Claim No. CL-2006-000797/000798/00312

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Neutral Citation Number: [2020] EWHC 1130 (Comm)

Wednesday 6 May 2020

Before:

SIR MICHAEL BURTON GBE
Sitting as a High Court Judge

BETWEEN:
(1) SUPER-MAX OFFSHORE HOLDINGS
(2) ACTIS CONSUMER GROOMING PRODUCTS LIMITED
Claimants
-v-

RAKESH MALHOTRA
Defendant

MS BINGHAM QC and MS ROGERS (instructed by Clifford Chance) appeared on behalf of the Claimants.

MR MARSHALL QC and MR MCCOURT FRITZ (instructed by Fladgate) appeared on behalf of the Defendant.

Wednesday, 6 May 2020

(12.15 pm)

JUDGMENT (as approved)

SIR MICHAEL BURTON:

1. This has been the hearing of consequential matters, including the imposition of sentence arising out of my conclusions set out in my judgment supplied to the parties last week in draft and handed down today, dated 6 May, 2020, by which I found the Defendant in contempt in respect of 31 particularised grounds set out in four applications, as appears in paragraph 135 of my judgment and the reasons given in that judgment, to which I refer.
2. Mr Marshall QC has again appeared, together with Mr McCourt Fritz, and has made submissions on behalf of the Defendant and Ms Bingham QC and Ms Rogers have again appeared on behalf of the Claimants.
3. Mr Marshall QC has put forward two submissions in particular. First, that the contempts are now stale and second that the Claimants have not established any or any substantial prejudice. I shall deal with those two submissions first.
4. It is certainly right to say that the allegations in the four applications start in December 2016 and continue through to late March 2018. But the Defendant accepts that there can be no responsibility upon the Claimants for the fact that matters were not dealt with until after the judgment of Popplewell J, in December 2017, because that is what the Defendant himself sought. And no doubt in the light of the criticism of the Defendant by Leggatt LJ in the

Court of Appeal, makes no criticism of the period since October 2019. The two periods upon which Mr Marshall QC concentrates in his submissions are between December 2017 and July 2018, and between July 2018 and October 2019. I am satisfied that for the reasons set out in Ms Bingham QC's skeleton at paragraph 22 (d) to (h) and more fully in her Reply Note for this hearing and accompanying detailed chronology, that there can be no criticism of the Claimants in respect of those periods either. In the authority referred to by Mr Marshall QC, Attorney-General's Reference (No 2 of 2001) [2004] AC 72, there is specific reference in the context of Article 6 of the ECHR to action or inaction by a public authority, not relevant here. But in any event I am satisfied that there is no breach of any Article 6 right of the Defendant by virtue of the fact that, after disposal of a considerable number of interlocutory applications by the Defendant, the four applications were only resolved by me in March of this year with judgment handed down today. Not only am I in the circumstances satisfied that no responsibility for delay can be laid at the door of the Claimants, but I conclude that the Defendant is unable to complain of the passage of time or its impact, if any. I am also not persuaded, as Mr Marshall QC suggested in his written submissions, that the relationship between the Claimants and the Defendant is in some way ancient history. Even if the litigation in England and Wales has, subject to any outstanding appeal, finally been resolved, it does appear clear that there are still live disputes in other jurisdictions, particularly in India. Indeed, that appeared not only in the evidence before me, and in Popplewell J's interim relief judgment of March 2018, but in Mr Marshall QC's own opening skeleton of October 2019, at paragraph 51, when he said:

"*The main committal applications are only one part of a larger picture of ongoing multi-jurisdictional litigation between the parties and associated persons including an LCIA arbitration and proceedings in India and Dubai."*

5. As for the question of prejudice, I do not accept Mr Marshall QC's argument that there has been no or no substantial prejudice to the Claimants, and the following seems to me to be clear.

(i) The Claimants had a considerable struggle to deal with the continuing breaches of 7 orders of the Court, which they were only able to surmount with difficulty. The picture is clear from my judgment and is manifest in the evidence.

(ii) The fact that the false statements were made in the interlocutory witness statements meant that they had to deal with the difficulty of establishing the falsity of those statements, and meeting evidence that was falsely put forward in order to support them. In any event, as appears from the decision of the Court of Appeal, Etherton MR presiding, in Liverpool Victoria Insurance v Khan [2019] 1 WLR 3833, at paragraph 60:

"*Because this form of contempt of court undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation*."

(iii) The fact that the Claimants were in the event able to adduce the evidence of Mr Mukherji and Mr Desai before Popplewell J despite the best efforts of the Defendant and his agents does not mean that there was no prejudice to the Claimants, and in any event I take into account the very bad experience which both Mr Mukherji and Mr Desai had.

(iv) I do not accept that the appalling series of communications from the Defendant

between January and March 2018 had no lasting effect on the recipients, and in any event it plainly caused prejudice and distress at the time.

6. I have been assisted by both Counsel in considering a number of authorities, from which I derive the following matters.

(i) I accept that when considering what sentence to impose in respect of contempt of court, a custodial sentence is a last resort.

(ii) I accept that the fact that there are 30 particularised findings of contempt does not of itself exponentially increase their gravity, but I need to look at the substance of them. I consider that they fall into 5 categories:

Category 1, the breach of orders by the court which were specifically intended to stop the coup by the Defendant in breach of his contractual obligations between December 2016 and January 2017.

Category 2, the false statements in the witness statement.

Category 3, the communications with Relevant Employees, in continuing breach of Court orders, between March and November 2017, intended to undermine and disrupt the Claimants' continuing management.

Category 4, the disgraceful WhatsApp and email communications between January and March 2018.

Category 5, the steps taken to prevent Mr Mukherji and Mr Desai from leaving Dubai so as to attend and give evidence at the Popplewell trial.

(iii) I consider that the intentional breach of 7 continuing court orders is serious, and defies the court's jurisdiction. It is plain that the breaches were premeditated, contrary to Mr Marshall QC's submission in paragraph 31 of his skeleton, and pursued in what I have described in my Judgment as a deliberate race against the

clock to try to get in before the Court orders; and the communications with Relevant Employees continued even after a neutral form of communication to employees was specifically agreed by the Defendant and incorporated into a Court order.

(iv) I respectfully agree with the words of Lord Denning M.R. in AG v Butterworth [1963] 1 QB 696, particularly at 719, and Chapman v Honig [1963] 2 QB 502, at 51, as to the vital importance of the protection of witnesses. I have already addressed, and not accepted, in paragraph 104 of my Judgment the submission repeated by Mr Marshall QC in paragraph 18 (4)of his skeleton, as to whether it matters that the WhatsApp communications were ostensibly private.

(v) Mr Marshall QC submits that any order I make as to the contempts will have no coercive effect, although, given that there is still an injunction in place (Popplewell 3) and that there continue to be disputes between the Claimants and Defendant, who remains non-executive chairman of the First Claimant, I do not accept that that is the case. However, I emphasise, as have many previous authorities, the importance of complying with Court orders and there is no doubt, see for example JSC BTA Bank v Solodchenko (No 2) [2012] 1 WLR 350, that the purpose of the committal jurisdiction is primarily punitive.

7. I am encouraged by both Counsel to look at the guidance of Lawrence Collins J, as he then was, in Crystal Mews Limited v Metterick [2006] EWHC 3087 (Ch), as adopted and supplemented by Popplewell J in Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd [2015] EWHC 3748 (Comm), and so approved by the Court of Appeal in Olga Olita Sellers v Artem Podstreshnyy [2019] EWCA Civ 613, and McKendrick v Financial Conduct Authority [2019] 4 WLR 65. I read

paragraph 7(6) of Popplewell J's Judgment in Drum Risk:

"The factors which may make the contempt more or less serious include those identified by Lawrence Collins J, as he then was, at para 13 of the Crystal Mews case, namely:

(a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;

(b) the extent to which the contemnor has acted under pressure;

(c) whether the breach of the order was deliberate or unintentional;

(d) the degree of culpability;

(e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;

(f) whether the contemnor appreciates the seriousness of the deliberate breach;

(g) whether the contemnor has co-operated.

To which I would add:

(h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

8.. Applying those factors to this case,

(a): I am satisfied that the Claimants were prejudiced. The Court has done its best to remedy that prejudice by its continuing orders.

(b) does not apply.

(c): I am satisfied that the breaches of the orders and the interference with justice were deliberate and intentional.

(d): There has been a high degree of culpability.

(e) does not apply.

(f), (g), (h): I am satisfied that there has been no appreciation at all by the Defendant of the seriousness of his deliberate breaches, no co-operation, and no apology or acceptance of responsibility. I do not specifically take into account the Defendant's non-attendance at the contempt hearings, although an unhappy picture does appear from Ms Bingham QC's Reply Note, but I take into account the conduct of the defence by way of total resistance to the entirety of the Claimants' claim, even down to the withdrawal of such limited admissions as were earlier made. I add the words of Lewison J in Aspect Capital Limited v Christensen [2010] EWHC 744 (Ch), at paragraph 52, when he also added some factors to those set out by Lawrence Collins J:

"*I would add to the list of factors the following.*

(1) Whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made the more credit the contemnor is entitled to be given;

(2) But again, by analogy with sentencing in criminal cases, if a contested Newton hearing is held and the court decides the disputed facts adversely to the contemnor he is liable to forfeit some of the credit to which he would otherwise be entitled;

(3) Whether the contemnor has made a sincere apology for his contempt;

(4) Whether the contemnor has been frank with the court in admitting his contempt."

9. Mr Marshall QC submits that of the factors the most important is (a), the question of prejudice. It does have an importance, but to my mind much the most important in this context are the factors in (f), (g) and (h) of Popplewell J's list and (1) to (4) of Lewison J's list, and in this case there is a total absence of contrition, remorse or

apology.

10. I come finally to Mr Marshall QC's submission that I should take into account the fact of the COVID 19 virus. I do not accept that there is any impact on sentencing. In any event it seems that the Defendant is in the United States. He has no reason to come to the United Kingdom and he may never do so. If he ever did so, the impact of the virus may well happily be very substantially alleviated if not eliminated by that time. The point can be raised at that stage if it arises, particularly as I propose to stay any order pending appeal.

11. I now come to consider sentence in respect of the five categories.

Category 1, the deliberate breach of Court orders between December 2016 and January 2017, in what I have called the race against the clock, and the coup, including attempts to backdate documents in order to appear not to have been in breach of the orders: Application 1 (a) to (f), (j) and (k). I am quite satisfied that the breaches were serious and merit a custodial sentence, and I take all of them together in concluding that a sentence of four months is appropriate.

Category 2, the false statements: Application 2. I conclude that these contempts are serious and merit a custodial sentence of four months consecutive to Category 1.

Category 3, communications with Relevant employees: Application 3, (1-10) and (13-14), and Category 4, the WhatsApp and email communications, Application 3, (15-22), and Application 4, paras 8-9. The appropriate custodial sentence I consider to be two months in respect of Category 3 and four months for Category 4, concurrent with each other but consecutive to Categories 1 and 2.

. Category 5, the interference with witnesses and prevention from leaving Dubai: Application 4. 6 months custodial sentence, consecutive.

12. I have already taken into account to an extent the question of totality, and I now reconsider that question and also take into account the maximum sentence of 24 months under the Contempt of Court Act 1981. My sentence in respect of the individual contempts set out above would amount to a total of 18 months. Looking again at totality, I would reduce the total to 15 months.

13. I stay this order pending appeal and I therefore make no specific order that the Defendant should attend before the tipstaff at this stage, and adjourn the attendance of the tipstaff to the outcome of the Court of Appeal.

14. There remains the question of whether I grant permission in respect of the two other applications for permission, ancillary to the Defendant's main appeal for which he does not require permission, and I adjourn the question of whether to grant permission on those two applications to be considered by the Full Court at the same time as the hearing of the appeal.

15. I turn to the question of costs. The first issue is whether I should order indemnity costs, and I am entirely satisfied that I should so order, not only because that is the ordinary course in the case of a successful contempt application, but also for the reasons set out by Ms Bingham QC in paragraph 21 of her skeleton.

16. I turn then to the question of apportionment of the costs to allow for the fact that the Claimants were not entirely successful. The Claimants concede a discount of 5 percent, and the Defendants have submitted that there should be a discount of 20 per cent. I propose, having considered the matter in full and having presided over a number of the hearings, in particular the most recent one, to order that the Claimants should have 90 per cent of the costs.

17. It is plainly appropriate to make an interim order for costs. I am not surprised at all

that these very substantial applications and hearings have resulted in the expenditure of very substantial costs, and I have no doubt that, although I have not seen a schedule from the Defendant, his costs would be in the same range or certainly a range which would allow for his solicitors having had less responsibility in relation to the preparation of a case, which in the end resulted in more than 50 files and a number of hearings, including an eventual 7-day trial. There have been no specific challenges to any of the individual items in the Claimants' schedule, simply a challenge to the number of lawyers involved and to its total. Without sight of the Defendant's costs, and doing my best to assess what is on any basis likely to be ordered at the end of the day in respect of an indemnity costs calculation, I make an award of £1.3 million by way of an interim order.

18. The Defendant contends that any interim order I make should not involve the costs being paid to the Claimants, because the Defendant asserts, on the basis of a witness statement very recently served by Mr Buckley of the Defendant's solicitors, which I have read, that there is a risk that, in the event of the Defendant's appeal being successful, the Claimants will not be able to repay any sum paid over, and undertakes to prosecute the appeal diligently.

19. The battle over what is obviously a very successful business in India and the UAE still continues, and I am not persuaded that there is a risk of such irrecoverability. The concern articulated by Mr Buckley in his witness statement at paragraph 20 is that, by virtue of the very substantial indebtedness of the First Claimant to its preference share or debenture holder, the Second Claimant, of US$ 132 million, the First Claimant may be unable to repay the interim sum of, as it turns out, £1.3 million. However, as Ms Bingham QC accepted, any repayment would be

a joint and several liability of both Claimants.

20. Notwithstanding, in the light of Mr Marshall QC's submissions, and in the light of Ms Bingham QC's suggestion as to payment being made into Clifford Chance's client account, I propose to deal with the submission in this way. I see no reason whatsoever why the Defendant should not pay the interim order in the usual way. However, to account for the possible risk which the Defendant has articulated, I propose that that sum be paid into court, pending the outcome of the appeal, while accepting the Defendant's undertaking to pursue it diligently, and there will be liberty to the Claimants to apply, in the event of non-payment, to vary or amend the order for payment into court, so as to provide instead for payment direct to the Claimants.

21. I will hear Counsel on the timescale for payment of the sum into court. [The judge subsequently fixed 28 days]
