Neutral Citation Number: [2021] EWCA Civ 146

Case Nos: A3/2020/1900, 1902

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS, BUSINESS LIST (CHANCERY DIVISION)
Mann J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 February 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

RIZWAN HUSSAIN	**Appellant**
- and -	
(1) GULRAJ VASWANI	**Respondents**
(2) SAROJ VASWANI	
(3) KRITI VASWANI	

- -
- -

Adam Tear of **Scott-Moncrieff & Associates Ltd** for the **Appellant**
The **Respondents** did not appear and were not represented

Hearing date : 4 February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 10 February 2021

Lord Justice Arnold:

Introduction

1. Rizwan Hussain appealed against two orders of Mann J dated 30 October and 4 November 2020 refusing Mr Hussain permission to make an application under a general civil restraint order made by David Halpern QC sitting as a Deputy High Court on 9 July 2020 ("the GCRO"). The application which Mr Hussain wished to make was an application to His Honour Judge Lethem sitting in the County Court at Central London to purge Mr Hussain's contempt of court and to ask for his early release from a sentence of 12 months' imprisonment imposed by Judge Lethem by order dated 30 July 2020 ("the Committal Order"). At the conclusion of the hearing the Court announced that the appeal was dismissed for reasons that would be given subsequently. This judgment sets out my reasons for concluding that the appeal should be dismissed.

The GCRO

2. Practice Direction 3C paragraphs 4.1 to 4.6 provide, so far as relevant for present purposes, as follows:

> "**4.1** A general civil restraint order may be made by –
>
> …
>
> (2) a judge of the High Court; or
>
> …,
>
> where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate.
>
> **4.2** Unless the court otherwise orders, where the court makes a general civil restraint order, the party against whom the order is made –
>
> (1) will be restrained from issuing any claim or making any application in –
>
> …
>
> (b) the High Court or the County Court if the order has been made by a judge of the High Court; or
>
> …,
>
> without first obtaining the permission of a judge identified in the order;

(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and

(3) may apply for permission to appeal the order and if permission is granted, may appeal the order.

4.3 Where a party who is subject to a general civil restraint order –

(1) issues a claim or makes an application in a court identified in the order without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed –

(a) without the judge having to make any further order; and

(b) without the need for the other party to respond to it;

(2) repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss that application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal.

4.4 A party who is subject to a general civil restraint order may not make an application for permission under paragraphs 4.2(1) or 4.2(2) without first serving notice of the application on the other party in accordance with paragraph 4.5.

4.5 A notice under paragraph 4.4 must –

(1) set out the nature and grounds of the application; and

(2) provide the other party with at least 7 days within which to respond.

4.6 An application for permission under paragraphs 4.2(1) or 4.2(2) –

(1) must be made in writing;

(2) must include the other party's written response, if any, to the notice served under paragraph 4.4; and

(3) will be determined without a hearing."

3. The GCRO was made in proceedings between Kilimanjaro AM Ltd ("KAM") and (1) Mann Made Corporate Services (UK) Ltd ("Mann"), (2) Mark Cundy, (3) David Cathersides, (4) Mr Hussain, (5) Alfred Olutayo Oyekoya and (6) Rajnish Kalia. On 10 May 2019 Mr Halpern struck out a claim brought in the name of KAM against Mann, Mr Cundy and Mr Cathersides ("the original defendants") on the ground that Mr Oyekoya and Kilimanjaro Capital Management Ltd ("KCM"), who purported to be the directors of KAM, were not genuinely directors, that their purported appointments were the result of fraud and forgeries, and accordingly that the proceedings had been brought in the name of KAM without authority. He certified that the claim had been brought totally without merit. Subsequently Mr Halpern made an order joining Mr Hussain, Mr Oyekoya and Mr Kalia as defendants to the proceedings in order for applications to be made against them for non-party costs orders and, in the case of Mr Hussain and Mr Oyekoya, for general civil restraint orders.

4. The original defendants' application for general civil restraint orders to be made against Mr Hussain and Mr Oyekoya came before Mr Halpern on 7 July 2020. On 9 July 2020 he made orders as requested by the original defendants for the reasons given in a reserved judgment handed down on the same date ([2020] EWHC 1804 (Ch)). Mr Halpern found that Mr Hussain and Mr Oyekoya had both persistently brought proceedings and applications which were totally without merit. In addition to the proceedings which were before him, he found that Mr Hussain and Mr Oyekoya were serial litigators who had been involved, either directly or indirectly, in numerous other proceedings in which they had committed abuses of process. He therefore concluded at [24]:

> "The court must protect the integrity of its own process and must also protect future would-be defendants from similar abusive conduct. The imposition of GCROs will not, of course, prevent the Respondents from commencing proceedings or making applications if they are able to satisfy a judge that it is proper to do so. I therefore make GCROs against both Respondents."

5. The GCRO was in the standard form. The operative part of the order provided that Mr Hussain "be restrained from issuing any claim or making any application in any court specified below without first obtaining the permission of" either Snowden J or Mann J. The specified courts were the High Court and "Any county court". The order went on to set out (among other things) the procedure for either making an application for permission or making an application to amend or discharge the order in accordance with PD 3C paras. 4.4, 4.5 and 4.6.

6. It does not appear to have been brought to Mr Halpern's attention at the time he made this order that on 1 July 2020 Judge Lethem had adjourned an application by Gulray, Saroj and Kriti Vaswani ("the Vaswanis") in separate proceedings for Mr Hussain to be committed to prison for sentencing after having found Mr Hussain guilty of contempt.

7. Mr Hussain, who acted in person in the proceedings leading to the making of the GCRO, has made no application to appeal the GCRO or to amend or discharge it. Mr Hussain's advocate suggested that Mr Hussain had been disadvantaged by the absence

of legal aid for the conduct of those proceedings, unlike the committal proceedings. I do not accept this. There is nothing to inhibit a litigant in person from making such an application, and the evidence shows that Mr Hussain is an experienced litigant in person.

The Committal Order

8. The background to the Committal Order is set out in my judgment on an appeal by Mr Hussain to this Court against that order: *Hussain v Vaswani* [2020] EWCA Civ 1216 at [2]-[17]. It is not necessary to set this out in detail again. The salient points for present purposes are as follows. Mr Hussain was the tenant of an apartment owned by the Vaswanis. The Vaswanis brought proceedings for possession of the apartment for non-payment of rent and obtained an order for possession and the payment of substantial arrears of rent. Mr Hussain sought a stay of execution pending appeal, and for that purpose on 2 January 2020 he gave the court an undertaking to pay the sum of £92,500 to an account nominated by the Vaswanis within four working days. On 6 January 2020 he gave the court a further undertaking to pay the Vaswanis £1,950 a week for occupation of the property until disposal of the appeal. He did not comply with those undertakings, however. On 21 January 2020 the Vaswanis applied for Mr Hussain to be committed to prison for contempt of court. In his judgment dated 1 July 2020 Judge Lethem found that Mr Hussain was in breach of the undertakings and therefore guilty of two counts of contempt. Sentencing was adjourned to 30 July 2020.

9. On 30 July 2020 Judge Lethem sentenced Mr Hussain to imprisonment for a term of 12 months on each of the two counts, to be served concurrently. As explained in my previous judgment at [51] and [54], Judge Lethem found that the contempts were "a particularly egregious breach of undertakings, particularly given the circumstances in which they were given". Among those circumstances was the fact that on 6 January 2020 Mr Hussain had falsely told the judge that the sum of £92,500 had been paid and produced a document from KCM purporting to confirm that fact. Judge Lethem also took into account the fact that the money remained unpaid and the absence of any guilty plea, contrition or remorse on the part of Mr Hussain. Judge Lethem therefore took as his starting point a sentence of 18 months.

10. Judge Lethem discounted the sentence to 12 months, however, to reflect Mr Hussain's mitigation that he was previously of good character, the effect of incarceration upon someone in his position and, in particular, his medical condition. Judge Lethem also took into the fact that the impact of a custodial sentence was likely to be heavier due to the Covid-19 pandemic than it would otherwise be. This Court rejected Mr Hussain's complaint that the sentence was manifestly excessive.

11. Importantly for present purposes, Judge Lethem apportioned the 12 months sentence into a punitive element of eight months and a coercive element of four months, thus enabling Mr Hussain to seek remission of the latter part if he purged his contempt.

12. It is clear from Judge Lethem's judgment of 30 July 2020 that he was aware of the existence of the GCRO, although it is not clear whether he had seen a copy of it or of Mr Halpern's judgment.

13. The Committal Order provided that Mr Hussain be committed to Her Majesty's Prison at Pentonville for a total period of 12 months "or until lawfully discharged if sooner". It also provided that "the contemnor can apply to HHJ Lethem to purge his contempt and ask for release".

14. When the Committal Order was pronounced Mr Hussain was not in court. It was not until 9 September 2020 that he was arrested and started to serve his sentence. Although section 258 of the Criminal Justice Act 2003 requires that Mr Hussain be unconditionally released once he has served half his sentence, as matters stand he will remain in prison until 8 March 2021 (subject to the possibility of temporary release discussed below).

The application

15. Following his unsuccessful appeal to this Court against the Committal Order, Mr Hussain's advocate applied on behalf of Mr Hussain to Judge Lethem by email dated 29 September 2020 to purge Mr Hussain's contempt and seek early release. The email was copied to the Vaswanis' solicitors. On 30 September 2020 Judge Lethem replied by email as follows:

> "I am anxious to expedite this matter bearing in mind that Mr Hussain is in custody. However I am struggling to understand why the procedure set out in CPR 81.31 has not been followed. Surely that sets out the procedure for the making the application that he seeks? For clarity's sake I have made an order requiring that any application for discharge of Mr Hussain is to be made to be me."

16. At that date CPR rule 81.31 provided:

> "**Discharge of a person in custody**
>
> (1) A person committed to prison for contempt of court may apply to the court to be discharged.
>
> (2) The application must—
>
> (a) be in writing and attested by the governor of the prison (or any other officer of the prison not below the rank of principal officer);
>
> (b) show that the person committed to prison for contempt has purged, or wishes to purge, the contempt; and
>
> (c) be served on the person (if any) at whose instance the warrant of committal was issued at least one day before the application is made.
>
> (3) Paragraph (2) does not apply to—
>
> (a) a warrant of committal to which CCR Order 27 rule 8 , or CCR Order 28 rule 4 or 14 relates; or

(b) an application made by the Official Solicitor acting with official authority for the discharge of a person in custody.

(4) If the committal order is made in a county court and—

(a) does not direct that any application for discharge must be made to a judge; or

(b) was made by a district judge under section 118 of the County Courts Act 1984 ,

the application for discharge may be made to a district judge.

(5) If the committal order is made in the High Court, the application for discharge may be made to a single judge of the division in which the committal order was made."

17. Although r. 81.31(2) did not in terms require the application to be made by application notice, note 81.31.1 of the 2020 edition of *Civil Procedure* stated that this should be done.

18. Judge Lethem's point was well-taken. In *Swindon Borough Council v Webb* [2016] EWCA Civ 152, [2016] 1 WLR 3301 this Court emphasised the need for the procedure specified in r. 81.31 ordinarily to be followed. As Tomlinson LJ pointed out at [25], the person or body at whose instance the warrant of committal was issued "has an interest which should be respected, and so far as practicable accommodated, by being heard on the question whether the contemnor should be released before serving the full term imposed, subject of course to any statutory entitlement to earlier release". That requires proper notice of the application.

19. With effect from 1 October 2020 the whole of Part 81 of the Civil Procedure Rules was replaced by new provisions by the Civil Procedure Rules (Amendment No 3) Rules 2020, SI 2020/747. There were no transitional provisions. Rule 81.31 has been replaced by r. 81.10, which provides:

"**Applications to discharge committal orders**

(1) A defendant against whom a committal order has been made may apply to discharge it.

(2) Any such application shall be made by an application notice under Part 23 in the contempt proceedings.

(3) The court hearing such an application shall consider all the circumstances and make such order under the law as it thinks fit."

20. As can be seen, r. 81.10(2) explicitly requires an application to be made by application notice. It follows that, unless the court orders otherwise, it must be served on each respondent (r. 23.4(1)) at least three days before the hearing (r. 23.7(1))

accompanied by a copy of any written evidence in support (r. 23.7(2)(a)). In my judgment the guidance given in *Swindon v Webb* remains applicable to r. 81.10.

21. On 2 October 2020 Mr Hussain filed and served an application notice in the County Court at Central London seeking to purge his contempt accompanied by written submissions from his advocate and a draft witness statement of Mr Hussain. On 6 October 2020 Mario Economides, a partner in the Vaswanis' solicitors, made a witness statement in opposition to the application pointing out, among other things, that Mr Hussain required permission to make the application under the GCRO. At the hearing of the application on 7 October 2020 Judge Lethem held that, owing to the fact that no permission to make the application had been obtained from Snowden J or Mann J, the application had been automatically struck out by virtue of PD 3C para. 4.3. Mr Hussain did not appeal against Judge Lethem's order of that date.

22. Later on 7 October 2020 Mr Hussain's solicitor sent the Vaswanis' solicitors an email notifying them that an application for permission to bring the application dated 2 October 2020 would be made after 9 October 2020 and asking for comments by then. The Vaswanis' solicitors responded the next day disputing that the email of 7 October 2020 constituted proper notice under PD 3C para. 4.4.

23. On 12 October 2020 Mr Hussain filed an application for permission to apply to purge his contempt by letter plus enclosures. The matter came before Mann J as a paper application on 14 October 2020. He made an order dismissing the application as totally without merit on the grounds that (i) it should have been made by application notice, (ii) insufficient notice had been given to the Vaswanis, (iii) no transcript of the committal judgments had been provided and (iv) the materials which had been filed provided "no basis at all" for an application to purge or for early release.

24. On 16 October 2020 Mr Hussain filed and served on the Vaswanis an application notice seeking permission to apply to purge his contempt accompanied by extensive written submissions from his advocate and enclosures, including a copy of Mr Economides' statement. Among other matters, the submissions made on behalf of Mr Hussain stated that he wished to pay the sums he had undertaken to pay, but was being prevented from doing so by being incarcerated.

25. On 26 October 2020 the Vaswanis' solicitors sent written submissions in response to the application to Mann J's clerk. On 27 October 2020 Mr Hussain's solicitors attempted to file a copy of the submissions via CE File, but it was rejected because "the parties names on the document does not match the parties names on this case" (the Vaswanis not having been parties to the proceedings in which the GCRO was made).

26. On 30 October 2020 Mann J made an order on paper dismissing Mr Hussain's application on the grounds that (i) he had still not been provided with the judgments on the committal application, (ii) he had not been provided with the Vaswanis' response to the application and (iii) he had not been provided with a copy of this Court's judgment.

27. On 1 November 2020 Mr Hussain requested that Mann J reconsider the matter in light of the fact that the relevant part of the Court of Appeal judgment had been quoted in Mr Hussain's submissions and the Vaswanis' submissions had been sent to the

judge's clerk and that an attempt had been made to file them. In addition, Mr Hussain's solicitors supplied a copy of the bundle for the Court of Appeal hearing, which contained transcripts of Judge Lethem's judgments.

28. On 4 November 2020 Mann J made a further order on paper dismissing Mr Hussain's application on the merits for the following reasons:

> "The question for me is not whether an application to purge would succeed, but whether there is sufficient material to lead to the conclusion that he [h]as at least an arguable case for placing before the judge. Bearing in mind, as I do, that this is an application affecting Mr Hussain's liberty, I apply an even lower threshold. Despite that, the application fails.
>
> First, there is nothing for this court in the point which suggests that Mr Hussain has the right to challenge a sentence which ought not to have been imposed. He does of course have that right, and he exercised it unsuccessfully when he appealed to the Court of Appeal. Nothing in his present application goes to the unlawfulness of his detention. The reference to a right to apply to the judge contained in the warrant is, in the circumstances, constrained by the civil restraint order against Mr Hussain.
>
> Next, it is suggested that Mr Hussain's prison conditions are rather worse than the judge contemplated, which justifies a reduction in his sentence. Now that I have seen the judgment of the judge it is apparent that the judge made a significant reduction to reflect the adverse conditions likely to arise out of Covid-19. I can see no arguably material change (which is all Mr Hussain would have to suggest) which might justify a further reduction. There may be differences but in my view it is clear that they would have no real effect on the sentence. Mr Hussain does not have an automatic right to apply to the judge – he is now under the constraints of a CRO. He must establish an arguable case fit for a further hearing – he has not done so.
>
> Next, there is a suggestion in Mr Tear's submissions that he wishes to purge by complying with the payment part of his undertaking. That is not, so far as I can see, founded in any reliable piece of evidence. And there is no explanation as to why that is possible now when it was not possible earlier when Mr Hussain was faced with the prospect of prison. As I understand it, he was pleading that the matter was beyond his control. If that is correct then prison life does not affect the position. If the 'beyond his control' source of the money has decided to pay it, then it can say so and demonstrate that it will. That might be a ground for reducing the coercive element of the sentence, but that will depend on the quality of the evidence.

> …
>
> As I have observed previously, the applicable prison regime is not a matter for the courts. It is a matter for the prison service."

29. On 10 November 2020 Mann J refused permission to appeal. On 7 December 2020 I granted permission to appeal on one out of three grounds. Although I expedited the hearing of the appeal, regrettably it was not possible for the hearing to be listed before 4 February 2021.

The appeal

30. The ground of appeal on which I granted Mr Hussain permission to appeal is that, as a matter of principle, a GCRO should not prevent a party held in prison by order of a civil court from obtaining a review by the sentencing judge of his sentence, and/or the conditions under which he is held. A GCRO should not inhibit in any way the right of a party who is detained to seek his liberty. The sentencing judge is generally best placed to consider whether the punishment of the court has at the time of application to discharge the order for committal been effectively carried out and has more than sufficient power to deal with frivolous applications.

31. At the hearing Mr Hussain's advocate advanced two submissions. His primary submission was that the GCRO should be interpreted as not applying to applications to purge a contempt and seek early release from imprisonment. His secondary submission was that, if the GCRO did apply to such applications, then the threshold for the grant of permission should be very low: indeed, so low that an even application which was totally without merit should be permitted unless some other ingredient was present (such as evidence that the applicant intended to use the application for an ulterior purpose e.g. to abuse the sentencing judge).

32. In my view the primary submission is untenable. The GCRO catches "any application" in the specified courts. That plainly includes an application to purge a contempt and seek release from prison. It would have been open to Mr Hussain to apply for the GCRO to be amended so as to except such applications, but he has not done so. (If the subject of a GCRO has already been committed to prison at the time that the GCRO is made, then consideration could be given to including an exception in the order at its inception, but that was not the position in this case.) Furthermore, Mr Hussain has not appealed against Judge Lethem's order dated 7 October 2020, Mr Hussain applied to Mann J for permission under the GCRO and Mr Hussain did not contend before Mann J that no permission was required.

33. Although the secondary submission has more merit, I am unable to accept it. The purpose of a GCRO is to prevent litigants with a history of meritless applications from making further applications unless a judge with knowledge of the history is satisfied that the applications have some merit. I see no reason why that purpose should not apply to applications to purge contempt and to seek release from prison. The suggestion that even an application that is totally without merit should be allowed to proceed unless some other ingredient is present is unacceptable.

34. Although Mr Hussain's advocate relied in support of the submission upon the fact that the Official Solicitor no longer has any role to play in relation to committal orders for

contempt of court, I do not see that this is relevant. As Sir James Munby P explained in *Devon County Council v Kirk* [2016] EWCA Civ 1221, [2017] 4 WLR 16 at [43]-[49], the value of the Official Solicitor was that he or she could act where the contemnor was languishing in prison through poverty, ignorance or obstinacy. As Munby P also explained at [52], however, legal aid is available for those accused of contempt. Thus poverty and ignorance should not be an obstacle for those in Mr Hussain's position (and indeed Mr Hussain has availed himself of such assistance). The availability of legal aid may not be an answer to obstinacy, but the obstinate contemnor is unlikely to be making an application to purge contempt.

35. Mr Hussain's advocate also pointed out that PD 3C paras. 4.4 and 4.5 require the person subject to a GCRO to give at least seven days' notice of an intended application to the other party (i.e. the party protected by the GCRO in the relevant context – here the Vaswanis). I cannot see any objection to notice being required, particularly given that, if permission is granted, notice of the actual application must be given under r. 81.10. It was submitted, however, that there could be circumstances in which an application needed to be made urgently, so that it would be unfair to the applicant to require seven days' notice to be given.

36. In my view there are two answers to this submission. First, an example which was suggested of such a situation was where the applicant sought temporary release on compassionate grounds to visit a relative who was dying. As Lewison LJ pointed out, however, Henderson J held in *Lexi Holdings plc v Luqman* [2008] EWHC 151 (Ch) (a judgment which, surprisingly, remains unreported) that the decision whether or not to grant an application by a contemnor for temporary release from prison was entrusted by rule 9 of the Prison Rules 1999 made under the Prison Act 1952 to the Secretary of State, on whose behalf the decision would in practice normally be taken by the prison governor, and was not a matter for the sentencing judge. Rule 9(3) permits a prisoner to be released on a number of grounds, including on compassionate grounds and for the purpose of receiving medical treatment.

37. Secondly, if there were nevertheless circumstances in which an urgent application was required, then I see no reason why the court could not exercise its power to abridge time under CPR r. 3.1(2)(a).

38. Returning to the test which should be applied on an application for permission under a GCRO to make an application to purge contempt and seek early release, I consider that Mann J was correct to say that the threshold should be a low one given that the liberty of the individual is at stake. Mr Hussain's advocate made the powerful point that no-one should be regarded as beyond redemption, and anyone committed to prison should have the chance to ask for mercy. Mr Hussain had the chance to ask for mercy when he was sentenced by Judge Lethem, however, and he received a degree of mercy in the form of a discounted sentence. That would not, of course, prevent Mr Hussain from seeking greater mercy on an application to purge his contempt and seek early release from prison. But Mr Hussain needed to show that his application had some merit. Mann J held that, even applying a low threshold, Mr Hussain had not established an arguable case fit for hearing by Judge Lethem. I am not persuaded that he applied the wrong test.

39. Although Mr Hussain does not have permission to challenge Mann J's reasons for reaching the conclusion he did, I would add two points. First, I would endorse Mann

J's observation that the applicable prison regime is a matter for the prison service and not for the sentencing court. Mr Hussain has complained about not receiving proper and timely medical treatment in prison. That is a matter for the prison service (subject, possibly, to judicial review by the Administrative Court). Mr Hussain has also complained about being kept in a Category B prison. Not only is that a matter for the prison service, but also (we were informed by Mr Hussain's advocate) Mr Hussain has subsequently been transferred to a Category D prison.

40. Secondly, I would also endorse Mann J's assessment of Mr Hussain's evidence with regard to payment of the sums he undertook to pay. As I understand it, Mr Hussain now asserts through his advocate that he has the money and is able to pay. But he has not yet produced any evidence to substantiate that assertion, such as a bank statement. Mr Hussain's advocate pointed out that this is a difficult task to accomplish when one is incarcerated. I accept that it is not easy, but not that it is impossible. It will be seen from the history set out above that Mr Hussain's application has encountered delays due to procedural lapses. I am sure that Mr Hussain's solicitors have tried their best for their client, but the moral of the story is that the application needed to be better prepared.

41. As the Court made clear when dismissing the appeal, the dismissal of Mr Hussain's present application does not preclude Mr Hussain from making a further application supported by better evidence.

Lord Justice Nugee:

42. I agree. I add only that there was formally before the Court an application by Mr Hussain for bail which had previously come before me and which I adjourned to this hearing, but Mr Tear accepted that in the light of our decision to dismiss the substantive appeal, he could not pursue that application.

Lord Justice Lewison:

43. I agree with both judgments.