Neutral Citation Number: [2020] EWHC 3155(Ch)

Case No: BL-2019-001909

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION (BUSINESS LIST)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 November 2020

Before :

MR JUSTICE TROWER

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Between :

ASTRID-CAROLINE COLE	**Claimant**
- and -	
(1) SEAN AVRAM CARPENTER	**Defendants**
(2) LAUREN SARAH CARPENTER	
(3) DAVID AARON CARPENTER	

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ANDREW LOMAS (instructed by **Direct Access**) for the **Claimant**
YASH BHEEROO (instructed by **Trowers & Hamlins LLP)** for the **Defendants**

Hearing dates: 12 November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be Monday 23 November 2020 at 10:00

Mr Justice Trower:

1. This is an application by the Defendants under CPR 81.3(5) for permission to make a contempt application against the Claimant. The allegation is that the Claimant deliberately falsified or caused to be falsified evidence in the form of a document that she then exhibited to her Reply. It is also said that she deliberately made a false statement in her Reply verified by a statement of truth without an honest belief that it was true.

2. The proceedings in which the application is made were commenced by the Claimant on 14 October 2019. She alleges that there was an oral contract between her and the Defendants pursuant to which she would be granted an exclusive right of sale for a period of 12 months of a work by Pablo Picasso, known as "Le Sauvetage" or "the Rescue" (the "Work"), if she was able to procure that the Work was exhibited at the 2018 "Picasso 1932 - Love, Fame, Tragedy" exhibition at the Tate Modern gallery. She alleges that the Defendants agreed to pay her a sales commission equal to 10% of the sale price of the Work.

3. At present the Claimant does not seek damages for breach of contract. Instead she seeks a declaration that the terms of the contract (a) gave her an exclusive right to sell the Work for a period of 12 months, (b) imposed on the Defendants a good faith obligation to consider all offers presented by the Claimant in respect of the Work and (c) entitled her to a sales commission equal to 10% of the sale price of the Work should it be sold. She also seeks an order that the Defendants perform the contract on the terms so declared and an injunction to restrain them from agreeing to sell or attempting to agree to sell the Work for a period of 12 months.

4. The Defendants deny that they are the proper parties to the proceedings because at all material times they acted in their dealings with the Claimant as officers or agents of Carpenter Fine Violins and Collectibles LLC (the "Company"), which owned the Work. They also contend that no agreement was entered into with the Claimant in relation to the Work, whether by the Defendants in their personal capacity or by the Company.

5. The Defendants accept that they had discussions with the Claimant in relation to the Work, but it is their case that those discussions never gave rise to a binding contract and were limited to an understanding that, after the conclusion of the Tate exhibition, the parties would explore whether the Work might be sold with assistance from the Claimant on terms similar to their previous dealings. These were to the effect that she would have a non-exclusive right to show the Work to potential buyers in return for an unspecified commission in the event that she successfully brokered a sale.

6. The Defendants also say that the Claimant was not in the event responsible for getting the work into the Tate exhibition and, to the extent that the discussions which they

had with the Claimant gave rise to a contract (whether on the terms alleged or at all), that contract has been lawfully terminated.

7. The Picasso exhibition opened at the Tate Modern in March 2018. There was an opening dinner on 6 March 2018. It is not in issue between the parties that, by that stage, the relationship between the Claimant and the Defendants had broken down, although the circumstances in which this had occurred are hotly contested.

8. It is part of the Claimant's case that, notwithstanding the breakdown in the relationship, she spoke to the First Defendant before and after the opening dinner and made a verbal offer to purchase the Work for US$10 million. The Defendants deny that any such verbal offer was made. The Claimant then says that she reiterated the offer in an email sent on 7 March 2018 in the following form "*As I quickly mentioned yesterday, my boyfriend Angus Ball made an IPO last December with one of his companies called Sabre. We would be utterly grateful and delighted, if you would consider our proposal for your "Le Sauvetage" painting. We would be most happy to wire you an escrow asap of $1 million as a deposit*." The First Defendant responded that the Defendants were *"not at all interested in selling our Picasso*".

9. The Claimant contends that, although the Defendants' ostensible position was that by this stage the Work was no longer for sale, this was not in fact true. In support of this part of her case, she pleads that an art collector (Angela Gulbenkian) was in some form of discussions with an art dealer (Murphy and Partners) about acquiring the Work from the Defendants.

10. It is said by the Claimant that, in the course of those discussions, Ms Gulbenkian was told that the Defendants had already turned down an offer in excess of US$10 million for the Work. She also says that the Defendants explicitly confirmed Murphy and Partners' right to offer the Work and that no one else had ever been granted permission to do so. The Claimant contends that this confirmation was intended to refer to her, and that the Defendants' explicit representation to Murphy and Partners that she had been denied any opportunity to engage in any sale of the Work was manifestly untrue.

11. It is common ground that the Work was not in the event sold to Ms Gulbenkian. However, the Claimant relies on what occurs as demonstrating that the Defendants acted in breach of contract by seeking to sell the Work through another agent.

12. The circumstances surrounding the offer that was made by the Claimant on 7 March 2018 is therefore an issue in the proceedings. The Defendants' case is that they did not accept the Claimant's written offer for a number of reasons including the fact that they doubted it was genuine, that they had no desire to continue their dealings with the Claimant following their falling out and that it was too low to be acceptable. They say that, although they were not actively marketing the Work at that stage, the stated net figure the Company was seeking was US$12 million.

13. The Claimant's case is that the offer she made orally on 6 March 2018, which was then reiterated in her 7 March 2018 email, was genuine. However, apart from her reference to Mr Ball, she did not give any further particulars of the person on whose behalf it was made until service of her Reply dated 7 May 2020. As the Claimant continued to represent until service of her Reply that the offer had been made on

behalf of Mr Ball, it is not surprising that the Defendants continued to proceed on the basis that this was her case.

14. The case which the Claimant then advanced in her Reply contained a significant difference. In paragraph 48 she pleaded as follows: "*As is set out in confidential Annex 1, the offer for the work was from a genuine multi-billionaire unconnected with Ms Gulbenkian*." Annex 1 contained a copy of what purports to be a screenshot of an email exchange between the Claimant (ACC Art info@acc-art.com) and Mr Paul Allen (Paul Allen <Paul@vulcan.com.>) which appears to have taken place a few days before the opening dinner for the Tate exhibition.

15. The screenshot starts with a message dated 3 March 2018 from the Claimant to Mr Allen "*Dear Paul, Would you be interested in a 1932 Picasso (see documents and image attached) that will be exhibited in the upcoming TATE show "Picasso 1932 - Love, Fame, Tragedy"? Warmly Caroline*". The answer apparently from Mr Allen, dated 4 March 2018, was very short. "*Yes. Offer $10m*".

16. It is the Claimant's case that the Paul Allen with whom she was in email correspondence was the co-founder of Microsoft. He fits the description of being a "multi-billionaire" and the email address from which he is said to have sent his answer to the Claimant was his address at Vulcan Inc. ("Vulcan"), a company founded by Mr Allen and his sister to assist in their philanthropic activities. The Claimant had had some limited prior contact with Mr Allen through this email address. Mr Allen died in October 2018, i.e. between the time of the Tate exhibition and the time at which his name was first mentioned by the Claimant in connection with these proceedings.

17. Although it is not apparent from the version of the screenshot exhibited to the Reply, it seems that the version of this email exchange which has survived is one that was forwarded by the Claimant to an unidentified third-party. This is apparent from another screenshot version of the same email exchange that an expert instructed by the Claimant (Mr Joseph Naghdi) has exhibited to his report dated 20 August 2020. This is a point to which I shall return a little later in this judgment.

18. The Reply was verified by a statement of truth signed by the Claimant. In pleading her case in this way, and in exhibiting the email exchange with Mr Allen, the Claimant was joining issue with the Defendants' case as to the genuineness of the offer she had made on 7 March 2018. She was also distancing herself from Ms Gulbenkian.

19. It is tolerably clear that these are both matters which are likely to be explored, possibly in some detail, at the trial, and neither party contended that this was certainly not the case. Some indication of the Defendants' views as to the significance and relevance of the issue can be derived from the facts that on 12 June 2020 they served a notice to prove documents at trial in relation to the email exchange and on 15 June 2020 they sought further information in relation to it under CPR Part 18.

20. Mr Yash Bheeroo, who appeared for the Defendants, submitted that the case may develop in a way which means that the dispute as to the genuineness of the email exchange does not have to be resolved. He also submitted that the mere fact that the Defendants had served a notice to prove documents and had sought further

information in relation to the exchange did not mean that it would be explored if the Claimant chose not to pursue the point. I accept that that is certainly a possible outcome.

21. In circumstances to which I shall come shortly, the Defendants contend that Annex 1 to the Claimant's Reply is a forgery and the case that the Claimant advances based on it is a dishonest fabrication. They contend that, in these circumstances, there are two grounds for the committal which they seek. The first is based on the Claimant's intentional interference with the due administration of justice. The second is based on a contention that the Claimant deliberately made a false statement of truth. The Particulars which the Defendants have given in support of each of the two grounds of committal are in all respects identical.

22. In his skeleton argument in support of the application, Mr Bheeroo submitted that it was only in respect of the second ground of committal that the Defendants required the court's permission to proceed. He pointed out that, where a contempt application is made in relation to an interference with the due administration of justice, permission is no longer required if (as in the present case) the alleged interference relates to existing High Court or County Court proceedings (CPR 81.3(5)(a)). This is to be compared with the former CPR Part 81, under which the then CPR 81.12(3) prevented a committal application in relation to interference with the due administration of justice in connection with proceedings from being made without the permission of the court. He then relied on the fact that the Defendants did not require permission in relation to ground 1 as one of the reasons why the court should grant permission in relation to ground 2.

23. At the beginning of the hearing, I expressed some scepticism that the Defendants did not require permission in relation to ground 1. The reason for my scepticism was that, although ground 1 was formulated as an interference with the due administration of justice, it was at least well arguable that an application based on ground 1 was also "*made in relation to … an allegation of knowingly making a false statement in any … document verified by a statement of truth …*" so as to fall within CPR 81.3(5)(b). If that were to be the case, they would also require permission for a contempt application based on ground 1, even though there might be other categories of interference with the due administration of justice for which permission is not required.

24. In the event, Mr Bheeroo did not pursue this submission. I think that he was right to take that course. Even if permission is not required for ground 1, the allegations of fact relied on in relation to both ground 1 and ground 2 are in all respects identical. In these circumstances, there is at least a serious possibility that the court would consider it appropriate to stay contempt proceedings based on ground 1 if permission is refused on ground 2 (cf. *TBD (Owen Holland) Ltd v. Simons and others* [2020] EWCA Civ 1182 ("*TBD*") at [239]) and, if the refusal were to be on the basis that the contempt application was being made for an improper purpose, that might be a ground for striking it out altogether (*Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch) at [53]). It follows that I will simply determine the question of whether permission should be granted on ground 2 without regard to any consideration that an application based on ground 1 might proceed in any event.

25. CPR Part 81 has been completely redrafted. As I have just explained the circumstances in which the court's permission to make a contempt application is required are now different from the circumstances in which permission was required to make a committal application under the former CPR Part 81. Nonetheless, neither party contended that the principles applicable to the grant of permission in circumstances in which a person is alleged to have made a false statement in a document verified by a statement of truth have changed.

26. As to those principles, I can start with the decision of the Court of Appeal in *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406 ("*KJM Superbikes*"), recently described by Arnold LJ in *TBD* at [232] as the leading authority in this area. Moore Bick LJ stressed at [16] - [17] the public element of the process:

> "16. Whenever the court is asked by a private litigant for permission to bring proceedings for contempt based on false statements allegedly made in a witness statement it should remind itself that the proceedings are public in nature and that ultimately the only question is whether it is in the public interest for such proceedings to be brought. However, when answering that question there are many factors that the court will need to consider. Among the foremost are the strength of the evidence tending to show not only that the statement in question was false but that it was known at the time to be false, the circumstances in which it was made, its significance having regard to the nature of the proceedings in which it was made, such evidence as there may be of the maker's state of mind, including his understanding of the likely effect of the statement and the use to which it was actually put in the proceedings. Factors such as these are likely to indicate whether the alleged contempt, if proved, is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. In addition, the court will also wish to have regard to whether the proceedings would be likely to justify the resources that would have to be devoted to them.
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> 17. In my view the wider public interest would not be served if courts were to exercise the discretion too freely in favour of allowing proceedings of this kind to be pursued by private persons. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance, whether justified or not …"

27. This focus on the need for the court to be satisfied that it is in the public interest for contempt proceedings to be brought has been a consistent theme in the approach adopted by the court to applications for permission in this context. Thus, in *Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1540 ("*Cavendish Square*"), per Christopher Clarke LJ at [28], *Zurich Insurance plc v Romaine* [2019] 1 WLR 5224 ("*Zurich Insurance*"), per Haddon Cave LJ at [26] and *TBD*, per Arnold LJ at [232] the following summary of the law derived from *KJM Superbikes* and set out in *Barnes (trading as Pool Motors) v Seabrook* [2010] CP Rep 42 at [41] has continued to be cited with approval by the Court of Appeal:

> (1) A person who makes a statement verified by a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it.

(2) It must be in the public interest for proceedings to be brought. In deciding whether it is the public interest, the following factors are relevant:

(a) The case against the alleged contemnor must be a strong case (there is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance);

(b) The false statements must have been significant in the proceedings;

(c) The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings; and

(d) The pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality.

(3) The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings.

(4) Only limited weight should be attached to the likely penalty.

(5) A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account."

28. In *Zurich Insurance*, Haddon Cave LJ added the following at [27] – [30]:

"27. In my view, the following further supplementary principles can be derived from Moore-Bick LJ's judgment in *KJM Superbikes* and are pertinent:

(1) Ultimately, the only question is whether it is in the public interest for contempt proceedings to be brought: para 16.

(2) Whilst at the permission stage the court is not determining the merits of the contempt allegation, nevertheless the court will have regard to the following factors in order to determine whether the alleged contempt is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. The factors include (i) the strength of the evidence tending to show that the statement in question was false, (ii) the strength of the evidence tending to show that the maker knew at the time the statement to be false, (iii) the significance of the false statement having regard to the nature of the proceedings in which it was made, (iv) the use to which the statement was put in the proceedings, and (v) such evidence as there may be as to the maker's state of mind at the time, including his understanding as to the likely effect of the statement and his motivations in making the statement): para 16.

(3) In addition, the court should consider whether contempt proceedings would justify the resources which would have to be devoted to them: para 16.

(4) The court should have in mind para 28.3 of the Practice Direction supplementing CPR Pt 32 and whether proceedings for contempt would further the overriding objective: para 18.

(5) The penalty which the contempt, if proved, might attract plays a part in assessing the overring public interest in bringing proceedings: para 22.

28. It is worth also highlighting the following passage in Moore Bick LJ's judgment in *KJM Superbikes* at para 17 in which he summarises the overall approach:

> "there is also a danger of reducing the usefulness of proceedings for contempt if they are pursued where the case is weak or the contempt, if proved, trivial. I would therefore echo the observation of Pumfrey J in para 16 of his judgment in ... *Kabushiki Kaish Sony Computer Entertainment Inc v Ball* [2004] EWHC 1192 (Ch) that the court should exercise great caution before giving permission to bring proceedings. In my view it should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it. All other relevant factors, including those to which I have referred, will then have to be taken into account in making the final decision."

29. I agree with Mr Callow that Moore-Bick LJ's warning was intended to ensure that the permission to bring committal proceedings is only granted where there is a strong prima facie case as to knowing falsity.

30. The issue for the court on an application for permission to bring proceedings is, therefore, not whether a contempt has, in fact, been committed, but whether it is in the public interest for proceedings to be brought to establish whether it has or not and what, if any, penalty should be imposed. The question of the public interest also naturally includes a consideration of proportionality."

29. In *TBD* at [233] – [234], Arnold LJ also added to what Moore-Bick LJ had said in *KJM Superbikes*:

> "233. I would add two points to this summary. The first is the point made by David Richards J (as he then was) in *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch) at [80] and cited with approval by Moore-Bick LJ in *KJM Superbikes* at [18]:
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> > "Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair number of cases, the allegations are well-founded. If parties thought that they could gain an advantage by singling out these statements and making them the subject of a committal application, the usual process of litigation would be seriously disrupted. In general, the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the

> totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under CPR Part 32.14."

234. The second is the point made by Christopher Clarke LJ in *Cavendish Square* at [79]:

> "The critical question, in this and every case, is whether or not it is in the public interest that an application to commit should be made. That is not an issue of fact but a question of judgment. The discretion to permit an application to commit should be approached with considerable caution. It is not in the public interest that applications to commit should become a regular feature in cases where at or shortly before trial it appears that statements of fact in pleadings supported by statements of truth may have been untrue. …".

30. On the facts of *TBD*, the approval of David Richard J's judgment in *Daltel* was important because the pre-trial committal proceedings against one of the alleged contemnors were found to be premature. The Court of Appeal said that this should have led to their dismissal rather than an adjournment until after the trial, which is what the judge at first instance had ordered. In the course of explaining why that was the right way forward, Arnold LJ accepted (at [237] – [238]) counsel's submission that the reason the committal proceedings were premature was because the issues raised by the applicants' grounds would be investigated at trial. "*It follows that, as the judge himself said, it was not in the public interest for an application for committal to be brought at that stage*." Arnold LJ then went on to add that, after trial the parties would have the benefit of the judge's findings, which were likely to be the court's first port of call when deciding whether or not committal proceedings should be brought.

31. Two cases at first instance are helpful in identifying a number of other factors which must be taken into account before the court can be satisfied that the case is one which requires the committal proceedings to be brought and that the applicant is the proper person to bring them. The first is the decision of Whipple J in *Newsome Smith v Al Zawawi* [2017] EWHC 1876 (QB) at [6] where she explained that, as well as the strength of the proposed proceedings, questions of proportionality and the need to consider the furtherance of the overriding objective are important considerations.

32. The second is the decision of Andrew Baker J in *Navigator Equities Limited v Deripaska* [2020] EWHC 1798 (Comm) ("*Navigator*"). His judgment contains a detailed description of the nature and significance of the particular and distinctive character of contempt proceedings. As he explained in [141] – [143] of his judgment they are civil proceedings, but they have several important hallmarks of criminal proceedings, having been described in a number of authorities as quasi-criminal in character. As he put it:

> "One consequence I have already identified, namely that the court recognises the particular capacity of contempt applications or the threat of contempt applications to be used vexatiously by litigants to further interests that it is not the function of the contempt jurisdiction to serve. That leads to the obvious materiality, at all

> events if there is some reason to question it on the facts of a given case, of the 'prosecutorial motive' of a claimant / applicant pursuing a contempt charge.
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> …
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> A further consequence is that the claimant / applicant pursues a contempt charge as much as quasi-prosecutor serving the public interest as it does as private litigant pursuing its own interests in the underlying dispute. The claimant / applicant needs to understand that; and if is legally represented, as here, the legal representatives need to understand that their role as officers of the court is acutely pertinent, even if (to repeat) the process is not to be equated with a private prosecution in a criminal court … its proper function is to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the court to make a fair quasi criminal judgment."

33. In light of those principles, the Defendants submitted that there is a strong prima facie case that the email exchange exhibited to the Claimant's Reply is not genuine and that accordingly the statement in paragraph 48 of her Reply that "*the offer for the work was from a genuine multi-billionaire*" is false. This it was said provided a clear basis for them to establish that it was in the public interest for a contempt application to be brought.

34. For reasons that will appear, it is not necessary for me to go into the evidence as to why the Defendants submit that they have established a strong prima facie case in great detail. In that regard, I am conscious that the Court of Appeal has reminded judges to be careful to avoid prejudicing the outcome of the substantive proceedings. Nonetheless, it is important that I should give an outline of the nature of the allegations that are made by the Defendants and the response that the Claimant has to them.

35. The Defendants submitted that the first problem with the email exchange is that it is inconsistent with earlier representations made by the Claimant. In her 7 March 2018 email, she appeared to be asserting that the offer was made on behalf of her boyfriend Mr Ball, not on behalf of Mr Allen. Although this email was not unambiguously clear that this was what she was saying, her contention that the offer was made on behalf of Mr Ball was more specifically reiterated by her in an email sent to the First Defendant on 27 September 2018.

36. Secondly, the Defendants pointed out that the Claimant made no mention of Mr Allen until May 2020 when the email screenshot was annexed to her Reply. This meant that it was not provided to the Defendants until well after proceedings had been launched, at a time over two years after the relevant events had occurred and after Mr Allen had died making it impossible for them to check with him personally. It is said by the Claimant that this was to preserve confidentiality. The credibility of that answer will have to be weighed against the fact that she had made and did not withdraw her representation that the prospective purchasing offeror was somebody else.

37. Thirdly, the Defendants submitted that there is no indication that the Claimant responded to the email from Mr Allen in which he is said to have made the offer on which she relies. There is evidence as to the way in which Mr Allen would normally

have given instructions in relation to works of art in which he was interested. For present purposes it suffices to say that, although he was often accustomed to expressing himself shortly, there are inconsistencies between the email exchange on which the Claimant relies and Mr Allen's normal *modus operandi*.

38. Fourthly, the evidence that the Defendants have obtained from Ms Alison Ivey, who is general counsel for Vulcan (as I have already explained, the email exchange is said to have been sent to and come from Mr Allen's Vulcan email address) is consistent with the email exchange being a fabrication. Ms Ivey says that Vulcan maintains full access to Mr Allen's historic email records, which have been preserved following his death. She has explained the nature of the investigations which she has caused to be carried out to see if the email exchange could be identified.

39. After a false start in which Ms Ivey said that there was no email correspondence (and on which the Claimant relied to show the unreliability of Vulcan's investigation), Vulcan has now identified that the Claimant had previously had email correspondence with Mr Allen amounting to a total of eleven emails sent by her to him and two emails sent by him to her in response. It is her evidence that Vulcan has been unable to identify the email exchange on which the Claimant relies.

40. The Claimant contended that in several respects the investigations carried out by Vulcan were insufficiently thorough and that the court cannot be satisfied that the exchange does not in fact exist at the Vulcan end. She also pointed out that Ms Ivey's reason for providing evidence is to protect Mr Allen's name and reputation and to identify false information provided about him, which as I understood it was intended to indicate a concern as to the objectivity of Ms Ivey in providing evidence in the form that she did. Subsequent investigations made by experts are consistent with the investigations made at the Vulcan end of email exchanges between Mr Allen and the Claimant being comprehensive.

41. Fifthly, the Defendants relied on the fact that the Claimant has been unable to produce the native version of the email exchange, despite the fact that she had earlier represented that she was in a position to provide the native email and the associated metadata. She has explained that the reason for this is that she lost her iPhone 7 in April 2018 thereby removing "*a physical device from my possession on which many of the relevant emails were saved / stored*". She says that the only other physical device on which she held her emails for the period of 2018 was on her laptop. Her evidence is that her emails were wiped entirely from her laptop on 8 September 2018. She explains that she sought assistance from Apple in recovering her emails in September 2018 and then again in June 2020, but these efforts were unsuccessful.

42. The Defendants characterise the loss of this data as being "convenient". As I mentioned earlier it is not for the court on this application to make any final factual findings. I simply have to make a judgment as to whether or not a strong prima facie case has been established. Given the importance which the Claimant now ascribes to her email exchange with Mr Allen, it is right to record that her inability to produce the native version of that exchange means that an obvious prop to her defence of a contempt application will not be available to her.

43. Sixthly, the Defendants submitted that the Claimant is not assisted by the expert evidence she has procured in support of her case from Mr Naghdi. She instructed him

to examine her iPhone 8 and her MacBook Air laptop in order to identify any email exchanges between her and Mr Allen in 2017 and 2018. This report was able to identify all of the emails that had been identified by Ms Ivey, but it seems that Mr Naghdi has only been able to identify the relevant email exchange in a version by which it was forwarded to an unidentified third party.

44. The Claimant says that this version was forwarded to an unidentified third party in November 2019. The Defendants point out that there is no explanation as to how it can have been forwarded as a genuine version of the original email exchange, in light of her evidence that by that stage she had no continuing access to her historic emails because of the data loss that I have already described her as having suffered in April and September 2018.

45. The Defendants have also instructed an expert (Mr Ian Smith of FTI Consulting) to consider the conclusions reached by Mr Naghdi. For present purposes it suffices to say that there are a number of aspects of this report, including evidence as to the format of the date string contained in Mr Allen's reply, which are inconsistent with it having emanated from his email account. Mr Smith also explained how it is not particularly difficult to send an email forwarding what appears to be a genuine email exchange with a third party when that forwarded exchange is not in fact genuine.

46. The Claimant said that she and her advisers have not had sufficient time since the production of the FTI report at the end of October to consider and answer its contents. I bear that in mind in reaching my conclusion on the question of whether the Defendants have established a strong prima facie case. Nonetheless it assists in showing that a careful reading of Mr Naghdi's report does not help the Claimant to the extent that she submits it does. The FTI report emphasises that Mr Naghdi has found no evidence that there was any contemporaneous exchange between the Claimant and Mr Allen, and I am satisfied that that is the right way of reading what Mr Naghdi says. It simply demonstrates that a screenshot of what purported to be an exchange was forwarded to a third party in November 2019. There is no evidence which links that screenshot to a genuine exchange of emails between the Claimant and Mr Allen in March 2018.

47. Taking all of these factors into account, I am satisfied that the Defendants have established that there is a strong prima facie case as to the falsity of the email exchange. While there is a theoretical possibility that the exchange might not have been known by the Claimant to be false on the basis that the reply came from somebody else at Vulcan, while she genuinely thought that it came from Mr Allen, that is an improbable result. I am satisfied that the circumstances are such that it also follows from the evidence in support of the falsity of the exchange, that there is a strong prima facie case that the Claimant knew that to be the case.

48. As the exchange was pleaded as a fact in a document verified by a statement of truth made by the Claimant, and as the Claimant purported to have participated in the exchange, it follows that there is also a strong prima facie case that she deliberately made a false statement of truth. If the Defendants are able to establish in due course that this is what happened, it is likely that the Claimant will be shown to have been guilty of conduct that was seriously dishonest.

49. In these circumstances, the Defendants have established the first prerequisite to it being in the public interest for contempt proceedings to be brought against the Claimant. Nonetheless, as appears from the authorities that I have described above, there are a number of other factors which separately and collectively are of considerable weight when the court is required to consider whether or not permission to proceed should be granted.

50. The first of these factors is what Mr Andrew Lomas, who appeared for the Claimant, picking up on what Andrew Baker J had said in *Navigator*, called prosecutorial motive. He submitted that the Defendants embarked on their application for permission at a time calculated to cause maximum inconvenience to the Claimant. He also submitted that it was an overhasty reaction to Ms Ivey's initial investigation which was subsequently accepted to have been incomplete, because of its initial failure to identify any emails between Mr Allen and the Claimant when some did in fact exist.

51. Mr Lomas also said that this application has been brought in furtherance of an improper motive and is an abuse. He said that the Claimant derived support for this contention from the contents of a without prejudice letter and the circumstances in which it was sent.

52. In order to understand this part of the complaint, it is necessary to explain the order of events. It is said by the Defendants that the email exchange exhibited to the Claimant's Reply immediately raised concerns, because they doubted that Mr Allen would have responded with a significant offer based on what appeared to be an unsolicited email from the Claimant. They also said that further suspicions arose out of the fact that the Claimant had only produced a screenshot of an extract of an email chain rather than the original email in its native format and with the related metadata.

53. As a result, the Defendants contacted Vulcan to whom they supplied a copy of the email exchange that had been exhibited to the Reply. This led to a letter dated 4 June 2020 from Ms Ivey to the Defendants' recently instructed solicitors, Trowers & Hamlins LLP ("T&H"), in which she said:

> "Based on our internal diligence related to this email, we believe it to be inauthentic and to have been falsified. While Mr Allen is now deceased, Vulcan maintains full access to his email records, which have been preserved following his passing. We have conducted a review of these records and have not found any instance of him sending an email to or receiving an email from Astrid-Caroline Cole, Caroline Cole, ACC art, or any email correspondence to the address: info@acc-arts.com, whether in March 2018 or otherwise. We have also not found any instance of Astrid Caroline Cole, Caroline Cole, or ACC art in Mr Allen's contacts. In addition, the email is not representative of how Mr Allen engaged with outside parties on arch transactions and the process that is followed by Vulcan prior to an offer being made for a work…"

54. The following day, T&H wrote an open letter to the Claimant confirming that they had recently been instructed and explaining that they took the view that her claim against the Defendants had considerable difficulties with no real prospects of success. The letter went into considerable detail as to why it was that her prospects of

succeeding at trial were slim. Much of this was concerned with matters not directly related to the March 2018 email exchange.

55. A significant part of that letter then went on to deal with the circumstances surrounding the offer made by the Claimant in her March 2018 email exchange, by reference to the allegations that had been made in the Reply. T&H drew attention to a number of the matters on which the Defendants now rely in support of their case that the email exchange said to have taken place between the Claimant and Mr Allen was a fabrication. A copy of the letter from Ms Ivey was enclosed.

56. There was then a section in T&H's letter which explained that the consequence of what they contended to be the false statements in her Reply was that the Claimant was in contempt of court. It was made clear that the Defendants were therefore able to bring committal proceedings against her and, if they were successful, her contempt was punishable by a prison sentence of up to two years. It was also explained that there were two separate bases for the allegation of contempt: the first was for making a false statement in a document verified by a statement of truth without an honest belief in its truth, the second was said to be for falsifying evidence.

57. T&H's letter of 5 June 2020 went on to urge the Claimant to take legal advice from her counsel on the matters raised in the letter (she acts in person although instructs counsel on a direct access basis). It concluded with the following:

> "We require a full response to the matters raised in sections three and four of this letter by no later than 4 pm on Tuesday 9 June 2020. Should we not hear from you by this time, our clients reserve their rights to issue committal proceedings without further recourse to you."

58. T&H also sent a second letter on 5 June 2020, which was marked without prejudice and which put forward a proposal for a full and final settlement of all matters between the parties. The Claimant said that this letter showed that the Defendants were treating pursuit of a contempt application in a manner which had no regard to the fact that their role is, as Andrew Baker J said in *Navigator*, "*to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the court to make a fair quasi criminal judgment*". Mr Lomas submitted that I was entitled to have regard to this without prejudice letter because it evinced unambiguous impropriety.

59. Subject to certain well-established exceptions, a without prejudice communication is not admissible in evidence. The reason for this is the public policy of encouraging litigants to settle their differences rather than litigate them to the finish. It is desirable that statements or offers made in the course of negotiations for settlement should not be brought before the court of trial as admissions on the question of liability: *Rush & Tompkins Ltd. v. Greater London Council* [1989] AC 1280, 1299.

60. One of those exceptions, which is the only one relied on by the Claimant, is described by Robert Walker LJ in *Unilever Plc. v. Procter & Gamble Co.* [2000] 1 WLR 2436, 2444 ("*Unilever*") as follows:

> "one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a

> cloak for perjury, blackmail or other "unambiguous impropriety" … But this court has… warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

61. It was submitted by the Claimant that one of the circumstances in which the court may be prepared to conclude that there has been unambiguous impropriety is where a threat of committal proceedings is used as a lever in order to obtain a favourable settlement of litigation. Depending on the circumstances, there is no doubt that this submission is correct.

62. The line of authority which deals with this point was applied in *Ferster v Ferster* [2016] EWCA Civ 717 ("*Ferster*"), where unambiguous impropriety was established when what the judge held to be a threat of committal proceedings amounting to blackmail was made by one party to another. In that case, the increase in price demanded during the course of settlement negotiations had nothing to do with the underlying merits of the claim, but was the price being exacted for not causing the commencement of criminal proceedings for perjury and perverting the course of justice and civil proceedings for contempt of court. These threats were also combined with threats of publicity.

63. It was also considered by Foxton J in *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm) ("*Integral Petroleum*") in the context of an application to strike out committal proceedings on two grounds, including one based on the contention that the proceedings were an abuse of process because the threat of committal was being used improperly as a lever to obtain a more favourable settlement agreement. In the course of his judgment Foxton J at [42] said: "*it can never be proper to seek to use a committal application as a lever to bully a respondent into a settlement*."

64. The Claimant contended that the without prejudice letter in the present case amounted to clear and unambiguous impropriety by T&H and the Defendants. She says that it does so because it falls squarely within the category of case in which an abusive and bullying threat of committal proceedings has been made in order to force a settlement.

65. The without prejudice letter was put in a separate bundle for the purposes of this hearing. Although it was always likely that it would be necessary for the court to consider it in order to reach a conclusion as to whether the Claimant had established her case on unambiguous impropriety, Mr Lomas pre-empted my decision that this would be the case because he recited its contents in full in his skeleton argument. I made clear during the hearing that this was inappropriate in the absence of agreement with the Defendants, but in the event Mr Bheeroo made clear that he was not going to submit that I should not look at it (and did not ask to go into private for its contents to be considered). Mr Bheeroo did however emphasise that there was a history in this case of the Claimant ignoring the rule that without prejudice communications should not be referred to in evidence and this was yet another example of the same.

66. In support of her argument that the contents of the without prejudice letter were unambiguously improper, the Claimant relied on the fact that it was sent on the same day as the open letter which I have referred to above, and before a point in time at which any questions had been asked of her in respect of the emails. It was also said that the Defendants relied on information from Ms Ivey (the apparent absence of any emails between Mr Allen and the Claimant) which was subsequently found to be

incorrect, although there was no reason for the Defendants to think that might be the case. She also said that there was no proper basis for alleging a contempt on 5 June 2020 and that, at that stage, any threat of committal was plainly premature.

67. As will appear, I agree that it would have been premature for the Defendants to commence committal proceedings at that stage. However, I disagree that there was no proper basis for alleging on 5 June 2020 that the Claimant was in contempt of court. It is plain to me that what the Defendants had been told by Ms Ivey gave rise to a justifiable concern that the Claimant may well have fabricated the email exchange. When this was combined with the first three problems with the Claimant's case that I have identified above, there was sufficient to establish a strong prima facie case that the exchange had been falsified without regard to the further confirmatory evidence which emerged thereafter.

68. The Claimant then went on to say that the without prejudice letter included a clear example of a threat of committal proceedings being made which would have been abusive because they were intended to cause maximum harm to the Claimant and force her into a settlement.

69. The part of the letter on which the Claimant concentrated was a statement to the effect that the Defendants were prepared to proceed with making a committal application against the Claimant given the circumstances which had been outlined in the earlier open letter of the same date. T&H said that they had been instructed to prepare the necessary papers for this purpose. They said that "*Our clients are entitled to apply to bring contempt proceedings against you for falsifying documents and making a full statement verified by a statement of truth prior to the trial of the substantive action*". The letter also included an explicit statement to the effect that the Defendants agreed to refrain from making an application to commence committal proceedings against the Claimant on condition that she complied in all respects with the terms of the proposed settlement agreement.

70. A compromise of any possibility that committal proceedings might be brought against the Claimant was therefore a material part of what was proposed, but the substance of the letter was to put forward a complete proposal in full and final settlement of all disputes between the parties. It proposed a mutual agreement to settle all matters between them including a confidentiality clause, a non-disparagement clause and non-contact provisions. It also included a proposal that the Claimant should pay the Defendants' costs on the indemnity basis with an interim payment on account.

71. I do not accept the Claimant's characterisation of the without prejudice letter as abusive. True it is that it was firm and forceful in the way that it was expressed, and it warned the Claimant that she was at risk of imprisonment if committal proceedings were successful. However, in light of the conclusions that the Defendants were entitled to reach as to the genuineness of the email exchange and their belief that the claim generally was weak, I do not consider that the tone in which it was expressed was unambiguously improper.

72. More importantly, I do not consider that its contents were inappropriate, nor more particularly could they be characterised as evincing unambiguous impropriety. In light of the information that had become available to the Defendants, it was obvious that committal proceedings required to be considered at some stage. If there were to be a

mutual settlement of all claims and cross claims against each other, it was likely to be necessary for any prospective contempt application to be wrapped up in any settlement. As Foxton J said in *Integral Petroleum* at [42] "*any settlement of the overall commercial dispute is necessarily going to have to address the position of the committal application*".

73. In my view there is a clear distinction between dealing with an outstanding or contemplated committal application, which is reasonably thought to be justified by reason of a party's conduct on the one hand, and a threat to obtain a commercial advantage through the commencement or continuation of committal proceedings on the other. In my judgment, while *Ferster* was a case which plainly fell into the latter category, this case falls squarely into the former.

74. While the language in which this issue is addressed in T&H's without prejudice letter carries with it a clear warning that, if proceedings are not settled in full their continuation would include the committal proceedings which the Defendants were said to be entitled to bring, I consider that such a warning was something that it was not improper for T&H to give. Indeed, a warning that particular conduct is regarded by an opposing party as constituting a contempt is in any event a relevant factor for the court to take into account when determining a permission application (see paragraph (5) in the summary of the law derived from *KJM Superbikes* that I have cited above).

75. In my view, the warning in the present case fell well short of the sort of threat or lever referred to in *Ferster* and *Integral Petroleum* and is certainly not the clear case of abuse of a privileged occasion contemplated by Robert Walker LJ in *Unilever*. The focus on why a settlement was said to be appropriate was the Defendants' belief that the Claimant's proceedings were misconceived. The reference to committal proceedings was in the form of a warning that, in the absence of a full and final settlement, the risk of a successful committal application should be a significant concern for the Claimant. In my judgment the way it was expressed was far removed from an attempt to take advantage of putative committal proceedings in order to bully a Claimant into accepting a settlement proposal that was not otherwise justified.

76. In these circumstances, I do not consider that the Claimant has clearly established the "unambiguous impropriety" necessary to render the without prejudice letter of 5 June 2020 admissible in these proceedings. It follows that I cannot take it into account when determining whether to grant permission to the Defendants to make the contempt application they seek to pursue.

77. Nevertheless, I am not satisfied that this is a case in which the Defendants should be granted the permission that they seek. In reaching that conclusion, I am very conscious that the allegations in respect of which I consider that a strong prima facie case has been established are serious. The evidence points to the fabrication of a document for the purpose of misleading the court. But as has been said on many occasions, the question for the court at this stage is not the merits of the application, but whether it is in the public interest for it to be brought, and in particular whether it is in the public interest for it to be brought at the stage at which the application for permission is made.

78. I asked Mr Bheeroo during the course of his submissions whether he could point me to any authority in which the court had given permission for committal proceedings to be commenced where (a) the alleged contempt was knowingly making a false statement in an affidavit affirmation or other document verified by a statement of truth, (b) the statement related to a material issue that was likely to be explored at trial and (c) the application was made for the committal proceedings to be heard before the trial. He said that he was aware of no such case. Mr Lomas confirmed that he was not aware of one either.

79. Even though Mr Bheeroo does not accept that it is inevitable that the issue of the genuineness of the email exchange will be explored at trial, and I cannot rule out the possibility that he may prove to be right, the court can only proceed on the basis of the issues which are now pleaded. This is all the clearer because the Defendants have sought further information and served a notice to prove documents in relation to the exchange. It follows that those authorities which proceed on an assumption that it is only after the relevant evidence has been scrutinised at trial that it might be appropriate for a contempt application based on its falsity to be made are applicable.

80. As I have explained, this principle is spelt out quite explicitly in *Daltel*, but it is also implicit in the way in which other judges have expressed themselves. In part this is because authorities such as *Zurich Insurance*, *Cavendish Square* and *KJM Superbikes* are all cases in which the application for permission was only made after the relevant evidence had been given, but the focus is always on the importance of the application being made in its proper context and this will often be impossible to achieve before the evidence is given at trial (see e.g. Gloster LJ in *Stobart Group Ltd v Elliott* [2014] EWCA Civ 564 at [55]).

81. While it is certainly possible that there may be cases in which permission has been granted in such circumstances, it seems to me that it will normally be premature and contrary to the overriding objective to do so. This is partly because it is an inefficient way of resolving disputed issues of fact, but it is also because it is a distortion of the normal trial process to extract a particular issue for determination out of order. It is not the kind of issue which requires or is suitable for determination as a preliminary point in the normal course of litigation, and there are real risks that, if the court were to permit such proceedings in anything other than the most exceptional of circumstances, the proper conduct of contempt applications of this sort would be vulnerable to use for tactical reasons.

82. As the Court of Appeal has confirmed by its approval of the passage from the judgment of David Richards J in *Daltel* that I have cited above, if parties thought that they could gain an advantage by singling out a particular statement and making it the subject of a committal application, there is a clear risk that the usual process of litigation would be seriously disrupted:

> "In general the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence."

83. In my judgment, the present case is one in which, whatever the position may be after the trial, bringing the contempt application at this stage would be premature, disproportionate and contrary to the overriding objective. It would take one issue out

of order and unbalance the proper conduct of the proceedings. Furthermore, once the trial has concluded, it will be possible for the court to adopt a more clear-sighted view of the true significance of what occurred at the time of the alleged email exchange and the extent to which it was in fact material to the issues in the action. These are also both factors which will be relevant to any court's determination as to the seriousness of any contempt.

84. Proceeding with a contempt application now will also cause disproportionate resource to be expended on a single question simply because very serious questions as to one party's conduct may arise in relation to it. In my view it would not be proportionate in accordance with the overriding objective for the necessary resources to be devoted to a contempt application at this stage. Mr Bheeroo submitted that the matter could be dealt with in relatively short order and that much of the preparatory work for a hearing had already been done and put in evidence for the purposes of this application. That may be the case so far as the Defendants are concerned, but the same cannot be said for the impact on the court and other court users.

85. At a later stage (most probably after the trial) it will also be easier for the court to make a more informed assessment as to whether or not the pursuit of the public interest in this case is a matter which it is appropriate to have entrusted to the Defendants. While I have concluded that there was nothing unambiguously improper about the without prejudice letter, and while I have no concerns about T&H's appreciation of their role as officers of the court (cf Andrew Baker J in *Navigator* at [143]), the forthright and trenchant terms of the correspondence gave me some concern that the Defendants may find it difficult to control the outrage they appear to feel for what they have described as the Claimant's dishonest conduct. I am satisfied that it is only after the trial that it will be possible to make a proper and dispassionate assessment as to whether they can fulfil the quasi-prosecutorial role (as discussed by Andrew Baker J in *Navigator*) that is required in an application of this sort.

86. It follows that this application for permission to make a contempt application fails. In accordance with the approach adopted by the Court of Appeal in *TBD*, it will be dismissed.