 That then is my judgment and that is what I am determined to do. I have given a somewhat lengthy judgment in relation to this. Firstly because it seems to me to an important point of law. Secondly because Mr Yaxley-Lennon is not here and it seems to me that he should be notified fully of what is the court's reasoning. I am therefore proposing to direct that a note of the judgment (and a transcript if such is sought by the claimant) is to be provided to Mr Yaxley-Lennon under CPR 39.9(5).

Approved by Master Dagnall  18.2.2022

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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