IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2018] EWHC 3383 (QB)

No. IHQ18/0523

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 8th November 2018

Before:

MR. JUSTICE GOOSE

B E T W E E N :

ZURICH INSURANCE PLC — Applicant

- and -

DAVID ROMAINE — Respondent

MR. D.CALLOW appeared on behalf of the Claimant.

MR. J GIBBONS appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE GOOSE:

1 Zurich Insurance Plc, (“the claimant”) are the former employer's liability insurers of Stanley Refrigeration Limited, ("the dissolved company"), which employed David Romaine, (the defendant), in the 1970s and 1980s. In 2015, the defendant commenced proceedings in the County Court for personal injury, loss and damage caused by noise-induced hearing loss during the course of his employment. In those proceedings, the defendant provided a witness statement dated 27 June 2016 and replies to a Part 18 Request for Information dated 1 August 2016. In response to the evidence within those documents, the claimant obtained information which seriously undermined the defendant's credibility. When the claimant indicated that it would seek to strike out the claim, the defendant served notice of discontinuation of his proceedings.

2 On 12 September 2017, the claimant issued an application against the defendant for permission to commence committal proceedings for contempt of court. The defendant provided a witness statement opposing the application. On 17 August 2018, I considered the application on the face of the papers and determined that a hearing was not appropriate under CPR 81.14(4). I refused the application and gave short reasons. The claimant now seeks to renew the application orally for permission to commence contempt of court proceedings.

3 At the start of this application I heard submissions from the parties about whether they were content for me to hear this application, having been the judge who made the order on 17 August, refusing permission. Both counsel confirmed that I should hear the application and I agreed to do so.

THE PROCEDURAL FRAMEWORK

4 In the course of the personal injury proceedings, the defendant was required to verify any document with a statement of truth under CPR 22.1. This included his witness statement and responses to the Part 18 Request for Further Information. The defendant brought his claim through solicitors and provided a statement of truth which was signed with an electronic signature. The contents of those documents are at the heart of the application to commit the defendant for contempt of court. The use of an electronic signature upon a statement of truth or other documents in the proceedings is permitted under CPR 5.3. Accordingly, the electronic signature was sufficient compliance with the rules.

5 Where a person makes or causes to be made a false statement in a document verified by a statement of truth without an honest belief in its truth, proceedings for contempt of court may be brought against that person:- see CPR 32.14. The procedure for making an application for permission to commence committal proceedings is set out within CPR 81.14, which requires a detailed statement of the applicant's grounds for bringing the application and an affidavit setting out the facts and exhibiting all documents relied upon. This being an application in relation to a false statement of truth in the County Court not the High Court, the claim form for an application for permission from the court must be by CPR Part 8 and not Part 23 – see CPR 81.18(3). The application must be filed and served personally upon the defendant. CPR 81.14 determines the rules relating to permission applications and CPR 81.14(4) provides:

"The court will consider the application for permission at an oral hearing, unless it considers that such a hearing is not appropriate."

6 When the claimant's written application was made to the court it included affidavits from Andrew Ball dated 5 September 2017, Georgia Legg dated 6 June 2017 and Simon Gifford dated 21 August 2017. More recently, after the decision of the 17 August 2018, statements from Elliot Kinnear dated 5 October 2018 and a further statement from Andrew Ball dated 5 October 2018 have been served. The defendant's statement dated 8 November 2017 was included in the papers in time for the decision. On 17 August 2018, I refused permission without an oral hearing, having considered that such a hearing was not appropriate. The issues on the papers were clear and full representation had been made on behalf of both the claimant and the defendant.

7 The claimant now makes a renewed application for permission orally. Whilst one of the grounds in this application included asserting that there had been some irregularity in the 17 August decision, that has been abandoned in the course of argument. The claimant, however, submits that the court has power to set aside that decision using its inherent jurisdiction and case management powers within CPR 3.1(2m) and 3.1(7) and to hear the application now orally. It had been part of this application to rely on CPR 3.3(5) but for reasons that will emerge, that route is not available to the claimant. Once the order is set aside the claimant submits that the court should grant permission for the claimant to commence committal proceedings.

8 In two short skeleton arguments on behalf of the defendant, it is submitted that the claimant's only redress after the refusal of permission is to appeal to the Court of Appeal. The defendant submits that the decision I made on 17 August 2018 should not be disturbed.

9 The claimant has also issued an application to appeal to the Court of Appeal but as a protective measure. The defendant submits that the claimant must elect which route it wishes to take and cannot pursue both at the same time. The claimant responds to this submission by saying that it awaits the outcome of this application before it will elect. I need say nothing further about that point.

DECISION ON PROCEDURE

10 Whilst it is clear that the claimant would have preferred an oral hearing of its application for permission, the decision to consider the application without one was a matter for the court's discretion. Where detailed evidence in sworn affidavits have been provided to the court on behalf of the claimant, together with all supporting documentation, and a statement had been provided by the defendant, it may be entirely appropriate to make the decision under CPR 81.14(4) without an oral hearing. This rule states:
(quote format) *"The court will consider the application for permission at an oral hearing, unless it considers that such a hearing is not appropriate."*
(Same para) I concluded that it was not appropriate because the court had sufficient information and the submissions of the parties in writing, to make the decision. The decision of 17 August does not preclude me from considering the application afresh should there be jurisdiction to do so.

11 It was agreed between the parties that CPR 3.3(5) does not provide a route for the claimant to a renewed oral application. The reason for this lies in the difference between an application for permission in relation to false statements in connection with proceedings in

the Senior Courts and those that are not. The former must be commenced with a Part 23 application whilst the latter must be commenced with a Part 8 application. This distinction is drawn in CPR 81.18(1-3). The consequence of this is that the rules are different in seeking a renewed application for permission, depending on whether the false statement was made in a Senior Court or a County Court. In a Senior Court application, when the court has refused permission without an oral hearing under CPR 81.14(4), then under Part 23.8 and Practice Direction 23A para.11.2, an application to set aside the order as a decision made by the court of its own initiative, can be made. See Civil Procedure Rule 3.3(1)(4) and (5).

12 However, where the application for permission relates to County Court proceedings, Part 23 is not available because the application is under Part 8. There is no parallel to CPR 23.8 within Part 8. Therefore, CPR 3.3 does not apply. This puts a claimant, seeking to set aside a refusal of permission, at a disadvantage, if the false statement related to County Court proceedings rather than in the High Court. It is difficult to discern a logical reason for this. The authors of the notes in *The White Book* at para.81.14.5 comment:

> *"No provision is made for the making of a renewed application where permission is refused. A disappointed application may apply for permission to appeal against the adverse decision of a single judge in the normal way."*

13 The claimant submits that it is inconsistent with the overriding objective, to deal with cases expeditiously and fairly. The claimant should not be forced to apply to the Court of Appeal when its application has been refused on the papers without an oral renewal before the court at first instance. In other areas of practice such an application is always available. For example, in applications for permission to appeal or in applications for judicial review. The defendant rejects this submission and relies on the notes in *The White Book* submitting that the claimant must pursue the appeal in the Court of Appeal.

14 The claimant, recognising this apparently illogical distinction, submits that the court has an inherent power under CPR 3.1(2m) and 3.1(7) which provide:

> *"3.1.(1) List of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
> *(2) Except where these rules provide otherwise the court may –*
> *(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.*
> *(7) A power of the court under these rules to make an order includes a power to vary or revoke the order."*

15 The claimant submits that whilst a decision to refuse permission was made without an oral hearing in accordance with CPR 81.14(4), it is open to the court to take any step or make any other order to manage the case in furthering the overriding objective. Further, even as a final order refusing permission, it remains open to the court to revoke the order under CPR 3.1. The breadth of the court's judicial discretion has been demonstrated in cases such as *XYZ v Various* (*Breast Implant Litigation*) [2013] EWHC 3643 (QB) and *Bradley v Patterson* [2014] EWHC 3992 (QB). Further in *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, a case in which the Court of Appeal made observations about the general application of CPR 3.1(7), it was stated that it usually applied

to cases where there had been some erroneous basis for the final order, or subsequent information that undermined it.

16 The defendant submits that it is not open to the claimant in this case to seek a renewed application by the inherent power of the court under CPR 3.1

17 I have come to the conclusion that the court should in the circumstances of this case permit the claimant to renew its application for permission, and I do so for the following reasons:

(i) It is agreed between the parties that the rules operate differently where the application is made under Part 8 rather than Part 23. There seems no logical reason for creating a route for a renewal of application for one but not the other.
(ii) To refuse a claimant a renewed application after the decision was made on the papers to refuse permission, would compel it to pursue an appeal to the Court of Appeal based on a decision with brief reasons. I do not consider such a course to be consistent with the overriding objective.
(iii) The inherent power of the court preserved within CPR 3.1 is wide enough to permit the court to revoke the order on 17 August 2018 and allow a renewed application consistent with renewed applications in other jurisdictions.
(iv) The observation of the claimant appears correct that in my order of 17 August I did not record whether I had taken into account the affidavit of Simon Gifford, which provided evidence of a broad concern about false compensation claims in low value cases. Therefore, it may have created an impression that the decision was made without taking into account all of the evidence.

Accordingly, I permit the claimant's application for a renewed permission application. I now turn to the permission application itself.

THE APPLICATION FOR PERMISSION UNDER CPR 81.18

The Legal Framework

18 The decision on whether to grant or refuse permission under CPR 81.18 has been the subject of a number of reported decisions from which clear principles have emerged. See for example, *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406, *A Barnes (T/A Pool Motors) v Michael Seabrook* [2010], CPR EP42, *Kirk v Walton* [2009] EWHC 1780. The propositions which emerge are as follows: -

(i) The discretion to grant permission should be exercised with great caution.
(ii) That there must be a strong *prima facie* case against the defendant.
(iii) The court should consider whether the public interest requires committal proceedings to be brought, this being a public, not a private, remedy.
(iv) That such proceedings must be proportionate and in accordance with the overriding objective.
(v) The false statements must have been significant in the proceedings and the defendant understood the likely effect of the statements and the use to which they would be put.
(vi) The court must give reasons in making a decision but be careful to avoid pre-judging or prejudicing the outcome of any potential substantive proceedings.
(vii) Only limited weight should be attached to a likely penalty.

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

DISCUSSION AND DECISION

19 When considering the alleged dishonesty of the defendant in the documents submitted in the course of the personal injury proceedings, I make no decision one way or the other about whether they were false or dishonest. That is not a decision for this court at the permission stage. Further, the fact that I refused the application on the face of the papers before the court on 17 August 2018 does not affect my decision in this renewed application in an oral hearing. It is obvious without more that further evidence has been submitted by the claimant and that the court has now heard full oral submissions by the parties. This court has considered the application as a fresh exercise.

20 It does not follow that in all cases where a witness or a party may have dishonestly lied on the face of documents which they have signed as being true, that permission will be granted in favour of committal proceedings. Good, *prima facie* evidence of dishonestly false statements is the first step when considering an application for permission. Without it, the court need proceed no further. In this application, I remain of the view, having considered all of the evidence including the additional evidence dated after 17 August 2018, that there is good evidence of false statements having been made deliberately and dishonestly by the defendant. However, I make no findings of fact upon this.

21 There remains a substantial issue between the claimant and the defendant about whether the allegedly false statements were knowingly made by the defendant. The claimant's submissions based on the Civil Procedure Rules, that an electronic signature is sufficient to validate a document as belonging to its apparent author, are clearly correct. However, the defendant denies in his witness statement dated 8 November 2017 that the signature is his and says that it was inserted into the document without his instructions. Further, he states that he did not see the statement or Part 18 replies before they were served. Whether this is right or not, I do not seek to determine at this permission stage. However, it will be for the claimant to prove to the criminal standard of proof that he, the defendant, was expressly confirming the truth of the contents of the documents. This does not detract from my assessment that the evidence against the defendant establishes a good *prima facie* case but it remains a significant factor.

22 It does not appear on the evidence that the defendant was warned that he may have committed a contempt of court such as to merit an application for committal to prison. The chronology of events is as follows. On 13 June 2016, the defendant filed his Part 18 responses. On 1 August 2016, the defendant's witness statement was filed. On 16 February 2017, the witness statements of the claimant's solicitors revealed that the defendant may not have been truthful in the context of the Part 18 responses and in his witness statement. On 14 March 2017, the claimant's solicitors made an application to strike out the claim on dishonesty grounds having shortly before given notice. Within days the defendant's solicitor indicating that the claim would be discontinued, which was confirmed on 21 March 2017. On 12 September 2017, the application for permission to commence committal proceedings was issued by the claimant.

23 There is no indication within the chronology of events or within the evidence that the defendant was warned of his potential committal for contempt of court. Of itself, this is not decisive, but it is a relevant factor.

24 The chronology also establishes that almost immediately after the application to strike out, based on the claimant's inquiry evidence was made, he discontinued proceedings. The claimant correctly observes that this may have been because of his asserted dishonesty being discovered. However, the fact remains that the proceedings were discontinued almost immediately. I accept that from the claimant's point of view that usually, when a false claim is discovered (if that is what happened here), the claim will cease and that should not be a bar to permission.

25 It is undoubtedly in the public interest that dishonest conduct in the course of proceedings, criminal or civil should not go without sanction - see for example *South Wales Fire & Rescue Service v Smith* [2011] EWHC 1749 (Admin). However the court must still act cautiously; not all cases of alleged dishonesty are or should be sanctioned with committal proceedings.

26 I do not consider that the value of the claim being for up to £5,000 is a significant argument against the granting of permission. Such an argument is clearly offset by the public interest in sanctioning any such claims given the growing problem identified in the evidence of Simon Gifford's affidavit.

27 There is a clear and obvious public interest in seeking to bring to the attention of both legal professionals and the wider public, that dishonest claims for damages and personal injury actions are not without victims and comprise a growing problem as demonstrated in the claimant's evidence before this court. However, it is not all such potential claims that should lead to additional litigation in the public interest.

28 Having considered this application for permission in this oral hearing and having taken into account the additional evidence relied upon by the claimant, I have come to the clear conclusion that permission under CPR 81.14 should be refused. The balance of the public interest does not fall in favour of permission being granted in the circumstances of this particular case. Undoubtedly, the issues involved were and remain highly significant between the claimant and the defendant as private parties. However, in circumstances where the defendant may have dishonestly minimised potentially other causes of noise-induced hearing loss, where such hearing loss is not itself in dispute, and when confronted with evidence which caused him to discontinue proceedings immediately, it is not in the public interest for permission to be granted for contempt proceedings to be issued. I am not persuaded that the proposed committal proceedings are proportionate. Accordingly, this renewed application for permission is refused.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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