Neutral Citation Number: [2020] EWHC 2907 (Comm)

Case No: CL-2018-000750

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 30/10/2020

Before :

Mr Justice Butcher

- -

Between :

FULHAM FOOTBALL CLUB LIMITED **Claimant**

-and-

CRAIG KLINE **Defendant**

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- -

Nick De Marco QC and Adam Baradon (instructed by **Simmons & Simmons LLP**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing date: 29 October 2020

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JUDGMENT

Mr Justice Butcher:

1. I have to decide on an application by the Claimant, Fulham Football Club Ltd, that three applications fixed for next week should be heard in private.

2. The hearing of that application took place yesterday, pursuant to an order of Foxton J made on 5 October 2020 (amended on 21 October 2020). That order helpfully records the essential elements of the history leading to this application, and it is convenient to quote from it (as amended)

> "**UPON** the Order of Moulder J dated 23.11.18 (the '**Moulder J Order**') which contained injunctions against the Defendant
> **AND UPON** the Claimant's application dated 14.12.19 for the Defendant's committal for breaches of the Moulder J order (the **'First Committal Application**')
> **AND UPON** the Claimant's application dated 16.4.20 for the Defendant's committal for further breaches of the Moulder J Order (the '**Second Committal Application**')
> **AND UPON** the Defendant's application dated 5.5.20 to set aside an Order of Moulder J dated 24.4.20 (the '**Set Aside Application**')
> **AND UPON** the Defendant by email dated 5.10.20 telling the Court and the Claimant that (a) he has no legal representation for the hearing of the applications described above, including the two committal applications, which conjoined hearing is listed from 5-7.10.20; and (b) he is not in the jurisdiction as at the date of this Order
> **AND UPON** the Claimant's request to adjourn that hearing to 2-3.11.20 so that the Defendant may seek legal representation funded by Legal Aid
> **AND UPON** considering the parties' written submissions by email
> **AND UPON** the Defendant being reminded that he is entitled to legal representation funded by Legal Aid for the purposes of the First Committal Application and the Second Committal Application and should take prompt steps to secure such representation including by contacting the Legal Aid board [contact details set out]
> **AND UPON** the Defendant being reminded that (as recorded at CPR 23.11 and CPR 81.4(2)(o)) the Court may proceed to hear the Applications, including the First Contempt Application and the Second Contempt Application, in his absence if he does not attend
>
> **IT IS ORDERED THAT:**
> 1 The hearing of the First Committal Application, Second Committal Application and Set Aside Application ('**the Applications**') is adjourned to be heard on 2.11.20 and 3.11.20, time estimate two days with a further one day of pre-reading (the '**Conjoined November Hearing'**).
> …
> 3 There shall be a hearing on 29.10.20 at which the Court will determine whether the Conjoined November Hearing should be heard in public or in private, time estimate two hours …
> 4 Notice of this hearing has been given to the Press Association by email to [address set out]. The media shall be entitled to make submissions as to whether the hearing should take place in public or in private.

…"

3. As the amended order records, notice had been given to the Press Association of yesterday's hearing by the Court. In the event, however, no media organisation or representative expressed any desire to participate or to make submissions as to whether the Conjoined November Hearing should take place in public or private.

4. In addition, the Defendant, Mr Kline, did not participate in yesterday's hearing, though he was on notice of it. In communications to the Court and to the Claimant's representatives sent shortly before yesterday's hearing commenced, the Defendant indicated that, though he had a preference for the hearings to be in public, he had 'no objections one way or other on public or private', and could not afford to fight for a public hearing.

5. I decided that yesterday's hearing should itself take place in private, though as I have indicated representatives of the press or media could have attended and made representations had they wished to do so. My decision that yesterday's hearing should be in private was on the basis that I was satisfied that holding it in public would defeat the very object of having a hearing to decide whether the Conjoined November Hearing should be heard in public or private. This is because I considered that it would be (as indeed it proved to be) necessary on yesterday's hearing to consider detailed submissions as to why the Conjoined November Hearing should be in private. The reasons advanced are essentially that the Conjoined November Hearing will involve consideration of allegations which the Defendant has made in public which the Claimant says are prejudicial to it and are made in breach of various obligations on the Defendant, including injunctions made by this Court. Accordingly yesterday's hearing necessarily involved a consideration of the allegations which the Claimant contends the Defendant should not have made and which are prejudicial to it.

6. Having heard the submissions of Mr De Marco QC yesterday as to whether the Conjoined November Hearing should be in public or in private, I indicated that I would reserve my judgment on that matter in order that I could deliver it in open court today. That is what I am now doing. In this judgment I have tried to avoid referring to any of the allegations made by the Defendant of which the Claimant complains and the confidential circumstances in which, on the Claimant's case, he came under obligations not to make them.

7. As will be apparent from what I have already said and from the terms of the Recitals to the Foxton J order which I have quoted, the Committal Applications relate to the Defendant's alleged breaches of certain obligations imposed upon him, including by Court order, not to make disparaging allegations against the Claimant and its owners and management.

8. As Mr De Marco showed me, it will be necessary for the Court hearing those applications to consider various, and it may be many, instances of the alleged breaches of the Defendant's obligations and of the Court orders. This will undoubtedly involve a consideration of the allegations made, when they were made, and whether what the Defendant wrote did or did not constitute a breach of the obligations upon him. It seems likely that it will also involve consideration of

whether what the Defendant wrote was justified. A consideration of the allegations made by the Defendant is thus going to be central to next week's hearing. It is precisely the making and remaking of such allegations which is said by the Claimant to have constituted the contempt of court.

9. It also appears clear that there will be a consideration of whether the making or remaking of such allegations by the Defendant constituted a breach by him of obligations of confidence or a misuse of confidential information.

10. On those bases the Claimant has contended that the present is a case in which the Conjoined November Hearing should be in private, as one falling within CPR rule 39.2(3)(a) and/or (c).

11. In considering that application I begin by recalling the fundamental principle that justice should generally be open and public. CPR rule 81.8(1) states, in relation to Committal Proceedings:

"In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs."

12. The rule to which reference is there made, rule 39.2 is, in part, in these terms:

39.2— General rule—hearing to be in public

(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).
(2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
…
(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice—
(a) publicity would defeat the object of the hearing;
(b) it involves matters relating to national security;
(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
(d) a private hearing is necessary to protect the interests of any child or protected party;
(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.

13. Certain further helpful guidance as to how the rules should be applied in situations such as these is provided by the decision of Males J in EWQ v GFD [2013] EWHC 3231 (QB). At paragraph 11 Males J referred to the fundamental principle of open

justice. He referred to certain guidance given in 2013 in relation to the Court of Protection and in some cases the Family Division. At paragraph 13 he said this:

"[Counsel for the claimant] accepts that … the fact that the case is concerned with privacy would not, of itself, justify the hearing of a committal application in private. That would have to depend on the circumstances of the particular case and it may well be that there are, even in privacy cases, applications to commit which can and should be heard in public. The guidance goes on to say that the fact that the hearing of the committal application may involve the disclosure of material which ought not to be published, does not of itself justify hearing the application in private, if such publication can be restrained by an appropriate order. That is more likely to be the case if the disclosure of such material is essentially an incidental aspect of an application to commit. It is less likely to be the case if really the whole application is going to be concerned with confidential material which ought not to be published and which it was the whole purpose of the order which a defendant is said to have broken to keep confidential."

14. At paragraph 15, Males J referred to the general rule that hearings should be in public, and to the exceptions in sub-paragraphs (a), (c) and (g) of CPR rule 39.2. At paragraph 16 he went on:

"In contempt cases, those paragraphs, in my judgment, should be scrutinised with even greater care and rigour than in the case of proceedings generally in view of the criminal or quasi-criminal nature of contempt applications. I adopt that approach in considering the question of privacy or publicity in this case."

15. In paragraph 19, Males J concluded that, "even giving them a closer degree of scrutiny than usual", paragraphs (a), (c) and (g) of CPR rule 39.2 were fully met in that case.

16. I was also referred to the decision of Murray J in <u>Taher v Cumberland</u> [2019] EWHC 2589 (QB). After referring to the principle of open justice, and the court's power to derogate from it in the circumstances set out in CPR rule 39.2, Murray J said this, at paragraphs 71 - 72:

"[71]The test is one of necessity and not discretion: <u>AMM v HXW</u> [2010] EWHC 2457 (QB) (Tugendhat J). I also need to consider proportionality and, if I consider that some derogation from the principle of open justice is necessary, whether it can be achieved by a lesser measure or combination of measures, such as imposing reporting restrictions, anonymising the parties or restricting access to court records.
[72] I note that, although the Privacy Application was not opposed by Mr Cumberland, a derogation from the principle of open justice cannot be granted simply by consent of the parties. The parties cannot waive the rights of the public…."

17. I fully accept that it is necessary for me to form my own view of whether it is necessary for the Conjoined November Hearing to be heard in private, and that the facts that the Claimant seeks that result, the Defendant does not strenuously oppose it and no media organisation or representative has appeared to argue against it, do not of themselves determine the answer. I have however concluded that next week's hearing

should be in private. This is a case, in my judgment, which falls within CPR rule 39.2(3)(a). Publicity would indeed defeat the object of the hearing which is to decide on whether the Claimant has shown that that the Defendant has breached obligations not to make disparaging allegations against it, and if he has to prevent the making of further such allegations.

18. It will be necessary during that hearing to consider the various alleged damaging and disparaging statements by the Defendant and what motivated the making of any such statements. The ventilation of these matters could have the damaging effects on the Claimant which it is the purpose of its claim, and of the Committal Applications to seek to prevent.

19. In addition, I consider it to be clear that next week's hearing will involve consideration of confidential information, and publicity will damage that confidentiality. This case thus falls within CPR rule 39.2(3)(c) as well. Had that ground stood alone, it might not have been sufficient to persuade me that it was necessary for the hearing to be in private. As it is, however, I consider that it reinforces the conclusion which I reach based on the applicability of CPR rule 39.2(3)(a).

20. I have considered the question of proportionality and in particular whether it would be possible to achieve a solution which involved a lesser derogation from public justice than a hearing in private but which ensured that publicity would not defeat the object of the hearing, for example by imposing reporting restrictions. It appears to me, however, that the present is a case falling squarely into the type referred to by Males J in EWQ v GFD where really the whole application is going to be concerned with material which, on the Claimant's case ought not to have been published. This is emphatically not a case where the reference to such material would be incidental. In the circumstances it seems to me that to attempt to proceed in public but with reporting restrictions covering almost all that will be debated would simply be likely to give rise to argument and to the potential for the publication of material which should not be published, to no valuable purpose.

21. Accordingly, having given the matter the particularly close scrutiny which is necessary in relation to any application that committal hearings should be heard in private, I have concluded that it is necessary in the interests of justice that the Conjoined November Hearing should be heard in private.