Judgment Approved by the court for handing down.

Neutral Citation Number: [2022] EWCA Civ 1135

Case No: CA 2021 000522

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER CIVIL JUSTICE CENTRE
HHJ STEPHEN DAVIES
[2021] EWHC 49 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 August 2022

Before:

LADY JUSTICE SIMLER
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE CARR

- -

Between:

ANISH NAMBIAR	**Appellant**
- and -	
SOLITAIR LIMITED	**Respondent**

- -
- -

Gary Lewis (instructed by **Clifford, Johnston & Company**) for the **Appellant**
Respondent did not appear and was not represented

Hearing date: 20 July 2022

- -

Approved Judgment

This judgment will be handed down remotely by circulation to the parties or their representatives on 9 August by email and released to the National Archives. A copy of the judgment in final form as handed down should be available shortly thereafter but can otherwise be obtained on request by email to the judicial Office (press.enquiries@judiciary.uk).

Judgment Approved by the court for handing down.

Lady Justice Simler:

Introduction

1. This appeal concerns orders made by His Honour Judge Stephen Davies (sitting as a High Court Judge) following a three-day trial of a claim for damages and a permanent injunction, heard together with an application for contempt. The appellant is Mr Anish Nambiar. By his judgment dated 13 January 2021, (reported at [2021] EWHC 49 (Comm)), the judge found that Mr Nambiar had breached the fiduciary duties he owed to Solitair Limited ("Solitair"), a company of which he was a director, and that he had also breached the terms of an interim injunction and thereby acted in contempt of court. The first order with which this court is concerned is dated 27 January 2021. Among other things, it recorded the judge's finding of contempt by breach of paragraph 1(2)(a) of the interim injunction order, together with his orders on the claim. I shall refer to it as "the contempt order". The second order with which this court is concerned, dated 17 March 2021, recorded the sanction imposed for contempt. I shall refer to it as "the committal order". The judge also produced a judgment dated 17 March 2021 addressing the question of sanction on the committal application ("the sentence judgment").

2. The appeal, though on the face of it directed at the committal order and pursued as of right (pursuant to section 13(1) Administration of Justice Act 1960, "the AJA 1960", and CPR 52.3(1)(a)(i)), is exclusively targeted at the contempt finding. It challenges the finding of breach of paragraph 1(2)(a) of the interim injunction order on grounds of error in relation to the standard of proof, the enforceability of the injunction, the absence of evidence and other serious procedural failings said to vitiate the contempt finding. In other words, it is in substance a challenge to the contempt order. There is no challenge to the nature or length of the sentence imposed by the committal order.

3. The difficulty that has emerged at a late stage is that the appellant sought permission to appeal the contempt order by an application dated 10 February 2021, and permission was refused on all grounds by Males LJ by order dated 8 March 2021. That order is a final order disposing of the appeal against the contempt order. A preliminary question therefore arises as to whether the current appeal is an abuse of the court's process. It is only if not that the substantive appeal can proceed. This judgment addresses that preliminary question. It does not address the substantive appeal.

4. Mr Nambiar has been represented before us by Mr Gary Lewis, who appeared on his behalf at the sanction hearing but not at the trial. Mr Lewis prepared and signed the grounds of appeal and skeleton argument dated 10 February 2021, and the grounds and skeleton argument served in support of the current appeal. He contended that this appeal is not an abuse in the circumstances of this particular case. In any event, even if there is an abuse, the appellant cannot be estopped or fettered from exercising the statutory right to appeal under section 13(1) AJA 1960. Alternatively, if he is wrong about those submissions, Mr Lewis submitted that the court retains discretion to hear the appeal notwithstanding. Finally, as a fallback, he invited the court to exercise its residual power to re-open the refusal of permission to appeal by Males LJ under CPR 52.30.

5. Solitair is now in voluntary liquidation (and has been since 31 March 2022) and has played no part in the proceedings before this court.

The background

6. In short, Solitair's case below was that from April 2019 onwards Mr Nambiar breached his duties as a director by seeking to divert business, customers and employees from Solitair, including by the misuse of its confidential customer database, the misappropriation for himself of the opportunity to take a lease of the Olympos Hotel in Turkey and of the hotel's database, the misappropriation of its funds, the soliciting of some employees to resign and others to advance his interests whilst still working for Solitair, the sabotage of its website whilst at the same time using a domain name (www.gosingles.co.uk) which was its property, and setting up the "Go Singles" website. Solitair sought an injunction and claimed damages for breach of the fiduciary duties owed to it by Mr Nambiar.

7. Solitair obtained an interim injunction at a hearing on 27 November 2019 (made by Philip Marshall QC, sitting as a Deputy High Court Judge) at which Mr Nambiar was present. The precise terms of the interim injunction were finalised very shortly after the hearing and approved judicially by email sent to the parties' respective counsel on 29 November 2019. Paragraph 1(2)(a) prohibited Mr Nambiar and his company, Go Singles Ltd ("GSL"), among other things, from "*in any way*" using *"(a) the customer lists or customer details (including contact data, personal information, customer orders and associated details) used in [Solitair's] business prior to 4 April 2019 whether derived from [Solitair's] documents (including electronic documents) or obtained by [Mr Nambiar] during his directorship of [Solitair] …*" Subsequently Solitair also pursued allegations of contempt on the basis that Mr Nambiar breached this (and other) terms of the interim injunction order.

8. The contempt order recorded the finding made by the judge that Mr Nambiar breached paragraph 1(2)(a) of the interim injunction restraining him from using customer lists and details used by Solitair in its business before 4 April 2019. The breach entailed Mr Nambiar causing a company, known as "Mailchimp", which had previously provided automated e-mail mail shot services to Solitair, to send a marketing mail shot on behalf of GSL on 19 December 2019, to an unidentified number of customers, using customer details used in Solitair's business prior to 4 April 2019. The central evidence of this was the evidence of one such customer, Amanda Wiseman, who gave evidence which was accepted by the judge as honest, reliable and consistent with the documentary and other reliable evidence in the case, and inconsistent with the evidence and explanations given by Mr Nambiar. Mr Nambiar's consistent case at trial of the claim and the committal application had been that he never took any customer details from the Solitair database and thus did not cause Mailchimp to send any mail shots to such customers at any time. This was rejected by the judge. He expressed himself satisfied to the criminal standard that the injunction had been breached by Mr Nambiar in this regard. This was an isolated breach.

9. The judge adjourned the question of sanction for contempt. At the conclusion of his first judgment, the judge said this:

> "132. Without anticipating the outcome of the further hearing which will have to be held to deal with sentence, I have already considered the relevant principles so far as sentencing for contempt of court are concerned which have recently been set out in helpful detail in the judgment of Snowden J in the *Minstrel*

> *Recruitment* case referred to above, at [238] to [246]. However, it may be of some benefit to Mr Nambiar if I indicate that on the basis of the evidence I have heard and the findings I have made thus far and, thus, without taking into account any matters which may mitigate the apparent seriousness of the breach, my provisional conclusion is that the breach is so serious as to pass the custodial threshold and that a short custodial sentence of 2 months, which may properly be suspended for 12 months, would be justified."

10. On 13 January 2021 the judge listed the case for a further hearing on 27 January 2021 to deal with all matters consequential on the judgment. He ordered that the time for any appeal from the judgment "shall be extended to a date to be fixed at the hearing on 27 January 2021."

11. At the hearing on 27 January 2021, attended by trial defence counsel for Mr Nambiar, and by Mr Lewis, who appeared in relation to sanction only, the sanction hearing was listed for 17 March 2021. It is unnecessary to recite all consequential orders made, but I note that a permanent injunction and money judgment order was made on the claim; and paragraph 9 of the 27 January order recorded the breach of paragraph 1(2) of the interim injunction order. By paragraph 20 the judge extended time for any appeal to 4pm on 10 February 2021. There is nothing to suggest that a longer or different extension of time for appealing was sought.

12. At the sanction hearing on 17 March, Mr Nambiar was represented by Mr Lewis. Mr Nambiar produced a further witness statement (his fifth), made on 10 March 2021, in which he gave evidence that ran directly counter to the evidence he had adduced at trial and to the contempt finding made by the judge on the evidence available at trial. He now said for the first time that he had taken reasonable steps to ensure compliance with the terms of the interim injunction and that the mailshot sent on 19 December 2019 could only have been sent inadvertently.

13. As the judge recorded at [10] of the sentence judgment, it was not suggested by Mr Nambiar that he could not have adduced this evidence at trial; and the permission Mr Nambiar had to adduce further evidence did not extend to him adducing evidence so as to re-open earlier findings. The judge held that Mr Nambiar was not permitted to adduce evidence so as to reopen the findings made in the first judgment; and nor was it suggested that Mr Nambiar should be allowed to do so. (See [10] of the sentence judgment.)

14. However, the judge made clear that the new evidence was potentially admissible for the purposes of mitigation of sentence. For example, such evidence might have been deployed to argue for reduced culpability. But having concluded that the new evidence was fundamentally inconsistent with the finding of breach already made, the judge held that Mr Nambiar could not be sentenced on a basis that cut right across the finding of breach.

15. At [17] of the sentence judgment, the judge explained that he regarded the position as largely of Mr Nambiar's own making since he must have known what (if any) steps he had taken to comply with the terms of the injunction and that he needed to adduce such evidence to defend himself against the committal application. He must also have

known that he could have asked Mailchimp for information about the sending of the mail shot. The judge recognised that the case now advanced might be seen as an implicit acknowledgment of wrongdoing: the decision to "cleanse the database" by removing a substantial number of customers from it who had been added before May 2019 would have been done in recognition of the fact that they had been wrongly copied from the Solitair database. He recognised that this might have been damaging evidence to put forward at the substantive trial. But if that caused a difficulty, it was always open to Mr Nambiar and his legal representative to invite the court to hear the committal application separately from the substantive claim. Instead he chose to defend both the substantive trial and the committal application on the simple and mutually consistent basis that he had never taken any customer details from the Solitair database and thus had not caused Mailchimp to send any mail shots to such customers at any time. Having had that case rejected at trial, the judge concluded that he could not change his position to run an entirely different case when being sentenced for breach of the injunction order.

16. The judge accordingly proceeded to sentence Mr Nambiar on the basis identified in his first judgment. By the committal order dated 17 March 2021, the judge committed Mr Nambiar for contempt, imposing on him a sentence of 28 days' imprisonment suspended for six months until 17 September 2021.

17. Mr Nambiar appealed the committal order as of right, as he is entitled to do, on 26 March 2021. The notice of appeal settled by Mr Lewis advanced three grounds of appeal. As I have already observed, they are all directed at challenging the underlying contempt finding recorded at paragraph 9 of the contempt order. We have not been provided with or seen any other document purporting to challenge the committal order by reference to sentence length or type, or on any other ground. No specific submissions were made as to the length of the sentence or the finding that the custody threshold had been passed, and Mr Lewis has confirmed to this court that there is no challenge to the sentence imposed.

18. In his original skeleton argument for this appeal (at page 12, paragraph 25), Mr Lewis said Mr Nambiar had:

> "sought unsuccessfully to appeal the order dated the 27 January 2021 both in respect of the application and the claim. Permission to appeal was refused on the papers by Lord Justice Males on 8 March 2021".

The underlying documents were not provided and the chronology made no reference to these earlier unsuccessful applications for permission to appeal, whether to the relevant dates, the gist of what occurred, or anything at all about the unsuccessful applications. Nor was the court provided with copies of the orders made by Males LJ. The court made its own enquiries and obtained copies of the orders and the underlying materials.

19. There were two applications for permission to appeal (subsequently given case numbers A4/2021/0237/PTA and A4/2021/0260), one in relation to the claim and the other in relation to the contempt finding. The permission application in relation to the claim was prepared by trial counsel and included an application to stay enforcement of the money judgment. The permission application in relation to the contempt finding at paragraph 9 of the 27 January order (the contempt order) attached grounds of appeal and a skeleton

argument, both prepared by Mr Lewis and dated 9 February 2021, and advanced three grounds of appeal. They can be summarised as follows:

> i) The judge erred in finding that the injunction was enforceable for a breach alleged to have occurred on 19 December 2019 in the circumstances where, having only been sealed by the court on 21 January 2020, the injunction was not personally served upon the appellant until a date after the alleged breach on 5 February 2020. It was not therefore operative or enforceable at the time of the alleged breach on 19 December 2019.
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> ii) Alternatively, the judge erred in finding that the appellant had breached the injunction by causing the email to be sent by Mailchimp on behalf of the Second Defendant. Reliance was placed on four reasons, including (amongst other things) the asserted failure by the judge to apply the criminal standard of proof to the finding of contempt; the absence of evidence to support the judge's findings; and his reliance on inferences wrongly drawn.
>
> iii) Further and in the alternative, the proceedings below were unjust, resulting in serious procedural errors and irregularities in the context of a committal application. Reliance was placed on four errors or irregularities including the matters referred to in grounds 1 and 2, and the fact that the substantive issues in the claim were dealt with at the same time as the contempt allegations, which was unfair and effectively deprived him as an alleged contemnor of his right to silence.

20. Solitair produced a detailed statement, dated 16 February 2021, (under CPR PD52C, paragraph 19) answering each of the points raised (including the question of late personal service and enforceability of the interim injunction, the attack on the factual findings and the asserted procedural failings), submitting that the appeal had no real prospect of success, that permission should be refused, and that there should be no stay of enforcement or execution. It is significant that paragraph 2 expressly said that "*The limited exemption in CPR 52.3(1)(a)(i) does not apply because the order under appeal is not "a committal order" as such*" and referred to authority for this proposition.

21. Permission to appeal was refused by Males LJ on all grounds by order dated 8 March 2021 with the following reasons given:

> "1. It is apparent that it was not suggested below that the injunction was unenforceable or inoperative as of 19 December 2019. If that point had been taken, the judge would have been able to dispense with personal service and would undoubtedly have done so, as the applicant was aware of the relevant provisions of the order. In these circumstances it is not appropriate to allow this point to be raised for the first time on appeal.
>
> 2. It is clear that the judge applied the criminal standard of proof to the contempt allegation. Not only did he say so, but the text of his judgment (including his references to the existence or otherwise of a reasonable doubt) makes clear that he applied this standard. His judgment involves no reversal of the burden of

> proof. He was entitled to draw the inferences which he did. The evidence that the applicant was responsible for the sending of the email, taken as a whole, was very strong.
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> 3. There was no injustice in the proceedings below. Much of this ground represents repetition of points already raised in the previous grounds, but to the extent that it adds anything, it is without substance. In particular the applicant had the benefit of legal representation by counsel and was aware of his right to silence."

22. As I have said, on 26 March 2021, Mr Nambiar commenced the current appeal against the committal order, relying on the identical grounds of appeal as were considered and rejected by Males LJ in the application for permission to appeal the contempt order.

23. The court having identified all the earlier documents, Mr Lewis was informed (on 15 July 2022) that it would wish to be addressed on two issues at the outset of the appeal hearing:

> "i) On what basis the appeal is not abusive of the process because it appears to be an attack on the final decision of Males LJ dated 8 March 2021 refusing permission to appeal against the order of 27 January 2021, including in particular, paragraph 9 of that order;
>
> ii) on what basis the appeal against the findings in the judgment of 13 January 2021 and the order of 27 January 2021 can proceed in these circumstances."

24. The court also sought an explanation from counsel as to why he had not informed the court in terms of the substance of the appellant's application for permission to appeal the order of 27 January 2021, the respondent's statement dated 16 February 2021 in response, and the contents of the decision of Males LJ of 8 March 2021.

25. Mr Lewis served a supplemental skeleton argument responding to the questions raised and providing an explanation as required. He offered an unreserved written apology to the court for not addressing the substance of the documents referred to and said that it was not a deliberate omission on his part or an attempt to avoid an abuse of process point being raised. Regrettably, his oral submissions appeared to retreat from this apology and to lay at least some blame on the respondent for failing to raise the issue. This is unattractive, especially in light of the respondent's statement dated 16 February 2021. Mr Lewis owed a duty to the court to draw relevant matters to the court's attention, and at the very least, to include Males LJ's reasoned decision refusing permission to appeal the contempt order. The position was all the more acute once it became clear that the respondent was playing no part in the appeal. In the course of the hearing, Mr Lewis was asked by the court to confirm that there was nothing more that he felt obliged to inform the court as part of his duty to the court in the circumstances. He confirmed that there was not.

Appeals as of right against committal orders

26. An individual who is committed to prison for contempt of court, whether criminal or civil, may appeal as of right. Section 13(1) AJA 1960 provides:

> "Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt) …".

27. In a civil contempt case, the appeal lies from the High Court to this court. Although when the AJA 1960 was enacted, there was no general requirement for permission to appeal to the Court of Appeal Civil Division, section 54 of the Access to Justice Act 1999 provided that rules of court may provide for any right of appeal to be exercised only with permission.

28. The rules subsequently made provide at CPR 52.3(1)(a):

> "An appellant or respondent requires permission to appeal –
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> a) where the appeal is from a decision of a judge in the County Court or the High Court, or …, except where the appeal is against –
>
> i) a committal order;
>
> ii) a refusal to grant habeas corpus; or
>
> iii) a secure accommodation order made under section 25 of the Children Act 1989 or …"

29. The three categories of exception in CPR 52.3(1)(a) demonstrate that the purpose behind this exception is related to personal liberty. The theme of each specific exception is interference with, or deprivation of, liberty.

30. Moreover, as a matter of ordinary language, a "committal order" is an order committing a person to prison; in other words, imposing a sentence of imprisonment for contempt of court. That is so whether the order is immediate or suspended: see *Wilkinson v Lord Chancellor's Department* [2003] EWCA Civ 95, [2003] 1 WLR 1254 at [55] and [57]. As Hale LJ explained:

> "57. Although a suspended committal order does not immediately deprive the contemnor of his liberty …, it hangs a sword of Damocles over his head which puts his liberty at much greater risk than did the order which he has been found to have breached. To the extent that there is any doubt about the meaning of the rules, it should be resolved in favour of the citizen whose liberty is thus put in jeopardy. In our judgment, therefore, a suspended committal order is a committal order for the purpose of CPR52.3(1)(a) and may be appealed without permission."

31. In *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898, [2012] 1 WLR 223 this court dealt with the question whether the various companies

involved in the case required permission to appeal to this court against an order made by Christopher Clarke J, who found them to be in contempt of court. No sanction had been imposed. The companies argued that they were entitled to appeal the findings of contempt as of right, without the need for the permission of Christopher Clarke J or of this court. That argument was rejected.

32. In the course of his judgment Maurice Kay LJ reviewed a number of authorities dealing with the scope of the words "committal order":

> "13. The meaning of "committal order" in CPR52.3(1)(a) was at the heart of *Government of Sierra Leone v Davenport* [2002] EWCA Civ 230. The appellant Government had been the applicant in committal proceedings in the Chancery Division where the judge had made no order on the application save as to costs. The Government maintained that it did not need permission to appeal. Jonathan Parker LJ accepted a submission on behalf of the respondent that the appeal regime set out in section 13 of the Administration of Justice Act 1960 had been radically changed by the introduction of the CPR pursuant to section 54 of the Access to Justice Act 1999. He said (at paragraph 8):
>
> "The natural meaning of the expression 'committal order' is an order which commits a party to prison. That that is its true meaning in the context of CPR52.3(1)(a) is in my judgment confirmed when one looks at the other two exceptions to the requirement of permission to appeal, namely a refusal to grant habeas corpus and a secure accommodation order, both such orders being ones which affect personal liberty. [This] order is manifestly not a committal order in that sense of the expression. On the contrary, it expressly records that no order is made on the claimant's application. Nor can I see any basis for saying that s13 of the 1960 Act somehow limits the effect of s54 of the 1999 Act on the operation of r52.3 of the Civil Procedure Rules. It follows, in my judgment, that permission to appeal is required."
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> Laws LJ expressed his "entire agreement". He also expressed the provisional view (at paragraph 34) that, even where a contemnor has been committed to prison, only he and not the applicant has an appeal as of right.
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> "14. *Tanfern* and *Government of Sierra Leone* were considered by this Court in *Barnet London Borough Council v Hurst* [2002] EWCA Civ 1009, where Brooke LJ (with whom Dyson and Simon Brown LJJ agreed) said (at paragraph 26):
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> "It is therefore clear that for the purposes of the CPR appellate regime a distinction has to be drawn between an order by which a party is committed to prison (for which permission to appeal is not required) and any other order or decision made by a court in the exercise of jurisdiction to punish for contempt. Such orders

> come within the ambit of section 13 of the 1960 Act. Whether they consist of 'no order save as to costs', as in the *Davenport* case, or an order for the adjournment of the whole or part of the application, as in the present case."
>
> Brooke LJ later acknowledged (at paragraph 31) that "it is not possible to legislate in advance of every type of situation" but hoped that "the general principles will now be clear"."

33. Having identified a single case pointing in the opposite direction (*S-C (Children* [2010] EWCA Civ 21, [2010] 1 WLR 1311) and concluding it was wrong (see [20]), Maurice Kay LJ concluded that the companies required permission to appeal:

> "21. In my judgment, the earlier authorities all point in a consistent direction. They demonstrate that the purpose behind the wording of CPR52.3(1)(a)(i) was related to personal liberty. That is apparent not only from the Bowman Report but also from the drafting which specifies three exceptions to the requirement for permission, the singular theme of which is interference with, or deprivation of, liberty. I appreciate that a financial penalty may impact harshly on a contemnor but the considerations which underlie the impact of a deprivation of liberty are absent. Apart from *S-C*, the post-CPR authorities all point away from an expansive construction of "committal order". Notwithstanding Mr Brindle's attempts to circumnavigate them, I consider that they are fatal to his case".

34. Accordingly, it is well established that the exception to the requirement for permission to appeal is strictly limited to orders which commit a party to prison. Mr Lewis' response to these authorities was to contend that the statement made by the judge at the end of his first judgment (see [132] set out at paragraph 9 above), that the custody threshold had been passed, was a sword of Damocles over the head of the appellant, as in *Wilkinson*, and the contempt decision should therefore be treated as a committal order with unfettered appeal rights. I do not accept this contention. First, this is not what the judge said. The judge merely expressed a provisional view for the benefit of Mr Nambiar, hedged with caveats because he had not heard submissions in mitigation. He passed no sentence, suspended or otherwise. Sentence was adjourned. Secondly, it is trite that appeals are against orders not judgments. The first order, made following the first judgment, was a contempt order. It made no committal order.

35. It follows that Mr Nambiar's application for permission to appeal the contempt order, before any sanction had been imposed, was properly made, and properly treated by Males LJ as requiring permission. He required permission because the order he was challenging is not, on any view, a committal order.

36. It is unnecessary for me to reach any firm conclusion on the question whether, in the absence of that application for permission to appeal, Mr Nambiar could have used his appeal as of right against the committal order of 17 March 2021 (imposing a suspended sentence of imprisonment) to challenge the underlying facts or findings that gave rise to the right to impose that penalty. My provisional view is that he would have been able to do so. However, this court has not heard argument on the question, still less argument

from both sides. In any event, it is not what happened. The question that now arises is what is the consequence of having sought and been refused permission to appeal the contempt order. Can Mr Nambiar have an identical second appeal?

Abuse of process and estoppel

37. The decision of Males LJ dated 8 March 2021 refusing Mr Nambiar permission to appeal the contempt order, is a final order that cannot be further reviewed or appealed: see CPR 52.5 and section 54(4) of the Access to Justice Act 1999. It is implicit in the order made by Males LJ that he considered an oral hearing was unnecessary and clear from his reasons that his refusal of permission was because he concluded that the appeal raised no arguable error of law or legal approach and had no real prospect of success.

38. Apart from by way of an appeal, there are limited ways in which a party can challenge a civil decision which is otherwise final and binding: the party can seek to have the judgment or order set aside on the basis of fraud or because fresh evidence has subsequently come to light which meets certain rigorous requirements for its adduction. No such application has been made, or could be made in this case. It is also the case that the principle of finality in relation to Males LJ's decision is preserved by the doctrine of res judicata, so that save on appeal, the matters decided by it may not be relitigated by the parties bound by the judgment; in other words, it may give rise to a cause of action (or issue) estoppel as between the parties to the proceedings. Whether that is so or not, the new appeal may also be an abuse of process, if it would bring the administration of justice into disrepute.

39. The nature of a claim of abuse of process, and the circumstances in which it can arise, are well established. In his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock held at paragraph 536B:

> "[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power".

40. In determining whether the duty referred to by Lord Diplock arises, the court must consider "*by an intense focus on the facts of the particular case, whether in broad terms the proceedings that are to be struck out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute*": see *Taylor Walton (A Firm) v Laing* [2007] EWCA Civ 1146, [2008] BLR 65 (Buxton LJ at [12]).

41. The categories of abuse are not closed, but these two rubrics are particular instances of a fundamental principle that the court will not allow its process to be abused. Abuse is

fact-specific, as the authorities make clear, but there are a number of underlying public interests engaged by it: the interest in finality in litigation and that a party should not be twice vexed in the same matter. These public interests are reinforced by the overriding objective in reducing cost and delay in the conduct of litigation, in the interests of the parties and the public as a whole.

42. In *Stuart v Goldberg & Ors* [2008] EWCA Civ 2, [2008] 1 WLR 823, which was a case based on *Henderson v Henderson* abuse of process, this court held:

> "24. The court's power to strike a claim out is discretionary, but it does not seem to me that on an application to strike out a claim based on the proposition that the proceedings are an abuse of the process of the court, on the principle of *Johnson v Gore Wood*, the case is likely to turn on the exercise of a discretion, at any rate if the court decides in favour of the application. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out (on this ground) unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 Lord Diplock spoke of the court's inherent power to prevent misuse of its procedure and of the court's duty (I disavow the word discretion) to exercise this salutary power'.
>
> I note that Longmore LJ has expressed the same view, agreeing with Thomas LJ, in *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 at paragraph 38."

The position is even clearer where, as here, the proceedings involve a direct challenge to a final decision disposing of an identical appeal.

43. The question that accordingly arises for decision is whether this court is satisfied that the process of this court is being abused by this appeal. If it is so satisfied, there is a duty (and not a discretion) absent some unusual circumstance, to strike out the appeal for misuse of the court's procedures. Although at one stage in the course of his submissions Mr Lewis contended for a broad merits-based discretion to decide what to do even where abuse has been established, he conceded that once an abuse is established, there is little scope for a broad merits-based discretion in light of the principle cited above.

44. In arguing that this case involves no abuse, Mr Lewis submitted that questions of abuse are fact sensitive. He emphasised the unusual circumstances of this case and in particular a series of significant features. I summarise them without setting out the full detail of the arguments he advanced, all of which I have considered under the following heads. First, because of the extension of time to 10 February 2021 only, he contended that the appellant was put in a position where he had to appeal the contempt order (and the findings of breach of fiduciary duty) by that date or lose his appeal rights altogether. Secondly, he has an absolute right to appeal the committal order but that only arose on 17 March 2021. A finding of abuse in this case would deprive the appellant of his absolute right under the AJA 1960 Act to have a full appeal on all substantive grounds

(raising fundamental issues of procedural unfairness) without first obtaining permission, and deprive this court of its jurisdiction under the AJA 1960. This jurisdiction cannot be removed or fettered. In developing this submission Mr Lewis placed considerable reliance on *Re State of Norway's Application* [1990] 1 AC 723 at 744 where May LJ observed (obiter) that even if there was an issue estoppel in that case, it could not deprive the court of its statutory jurisdiction. He submitted that this is analogous with the position here, and demonstrates that the court cannot be deprived of jurisdiction by the operation of abuse or an issue estoppel, of a jurisdiction which it would otherwise possess under section 13 of the AJA 1960. Thirdly, the position is now different to what it was before Males LJ because of the 17 March 2021 hearing and the ongoing procedural unfairness that impacted upon the appellant. Mr Lewis relied on a suggestion that the appellant had been debarred from giving evidence in response to the committal application, or had perceived himself to be debarred, and that was an additional unfairness. Fourthly, Mr Lewis placed reliance on a decision of Miles J in *Business Mortgage Finance 4 plc v Hussain* [2022] EWHC 449, [2022] 3 WLUK 12 and more specifically on the fact that on appeal to this court, although this court dismissed the appeal (and refused permission to appeal to the Supreme Court) on the question whether the court has jurisdiction to dispense with personal service of an injunction retrospectively, nonetheless the court certified that issue as raising a point of law of general public importance for consideration by the Supreme Court. This court's order is available but judgment is awaited.

45. Mr Lewis' fall-back position, as foreshadowed, is that the order refusing permission to appeal should be reopened under the exceptional jurisdiction in CPR 52.30. He accepted that the jurisdiction is rare and confined but submitted that the appellant will suffer a real injustice if he is not permitted to exercise his absolute right to appeal the committal order and have his grounds of appeal considered at a full in-person appeal hearing. The circumstances of this case are exceptional because of that unfettered right to appeal without first obtaining permission. Moreover, there is no alternative remedy available to him.

46. I do not accept the submissions that there is no abuse here. If this appeal proceeds and is successful it will necessarily lead to divergent judgments of this court of co-ordinate jurisdiction. That undoubtedly brings the administration of justice into disrepute and is plainly abusive: it engages the twin interests of the abuse principle, namely that the other party should not be unfairly harassed twice, and the public interest in the finality of litigation, avoiding duplicated use of judicial resources and the risk of inconsistent judgments. In reality, this appeal is no more than an (improper) attempt to have a second appeal against what is now a final contempt order. My reasons for reaching those conclusions follow.

47. Mr Nambiar chose to appeal the contempt order of 27 January 2021 by an application for permission to appeal dated 10 February 2021 in which he sought to challenge the finding of breach of paragraph 1(2)(a) of the injunction order. He did not need to do that, and following the contempt order, could have protected his appeal rights by seeking an extension of time for appealing from the 27 January order until after the sentence hearing. This was the approach adopted by the contemnor in *Business Mortgage Finance*: see [397]. Indeed, HHJ Stephen Davies was plainly alive to the need to address time for appealing, as paragraph 3 of his 13 January order made clear. There is nothing to suggest that the judge did anything other than accede to the limited

extension of time sought, when he made his 27 January order. Alternatively, having filed the applications for permission to appeal the 27 January order, Mr Nambiar could have invited the court to stay consideration of these applications until after sanction had been determined on the basis that if a committal order was made he would then pursue his appeal as of right without permission, but if not he would pursue the permission to appeal against the finding of contempt.

48. In the course of argument Mr Lewis accepted that both options were open to Mr Nambiar. He argued however that the procedural complexity of having to appeal the claim findings and the contempt order militated against either approach, and he appeared to contend that Mr Nambiar would have been disadvantaged by any delay to these appeals because he faced paying a money judgment. I do not accept that any material disadvantage would have flowed to Mr Nambiar by adopting either course. The sanction hearing was listed for 17 March on 27 January and involved no real delay. Ultimately Mr Lewis conceded that nobody had anticipated this problem at the time. Had they done so, he accepted that an extension of time for appealing until after the sanction hearing could have been sought. Had that been done I am in no doubt that the extension would have been granted in the circumstances. Accordingly, I reject the suggestion that Mr Nambiar had no alternative but to appeal paragraph 9 of the 27 January contempt order when he did.

49. Furthermore, Mr Nambiar's ability to pursue available avenues of appeal is not undermined by a finding of abuse. Rather, having chosen to appeal the contempt finding, he pursued that appeal through to its final disposal: his application was properly considered by Males LJ on the papers in accordance with CPR 52.5, and an order was made, with reasons addressing why none of the grounds raised an arguable (or any other compelling) basis for the appeal to be heard by the full court. The order is final and he cannot now seek a second bite at that cherry. So far as the committal order itself is concerned, there is no challenge to that order as Mr Lewis accepted.

50. Nor is the court being deprived of its statutory jurisdiction or power under the AJA 1960 to hear an appeal against the committal order which only arose on 17 March, or having that statutory jurisdiction or power fettered or constrained. A decision to strike out the appeal as abusive would be a decision by this court not to exercise the statutory jurisdiction that is available because of an earlier court order that is final.

51. The decision in *State of Norway* is not relevant. The jurisdiction the court was being asked to consider in that case was a request for evidence from the Norwegian court, which could only be granted if as a matter of Norwegian law, the request was in "proceedings in any civil or commercial matter". The passage relied on by Mr Lewis suggested that even if the witnesses were subject to issue estoppel preventing them as civil litigants from challenging the first Court of Appeal decision that the proceedings were civil or commercial (so that the court had no jurisdiction), that did not prevent the courts on the second request, examining their jurisdiction which turned on that question. But the issue which was the subject matter of the estoppel in that case went to whether the court had jurisdiction. May LJ's obiter remarks are to the effect that this is a question for the court, not the parties. By contrast here, the matters which it is an abuse to have redetermined do not go to whether this court has jurisdiction. Rather, there has been a substantive adverse decision on the merits of the earlier appeal, which Mr Nambiar is now seeking to re-litigate in circumstances where his appeal rights have been exhausted.

52. As to the contention that the position has changed since the decision of Males LJ, there is no doubt that where new material becomes available after a decision which it would be proper to admit on a second occasion, that may prevent reliance on new grounds being abusive if they do not fall foul of the principle in *Henderson v Henderson* because they could and should have been raised on the first occasion. However, the "new points" relied on by Mr Lewis do not begin to justify a fresh argument on this basis. First, what the judge said in the sentence judgment merely confirmed that his contempt finding was made on the evidence then before him, not that his committal order was based on new evidence or could be reopened by reference to it, as the summary above demonstrates. The issues before Males LJ were unaffected by the new evidence, and it remains irrelevant now. The new evidence was admissible for the purposes of mitigation of sentence (as the judge had earlier indicated would be the case), and was admitted and rejected on that basis. Mr Nambiar could legitimately seek to rely on this evidence on the present appeal to challenge the sentence imposed on him, but he has not done so. His only grounds of appeal challenge the finding of contempt.

53. Moreover, the new evidence was available to Mr Nambiar at trial and could have been adduced by him at the trial had he chosen to do so. To the extent that Mr Lewis contended that there was an order debarring (or perceived as debarring) Mr Nambiar from relying on new evidence in relation to the committal application, I do not accept this to be the case. First, having failed to comply with orders made in the lead up to the trial of the claim, for disclosure and exchange of witness statements, it is correct that the defendants (as they were then) were debarred from relying on documents or witness evidence at trial by reason of those failures. However, the order did not extend to the committal application, and the defendants were expressly entitled to rely on the evidence served in response to the committal application. Secondly, this submission is inconsistent with a submission made to the judge at trial to the effect that Mr Nambiar had been able to produce documents during the course of the trial which were said to have supported his case (see [39] of the first judgment); and inconsistent with what the judge recorded at [10] of the sentence judgment, that it was not suggested by Mr Nambiar that he could not have adduced the new evidence at trial. His permission to adduce further evidence did not extend to him adducing evidence so as to re-open earlier findings, and nor was it suggested at the sanction hearing that he should be permitted to do so.

54. Furthermore, there has been no new change in the law since Males LJ's decision. This court's decision to dismiss the appeal in *Business Mortgage Finance* suggests that the decision was that the court has jurisdiction to dispense with personal service of an injunction retrospectively. The mere certification that this is a point of importance does not alter that fact; and permission to appeal to the Supreme Court was refused.

55. Mr Lewis invited the court to consider the issue of prejudice if the appeal is held to be abusive. He submitted that there was no prejudice to the respondent but the appellant will suffer the prejudice of his statutory appeal rights not being met in full and the stigma of being subject to a finding of contempt and a suspended sentence of imprisonment. I am not persuaded that there would be no prejudice to the respondent if the appeal were to proceed. It responded in full to the 10 February application for permission by a statement dated 16 February 2021. There will be some prejudice accordingly. I accept that Mr Nambiar will suffer the stigma associated with a finding of contempt and the suspended committal order, but that does not flow from a finding

of abuse. It flows from the orders made by the judge which are final following the refusal by Males LJ of permission to appeal. In any event, prejudice can have, at best, a limited role only where the question of abuse raises questions of public policy and the proper administration of justice.

56. Finally I reject Mr Lewis' submission that Mr Nambiar has not had a full opportunity to contest the contempt finding because the application was considered on the papers alone. He relied on a passage in the judgment of Sir Thomas Bingham MR in *Smith v Linskills (A Firm) and another* [1996] 1 WLR 763 as supporting his submission, but in my judgement it undermines it. In *Smith* this court upheld the striking out of a claim brought against the claimant's former solicitors for negligence and breach of contract in the conduct of criminal proceedings, which, it was alleged, had led to his conviction and imprisonment. The new proceedings were a collateral attack on the earlier criminal proceedings which had not been successfully challenged on appeal and the attempt to relitigate the criminal proceedings in the subsequent proceedings was held to be an abuse of process. It was argued on behalf of Mr Smith that he had not had a full opportunity to contest the decision in the Crown Court because his solicitors' negligence had prevented him deploying the full case which he would have wished to deploy. The argument was held to be founded on a misunderstanding of what Lord Diplock meant in *Hunter* (at 542H) when he referred to the need for the intended claimant to have had a full opportunity of contesting the decision against him in the first court. In response to that argument, Sir Thomas Bingham MR said at 770:

> " …We cannot think that Lord Diplock would have regarded Mr Smith as lacking a full opportunity of contesting the Crown Court decision against him when he had had the benefit of a solicitor and counsel throughout the proceedings, had pleaded not guilty, had attended every day of the trial, had been able to give instructions to counsel on the cross-examination of prosecution witnesses, had given evidence himself, had called witnesses, had sought to establish an alibi, had had the benefit of submissions made to the jury on his behalf, had pursued an application for leave to appeal against his conviction, had settled grounds of appeal drawing attention to some at least of his complaints about the manner in which his case had been conducted by his solicitor and had renewed his application for leave to appeal to the full court on the initial refusal of leave. Even if it be true that valid criticism can be made of the conduct of his defence, it seems to us quite impossible to hold that Mr. Smith lacked a full opportunity to contest the charge. Were this the correct meaning of the rule, then the rule itself would be virtually meaningless, since it is hard to imagine a case in which a convicted defendant could not find some plausible ground upon which to criticise the preparation of the defence by his solicitor. We fully appreciate the great difficulty which faces any convicted defendant seeking to challenge his conviction on appeal on the grounds that his defence had been negligently conducted; this does not, however, lead to the conclusion that such a defendant lacked a full opportunity to contest the charge against him".

57. The same is plainly true here. Mr Nambiar had a full opportunity to contest the contempt allegation. He was represented by counsel throughout. Counsel challenged the evidence against him and made submissions on his behalf. He sought leave to appeal, and in a clearly reasoned decision albeit on paper, was refused leave. That was, on any view, a full opportunity.

58. These conclusions mean it is necessary to address the fallback argument advanced by Mr Lewis that there are exceptional circumstances that justify reopening the decision of Males LJ in this case under CPR 52.30. In writing Mr Lewis reserved the right to rely on CPR 52.30, but made no written application seeking permission to do so. In argument he submitted that if the only way to enable Mr Nambiar to exercise his absolute right to appeal under section 13 AJA 1960 is by way of an application to reopen, he would seek oral permission to make such an application. Mr Lewis recognised the rare and confined operation of the rule in CPR 52.30. He submitted that not having his grounds of appeal considered at a full appeal hearing and preventing him from having his absolute right to appeal would be a real injustice to Mr Nambiar. The circumstances are exceptional because of his absolute right to appeal without the restriction of having to obtain permission first and because of the procedural errors and unfairness that flowed throughout the hearing of the committal application and into the sanction hearing.

59. Mr Lewis was correct to recognise that CPR 52.30 is drafted in highly restrictive terms with a high hurdle to be surmounted. It requires circumstances that are truly exceptional. It is well established that the jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings, whether at trial or at first appeal, has been critically undermined. The rule is not intended to cater for mistakes made by the lawyers involved, no matter how reasonable and understandable they may be. It follows that the fact that a wrong decision was made or a wrong result reached earlier, or that there is fresh evidence, or the point in issue is very important to one of the parties, is not sufficient to displace the fundamental public importance of the need for finality. For an appeal to be reopened, the injustice that would be caused if the appeal is not reopened must be so grave as to overcome that pressing need.

60. For the reasons already given in addressing the question of abuse, there are no exceptional circumstances and no grave injustice would be caused if the appeal against the contempt order is not reopened. In short, Mr Nambiar challenged the contempt allegations at a hearing at which he was represented and in which he gave evidence but was disbelieved. He chose to exercise his right of appeal against the contempt order in accordance with the civil procedure rules, by seeking permission before the committal order was made. His grounds of appeal were properly considered and addressed at the permission stage. He had no right to renew to an oral hearing and did not seek to do so in any event. Neither the integrity of the trial of the application nor the first appeal has been critically undermined; nor is this alleged in any event. This is a makeweight application made at the eleventh hour. In my judgement it does not begin to surmount the high hurdle identified by CPR 52.30.

Conclusion

61. For all these reasons, I am satisfied that the substantive appeal is an abuse of the court's process and should be struck out. There is no proper basis on which the final decision of Males LJ can be reopened. Accordingly, these proceedings are at an end.

Judgment Approved by the court for handing down.

Popplewell LJ:

62. I agree.

Carr LJ:

63. I also agree.