IN THE LEEDS COUNTY COURT — No. C01YM130

Leeds Combined Court Centre
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Tuesday, 4 October 2022

Before:

HIS HONOUR JUDGE GOSNELL

B E T W E E N :

DEBBIE DEB-NATH — Claimant/Respondent

- and -

AJIT DAS — Defendant/Applicant

MS A GEORGIOU (instructed by DWF Law LLP) appeared on behalf of the Applicant.

MR G LEWIS (instructed by Janes Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

JUDGE GOSNELL:

1 This is my judgment in an application made by the applicant, effectively Mr Ajit Das, in proceedings against the respondent, Debbie Deb-Nath. The history of the case is that Ms Deb-Nath was involved in a road traffic accident on 17 May 2013. She was a passenger in a car driven by the applicant Mr Das, so Ms Deb-Nath was the claimant in the original proceedings and Mr Das was the defendant. From now on I am going to refer to them as "applicant" and "respondent".

2 The case proceeded to trial before Recorder McNamara on 23 to 27 November 2020. Judgment was reserved at the end of the trial. A draft judgment was circulated to the parties on 30 March 2021 and judgment was formally handed down on 21 May 2021. I have read the judgment in full.

3 This was a claim which initially was quite substantial, seeking £652,000 in special damages, but the damages which were assessed were £4,953.84. As part of his judgment, the learned recorder found that the claimant had been fundamentally dishonest in a number of material respects and so her claim was dismissed pursuant to section 57.

4 An order was prepared to reflect those decisions, which included an order for costs against the then claimant, the current respondent. The respondent, however, served an appellant's notice seeking permission to appeal the decision and, for reasons which do not now matter, that application for permission did not come before Lavender J until 17 December 2021 when he refused permission on paper. The respondent exercised her right to an oral reconsideration hearing which took place on 23 May 2022, and Lavender J refused permission to appeal.

5 I have dealt earlier today with an application for relief from sanctions and so I do not need to go into much detail about this, but the application for permission to commit was first filed, I think, on 9 July 2021 but was left in abeyance as a consequence of an order of my colleague Judge Saffman, who, on 10 September 2021, made some directions in relation to the contempt proceedings that I have already referred to in my earlier judgment. The important parts are that he adjourned the contempt proceedings until the determination of the appeal and then ordered:

> "The applicant shall, by no later than 21 days after determination of the appeal, notify the court and the respondent in writing as to whether it intends to pursue the application."

And then, secondly:

> "The respondent shall file and serve any further witness statement upon which she intends to rely in respect of the application by no later than 14 days after the receipt of the notice referred to in paragraph 2 above."

That, I am afraid, the parties will have to take this from me, is an unusual order made by HHJ Saffman because I know, because I have seen many of his previous orders, that normally in contempt proceedings he always included provisions in the order giving the notice to the respondent in the contempt proceedings of essential rights, such as the right to

have legal representation, the right not to self-incriminate and the right not to give evidence at all. That was not done in the order, which is unusual. I will return to the relevance of that in a moment.

6 The application for contempt, as I say, was made on 9 July 2021 and it was supported by a witness statement from the solicitor for the applicant, Ms Malone. That was a long witness statement with a number of exhibits and basically set out in considerable detail the history of the case, the judgment of Recorder McNamara and the submission that the respondent had made a number of untruthful comments, either in witness statements or a schedule of loss supported by a statement of truth or in her evidence at trial, and accordingly the court should grant permission for a contempt application to be brought.

7 There has not been much concentration by the advocates today about the test for contempt generally. Now, I do not criticise them for that because there will be other more specific considerations about this case than they had both focussed on. In general terms, on application for permission to make a contempt application, the question for the court is not whether contempt of court has in fact been committed, but whether proceedings should be brought to establish whether it has or not. The two questions cannot wholly be separated. Put shortly, permission should not be granted unless firstly, a strong *prima facie* case has been shown against the alleged contemnor until the court is satisfied that: (a) the public interest requires the proceedings to be brought; (b) the proposed proceedings are proportionate; and (c) the proposed proceedings are in accordance with the overriding objective.

8 Inevitably, determining whether there was a strong *prima facie* case requires the court to have regard to what must be proved before an allegation can succeed. Again, put shortly, in that respect it must be proved that the alleged contemnor knew what she was saying was false and knew that what she was saying was likely to interfere with the course of justice. I have taken that summary from the editors' comment at page 2470 of the **White Book** and it is a section that I have read many times previously.

9 The case put simply by the applicant is that Recorder McNamara's judgment provides ample evidence of the fact that in various respects the respondent provided evidence to the court which was untruthful and which she knew was untruthful because that was what the recorder found. The inference from the submission is that she must have known that in providing untruthful evidence it would affect the course of justice in the sense that she would be awarded more compensation.

10 Standing back from the situation, this is the type of application I have seen many times before. I am familiar with the authorities, particularly the *South Wales* authority, which deal with the need for the public in general to be aware that coming to court and knowingly telling lies may result in adverse consequences, both in the dismissal of the claim and the order of costs and the possible service to have a sentence of imprisonment for a contempt of court. I accept in general terms that this case has been put in what I might regard as a conventional way in that respect. I would also accept in general terms that the judgment of Recorder McNamara provides the appropriate *prima facie* support for the assertions which are made in support of the application.

11 The problem, however, with this application is that there are a number of considerations which are specific to this application which Mr Lewis for the respondent would say should mean that the court should exercise its discretion by refusing permission because it is not in the public interest for what he would describe as a wholly flawed application to be allowed to proceed further.

12 It has been helpful that both counsel have provided written skeleton arguments and I rely on what they both say. There are essentially three considerations which Mr Lewis relies on, although I think probably, if invited to, he could add to those by some others, but in general terms these are the important ones. The first point is that the committal application has been issued without the authorisation of the applicant; secondly, that the committal application has been pursued for an ulterior purpose, namely to put pressure on the respondent in relation to the payment of the costs order; and, thirdly, there is a wholesale failure to comply with the mandatory requirements of CPR part 81.

13 For the applicant, Ms Georgiou realistically concedes that there are problems with the application in particular as to its form, but the thrust of her submissions are that even if there are technical difficulties, it makes no difference at the end of the day in terms of the respondent's rights and the way in which the court is likely to approach the contempt proceedings. So dealing with those three separate points separately, the first point made is that Mr Das has not given authority to the solicitors to issue this application on his behalf. I say first of all that I am satisfied about that because I have examined the various emails which passed between Mr Das and Ms Malone, and Ms Malone and Ms Georgiou at around the time of the dismissal of the appeal.

14 Page 483, Mr Das emails Ms Malone and says:

> "It has been brought to my attention that your client Debbie Deb-Nath has been pursued by my old car insurer dated something in the region of early 2013.
>
> Said he had not been notified of any claims being pursued or given any permission to act on his behalf regarding a claim, could you confirm what the situation is?"

And she replied by saying as follows:

> "The matter proceeded to trial in November 2020 and it was the judge that found Ms Deb-Nath to have been fundamentally dishonest. The insurance company are pursuing their costs which are significant and they are entitled to do."

15 I just pause there because this will become relevant later, that Ms Malone does not mention the committal proceedings. I think it is fair to say that at some later stage Mr Das becomes aware that there are committal proceedings because he sends a specific email, if you like, withdrawing authority. He says, on 19 August:

> "Following on from my previous email, I would like this application withdrawn. I do not agree with it and certainly have not consented to it or given any permission."

So that appears to be straightforward. The applicant's response is that the insurer is entitled under its rights of subrogation to make this application in the name of their insured, and the subrogation rights are set out in paragraph (h) at 424 of the bundle. I will read these in full:

> "If you make a claim, you must be prepared to take any steps we reasonably ask you to take to protect your rights."

I pause there to say I do not think that Mr Das has made a claim. I think that is to cover perhaps if he was making a counterclaim or perhaps if the authority was covering a claimant rather than a defendant.

16 The next part is probably related to defendants:

> "You must also be prepared to allow us to act in your name and take any reasonable steps we feel are necessary to protect your rights. This may mean we defend or settle a claim in your name. If this happens we will pay any costs and expenses involved".

Again, that is a right of indemnity and a right of subrogation provided to the insurance company for the benefit of their insured. However, that relates to claims being made against Mr Das and does not include claims being made in his name of a different nature.

17 I accept the submission made by Mr Lewis that the subrogation rights set out in paragraph (h) of the policy would not authorise the solicitors for the insurance company to issue committal proceedings on behalf of Mr Das. The way it should have been done was an application should have been made to add them as second defendants and that once they were second defendants, they could, as a party, issue the application and pursue the committal proceedings on the same grounds. That has not been done. To be fair to Ms Georgiou, she has said well the court could put it right today, and I accept that in theory I have a discretion whether or not to do that.

18 The second submission is that the application for committal is an abuse of process and the way that is put is that the committal application is not being pursued for the stated aims set out in the statement of Ms Malone, it is being pursued to put pressure on the respondent in relation to the outstanding costs order. The position regarding the costs order is she has been ordered to pay the costs of the whole proceedings. Those costs have not been agreed and they are currently involved in detailed assessment proceedings.

19 I think the high watermark of this application is an unfortunate email which Ms Georgiou sent, no doubt in haste, to her instructing solicitors which was exhibited to the statement of Ms Malone's, not surprisingly. Anyway, what was said was:

> "I am told that the respondent's solicitors will be reaching out in the coming days to try to persuade us not to pursue the committal proceedings possibly with an offer of payment of some kind. You have 21 days from the date of the order following today's hearing to confirm if you want to proceed to committal. We will have to inform the court that we do if only to buy time if the respondent is really going to start paying".

I accept that a fair reading of that email is that there was some sort of causal link between the committal proceedings and a possible offer by the respondent to offer to pay a set sum in relation to the costs of the proceedings, and so I agree there is some sort of concerns there and the other concern is perhaps illustrated by the email that I read out earlier which was where Mr Das asked Ms Malone what the current situation was. She correctly confirmed that the judge had decided that the respondent had been fundamentally dishonest and that they were pursuing her for costs, which they are entitled to do, but the email did not mention the committal proceedings, which may have been an oversight, it may have been intentional, but either way it gives cause for some concern.

20 Ms Georgiou has directly addressed the court today and assured the court that this is not a committal application being pursued for an ulterior motive, that the committal proceedings and the detailed assessment proceedings stand completely separate and are not causally connected with each other. This is not a case of a vindictive litigant; this is a case of an insurance company pursuing a litigant who made a claim which was found to be fundamentally dishonest. I accept that is a submission she is entitled to make.

21 I think it probably would have been more helpful to have a specific witness statement from Ms Malone on this, but what I will say about this part of the application is that I accept that Mr Lewis is entitled to bring these concerns to the court's attention. I do not think it necessarily proves that the application for permission is an abuse of process, but it is something that I can take into account in the round along with other matters before the court.

22 The final issue is a rather technical point concerning the provisions of Part 81 of the Civil Procedure Rules. Under normal circumstances, I have to say that technical points do not tend to do very well in front of me as I am more of a purposive sort of judge who wants to get on with things. However, the one thing I have learnt in my 25 years on the bench is that you do not play fast and loose with the rules on committal applications because the liberty of the subject is at stake, and so my normal practice with contempt applications is to insist that everyone complies with the rules to the letter because it is important that these rules are complied with.

23 The difficulty, I think, for the applicant in this case that is that there are a number of breaches of rules for which there is not really an adequate explanation. I have been taken to CPR 81.3 and there is a debate between both counsel as to which form should be used. You would have thought that when the rules committee were changing the rules they would have made this clear, and sadly they have not. I think they thought that they wanted to cut down on the number of pages in the **White Book** by redrafting Part 81 and not having a Practice Direction. Of course, one of the consequences of that is that the rule has to be crystal clear in order for people to interpret it properly.

24 If one looks at the provisions of 81.4 – and I am going to come to that in a moment – you would think that the new form N600 would be mandatory in committal proceedings because that form contains virtually all of the warnings that are mandatory pursuant to 81.4. Indeed, in the **White Book**, the various forms which are supposedly relevant to Part 81, the N600 is the first one mentioned. If that is the case, therefore, why in 81.3 do the rules say:

> "Contempt applications made in existing High Court or county court proceedings is made by application to part 23 in those proceedings whether or not the application is made against the party to those proceedings".

I think that is confirmed in the notes that the editors to the **White Book** have put forward and so if you look at Part 23, there is only one application notice there mentioned which is N244.

25 Despite what Mr Lewis says about the information which was in the consultation for having the mandatory requirements that there should be a single form mirroring the content, that has been done but it has not been made a mandatory requirement. So my view is the rules are not clear that a party is entitled to issue an application notice under Part 23 because the rules say they can. I do not think it is wise because then you would have to include a schedule in the application notice which complies with 81.4. Whether I am right or not about the necessity of using form N600, in any event it makes no difference because the N244 used by the applicant in this case does not contain the mandatory requirements.

26 Dealing with those requirements and I agree that each of them is missing, the first requirement is in 81.4(1):

> "Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation."

It is accepted in this case that no such contrary direction has been given by the court, and so here we have a very lengthy witness statement from Ms Malone which she has done by witness statement rather than by affidavit or affirmation, so that is in breach of the rules and it is a mandatory requirement.

27 The next provision is that there should be a brief summary of the facts alleged to constitute the contempt set out numerically in chronological order, i.e. particulars of the alleged contempt. This has not been done either. What has happened is that Ms Malone has set out in a long witness statement the ways in which Recorder McNamara identified evidence of the respondent which was untruthful, but what normally happens is – and what I normally insist on before going to a contempt hearing – is for a schedule of breaches to be set out in what I call indictment form, which is essentially the same as it would be in a criminal trial, so the particulars of each of the contempt is set out in terms of what was the document that was filled in, what particular facts were stated there and in what respect it is said that those facts were untruthful. It is also important to identify whether the accusation is being made purely in relation to a document or whether it is being made only at trial or whether it is a combination of the two. So that has not been done.

28 The defendant is entitled to be informed of the right to apply for legal aid which may be available without any means test. That was not done. The defendant is to be informed of his or her entitlement not an obligation to give written and oral evidence in their defence. As I have said, that has not been done. Contrary to his normal then practice, Judge Saffman did not include the normal warnings that he always used to do before October 2020. I suspect that he did not include the warnings because he had been used to seeing form N600 which contains all the warnings.

29 The defendant had to be informed as well of their right to silence; that was not done. There should have been a notice in the prescribed form on the notice of application informing the defendant that the court may punish him by fine or imprisonment or other punishment.

30 The submissions of the applicant about these deficiencies are in effect that the court has the power to waive any procedural defect where there is no real prejudice to the respondent.

That is based upon the decision of Cockerill J in *Deutsche Bank v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm). I accept that in essence that is probably correct, in the sense that before October 2020 there was a specific provision in the practice direction and there is not now, but the court still has the right under rule 3.10 or under the overriding objective to make such an amendment and effectively to forgive a technical breach of the rules where there is no real prejudice to the party affected.

31 There has been a bit of a debate between counsel about where the burden lies. I agree with Mr Lewis on this: it is only if there is no prejudice shown to the respondent that the court should consider exercising their discretion in such a way. In relation to two aspects, it seems to me that they are important issues. One is the failure to advise the respondent that she was entitled to legal aid without means assessment and that is important because, as I understand it, at least she did work for the Department of Employment, or some similar organisation, so she is someone in work and she may not have been aware that she was entitled effectively to free legal aid for a contempt case. It has been submitted that she spent £11,000 on solicitors' fees. I accept that is disputed, so I am not going to find that such a loss has occurred, but what I do find is that until relatively recently she was unaware of that right and it would not be surprising if she prejudiced herself financially by taking advice from other lawyers who have taken on a retainer on a solicitor and own client basis rather than a legal aid basis.

32 The second provision is the fact that she was not told that she had the right to remain silent. Now, she has chosen to serve a very detailed witness statement, dated 2 August, with the benefit of advice from her then solicitors. I get the impression that Mr Lewis perhaps would not have advised her to do that. I accept some force in Ms Georgiou's submission that Ms Deb-Nath, I think, wants to say to the court, if we get to committal proceedings, "I did tell the truth. If I had have said something was inaccurate, it was a mistake and here are the reasons why". If you want to run that type of defence, inevitably you are going to need to give evidence, but I accept that it was a right that she had and she was not given that right or was not aware of that right until it was too late, and now the step which perhaps should have been given some thought as to whether it was necessary at this stage has already taken place. I am not convinced that I can stand back here and say there was no prejudice whatsoever to this respondent.

33 Even if I was prepared to do that, there are so many breaches of the rules here that I am not minded to be particularly forgiving. As I indicated at the start of this judgment, I am often not particularly fond of technical points, but I do think that in committal applications the technical points are important because in particular the provisions set out in 81.4 are significant and are important in preserving the respondent's rights so that only those litigants who have truly been dishonest and misled the court can feel the force of the court's condemnation.

34 Standing back from the situation, asking myself is it in the public interest, I accept the submission that these proceedings have been issued without the authority of the party who is supposed to authorise them, namely Mr Das. I accept that it could perhaps be corrected in the future if I was prepared to let the case go further by the addition of the insurance company who could take over conduct, but I think it is significant that committal proceedings have been brought by a party in circumstances where that party has not authorised them.

35 I do not make a finding against the claimant, the applicant or the applicant's solicitors in relation to the abuse of process, I accept that may have been infelicitous wording of the

email, but I do find that there are significant breaches of Part 81 which means that it is not in the overriding objective for permission to be granted, and so for those two reasons in the main, I intend to refuse permission.

36 I am going to order:

1. The application for relief from sanctions is granted;

2. The application for permission to proceed with the application of a committal is dismissed;

3. The applicant shall pay the respondent's costs for the application to be assessed by detailed assessment if not agreed;

4. There should be a detailed assessment of the respondent's publicly funded costs.

37 I will arrange for that order to be drawn up.

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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This transcript has been approved by the Judge.