IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT
[2023] EWHC 1030 (KB)

No. QB-2019-001430

IN THE MATTER OF A CONTEMPT APPLICATION OF THE COURT'S OWN INITIATIVE PURSUANT TO CPR 81.6
AGAINST DR CRAIG STEVEN WRIGHT
IN CONNECTION WITH PROCEEDINGS IN THE KINGS BENCH DIVISION, MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 5 April 2023

Before:

LORD JUSTICE WARBY

and

MR JUSTICE NICKLIN

B E T W E E N :

CRAIG WRIGHT — Claimant

- and -

PETER McCORMACK — Defendant

MR T GREY and MR G CALLUS (instructed by Janes Solicitors) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

LORD JUSTICE WARBY:

1 This judgment is given following the third hearing in these proceedings to determine whether Dr Craig Wright committed a contempt of court by disclosing the substance of a draft judgment in breach of the embargo provided for by Practice Direction 40E. The main issues at this stage are a question of admissibility, whether Dr Wright has any case to answer and, if so, what should happen next.

2 This is the judgment of the court to which we have both contributed.

The Background

3 The background facts, in summary, are these. Dr Wright claims to be "Satoshi Nakamoto", the inventor of Bitcoin. Peter McCormack tweeted and said in a recorded discussion that this was a mendacious and fraudulent claim. Dr Wright sued Mr McCormack for libel. Chamberlain J tried the action and concluded that some of Mr McCormack's publications were defamatory and caused serious harm to Dr Wright's reputation at the time that they were made. As Mr McCormack had abandoned any attempt to establish that the allegations were true or protected by the public interest defence under section 4 of the Defamation Act 2013, the judge concluded that Dr Wright had made out his case on liability, but he also concluded that only nominal damages of £1 should be awarded.

4 On the afternoon of 26 July 2022, a draft judgment setting out those conclusions and the reasons for them was circulated to the parties in confidence following the standard procedure. That procedure includes an express embargo on disclosure of the substance of the draft before the judgment is made public by "handing down". The terms of the embargo as included at the top of the draft judgment and in PD40E state that the parties must take all reasonable steps to ensure that the confidentiality of the draft is preserved and that a breach of the obligations may be treated as a contempt of court. The judgment was not handed down publicly until 1 August 2022.

5 On the evening of 26 July 2022, Dr Wright posted messages on the Slack messaging platform ("the Slack messages") which included these words:

> "If a person would spend 4 million to receive a dollar plus and 2 million costs …
>
> So the other side is bankrupt …
>
> what would you think? …
>
> Ie. the only thing that matters is crushing the other side …
> Well. I would spend 4 million to make an enemy pay 1."

6 Mr McCormack's solicitors ("RPC"), saw the Slack messages and, on 4 August 2022, after the hand-down, raised the matter in a letter to Dr Wright's solicitors, Ontier. RPC noted that Dr Wright's initial costs budget had suggested that his costs to trial would be approximately £4 million. RPC expressed concern that the Slack messages had disclosed the outcome of the case in breach of the embargo and that this was potentially a contempt of court. They suggested that the purpose of the breach appeared to have been "to limit the impact of the critical findings in the judgment" before these became known to Dr Wright's colleagues and the public via handing-down. RPC pointed out that in April 2022, Falk J DBE had determined that Ontier, when acting on Dr Wright's instructions, had broken the embargo attaching to a draft judgment which Falk J had circulated.

7 On 5 August 2022, Ontier wrote to Chamberlain J via his clerk to bring the matter to the court's attention and to inform it that "… we are treating the matters raised in RPC's letter as a matter of extreme urgency and importance." The following day, the judge's clerk replied by email that: "Mr Justice Chamberlain will expect your report during the week commencing 8 August 2022." On Thursday 11 August 2022, Ontier produced a report on the matter contained in a letter addressed to the court ("the Ontier report"). A redacted version was provided to RPC.

8 The Ontier report gave a detailed account of the steps the firm had taken upon receipt of the draft judgment and addressed the allegation that the Slack messages represented a breach of the embargo. The report proceeded on the basis, which is accepted by Dr Wright, that he had posted the Slack messages, albeit there was a dispute or difference about the time at which he had done so. Paragraph 17 of the Ontier report said that "Dr Wright has informed us of the following …" and then set out a rebuttal of the allegation of breach. This included an account of Dr Wright's purpose in posting the Slack messages and of the context in which he did so. It was said that his purpose "… was not to give any indication as to the outcome set out …" in the draft judgment, but rather "… to encourage debate amongst the members of the Slack Channel and to give an indication of Dr Wright's dogged approach to his opponents in the digital sphere generally ..." Paragraph 23 of the Ontier report said that "… Dr Wright does not believe that his posts on the Slack Channel breached the embargo and it was certainly not his intention ..." It went on to say that "to the extent that" his posts were or might be considered a breach, Dr Wright "unreservedly apologises to the court" and wished to emphasise that any such breach was entirely unintentional and inadvertent.

9 The hearing to decide matters consequential on the judgment took place on 20 December 2022. At that hearing, counsel for Mr McCormack advanced submissions in support of the complaint made in RPC's letter. They relied for this purpose on the Ontier report. Mr Callus represented Dr Wright at the hearing. His skeleton argument did not deal with the alleged breach of the judgment embargo. Early in the hearing the judge made clear that he proposed to address the issue and asked Mr Callus:

> "Are you going to say anything at all about the embargo or not? Obviously, I have seen what is contained in Ontier's report. I have to consider that and decide what to do about it."

Mr Callus answered:

> "… I am in somewhat of a difficulty because it really depends how your Lordship wishes to proceed on the issue of the embargo and the extent to which your Lordship is satisfied by the explanation that has been given in the [Ontier report]."

Mr Callus concluded by informing the judge that he had nothing to add to the Ontier report.

10 In the reserved judgment that he gave on the consequential matters ([2022] EWHC 3343 KB), the judge reviewed the relevant parts of the Ontier report, setting out all or most of paragraphs 17 and 23 of the report. He concluded that paragraph 17 had to be considered in the light of certain contextual matters, that there "may" have been a contempt, that the matter required further investigation and that he should exercise his powers to initiate a contempt application. A summons was issued on the court's initiative, pursuant to CPR 81.6.

11 Following a directions hearing before Nicklin J on 12 January 2023, a fresh summons was issued. This required Dr Wright to address allegations that he had committed contempt:

(1) on 26 July 2022 by revealing the substance of the draft judgment in the Slack messages; and/or (2) on 28 July 2022 by emailing a summary of the draft judgment to five people who were not entitled to see it, all in breach of PD40E, paragraph 2.4.

12 In response to the fresh summons, Dr Wright submitted two affidavits of his own, both sworn on 13 March 2023, and a witness statement from Joel Dalais. Dr Wright's first affidavit addressed the substance of the allegations. He made admissions, but denied committing a contempt. He gave a detailed account of events and the surrounding circumstances. In his second affidavit, Dr Wright said "At no point did I give any instructions to my solicitors to file the Ontier report … In filing the report, Ontier acted entirely of their own volition and motion without any authority from me …" He accepted that he did have "… limited involvement in answering some questions to allow Ontier to prepare the report." But he said that he had "explicitly asked Ontier not to file any report." Dr Wright said that the report contained privileged communications, the privilege over which he had never waived and that "The content of the report does not … represent my account of events." In short, Dr Wright says that in filling the Ontier report his then solicitors acted in breach of his express instructions and disclosed privileged material without his authority or consent, and he repudiates their account of events. Dr Wright's second affidavit further states that he had been advised that, in these circumstances, the Ontier report may not be admissible.

13 Dr Wright instructed new solicitors and new leading council, Mr Tim Grey, and Mr Grey leads Mr Callus, who was, as we have said, Dr Wright's junior counsel at the trial and at the consequentials hearing. The matter was listed for hearing by this Divisional Court with a time estimate of 1½ days. In their skeleton argument filed last week, counsel identified five issues for our determination:

(1) Whether there is any admissible evidence against Dr Wright; if so

(2) whether the evidence discloses a case for him to answer; if so

(3) whether the offences alleged against Dr Wright are known to English law; if so, in respect of each of the alleged contempts considered separately

(4) whether the evidence establishes the requisite *mens rea*; and

(5) whether the evidence establishes the necessary *actus reus*.

14 The skeleton argument of more than 17,000 words raised several issues of law about the evidential status of the Ontier report, going beyond the question of privilege. It also raised several issues about the correct characterisation and ingredients of the contempt alleged. The case advanced was that the contempt alleged was properly classified as criminal and that important consequences flowed from that classification. The skeleton argument was accompanied by a bundle of authorities containing forty-three items and running to 1,600 pages.

15 In the light of this wealth of material and some further written submissions filed at our direction, we determined that this hearing should be more limited in scope, focusing on the first two of the issues just identified and the further question of whether Dr Wright was entitled to assert both that his legal representatives misconducted themselves and that his communications with those legal representatives are protected by privilege.

The First Issue – Is the Ontier report admissible?

16 In our opinion it is.

17 The first point for consideration is that CPR 81.4 provides that:

> "Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation."

Counsel for Dr Wright highlight this provision but do not suggest that the current process is a "contempt application" for this purpose. They concede that there is nothing inherently wrong with a procedure by which the evidence is in written form but not by way of affidavit or affirmation. We agree. In this case, in any event, the effect of the court's approach is to direct that the issue should be decided by reference to the Ontier report. That is understandable. As counsel concede, until recently the court had been given no reason to doubt that the report set out Dr Wright's position on the potential contempt.

18 The second point to be addressed is that the report is hearsay. We agree that there are passages in the Ontier report which contain statements of fact on which the case of alleged contempt depends, and it is not proposed to call oral evidence from the author of the report, but we do not believe that the hearsay status of this material renders it inadmissible.

19 As a matter of law, the right approach to its hearsay status would seem to depend on whether these are properly classified as civil or criminal proceedings. If they are civil, then the position as regards hearsay evidence would appear to be that the court must apply the provisions of the Civil Evidence Act 1995 in a flexible manner consistent with the jurisprudence of the European Court of Human Rights: see *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [56] to [57] (Lloyd LJ, with whom Auld and Wilson LLJ agreed.) If these are proceedings to which the rules of criminal evidence apply then it seems that the applicable provisions would be those of the Criminal Justice Act 2003. But either way, we think the key point is that, on the face of the report, the statements were made by Ontier in their capacity as Dr Wright's professional agents, acting in the course of their engagement as such.

20 If that is the right analysis, then the starting point would seem to be that the statements in question are admissible in principle as, "admissions made by an agent of the defendant" under the common law rules, which are preserved by section 119(1) of the Criminal Justice Act 2003. It is clear law that statements made by a person's lawyer in circumstances where the lawyer has ostensible authority to act on his behalf are admissible under this common law principle. In *R v Turner* [1967] 1 Cr. App. R 67, the court was concerned with statements made by the defendant's barrister. The court held these to be admissible in the light of three elementary principles:

> "First, a duly authorised agent can make admissions on behalf of his principal. Secondly, [the party] seeking to rely upon the admission must prove that the agent was duly authorised … Thirdly, whenever a fact has been proved, any evidence having probative effect and not excluded by a rule of law is admissible to prove that fact …"

The court went on to say this:

> "Whenever a barrister comes into court in robes and, in the presence of his client, tells the judge that he appears for that client, the court is

> entitled to assume, and always does assume, that he has his client's authority to conduct the case and to say on the client's behalf whatever in his professional discretion he thinks it is in his client's interests to say. If the court could not make this assumption, the administration of justice would become very difficult indeed. The very circumstances provide evidence, first, that the barrister has his client's authority to speak for him and, secondly, that what the barrister says is what his client wants him to say."

21 The same approach was adopted in *R v Hayes* [2005] 1 Cr. App. R. 557, and its correctness was reaffirmed in *R v Newell* [2012] EWCA (Crim) 650, [2012] 1 WLR 3142, by reference to section 119 of the 2003 Act. The person relying on the statement must demonstrate that the lawyer had authority to make it but, as the passage we have cited shows, an inference of authority will ordinarily be available on the basis of the circumstances themselves. In such a case, as the court stated in *Newell* at [23]:

> " … it matters not that the defendant can call evidence to show that what was said was not said on instructions; the advocate had ostensible authority to make this statement; the evidence is admissible, though the defendant can call evidence to show that it was said without authority."

22 In this case, all the circumstances point towards the conclusion that the Ontier report was prepared and provided to the court on the instructions of Dr Wright. The circumstances include not only the correspondence of August 2022 but also the absence of any query or complaint about the report on the part of Dr Wright in the months that followed, the reliance on the report by counsel for Dr Wright at the consequentials hearing on 20 December 2022, and the continued silence on the issue of authority for the months that followed until 13 March 2023.

23 It would follow from this analysis that the statements in question are admissible in principle under the civil rules if it is those less demanding rules that apply in this case. In our judgment the real issue is whether, on either analysis, there is any reason why the statements should not be admitted in evidence and considered by the court. To put it another way, is there a reason why they should be excluded from the court's consideration?

24 In support of the proposition that the statements should be excluded, counsel's written argument advanced two related submissions. The first rests on the protection of legal professional privilege and runs along these lines: the Ontier report discloses information that is the subject of privilege. Although that would not ordinarily be a good ground for objecting to its admissibility, it is a ground of objection in this case because, as counsel argue at paragraph 25 of their initial skeleton argument:

> "It is clear that the report was provided to the court … by Ontier in its capacity as a firm of solicitors who are officers of the court …"

and it is "beyond doubt that the received the report" in its capacity as a court to which Ontier owed a duty. Having come into the hands of the "prosecution" in this fashion, it is submitted, the privilege in the information is not lost and should be upheld and protected by the court. The second submission relies on the right to silence, the right not to testify and the privilege against self-incrimination. The contention is that "in circumstances where the report was put before the court without consent from the defendant, but including material

purporting to be attributable to him" reliance on the report would represent "an assault" on these absolute rights.

25 In our judgment, both these arguments beg the fundamental question of whether the provision of the Ontier report, and any disclosure of privileged information it may have involved, were duly authorised by Dr Wright. If that was the case, then any privilege was waived, and we are unable to see how there can be a question of infringing the privilege against self-incrimination or the right to silence.

26 Chamberlain J reviewed the position at the consequentials hearing on 20 December 2022 and initiated these proceedings. He did so on the clear and uncontradicted understanding that the Ontier report was provided by the firm on Dr Wright's behalf, on his instructions and with his authority, and that its contents represented his considered position. Nothing was said at the hearing to suggest or imply otherwise; rather the contrary. However, emphatic may be the language now used by Dr Wright's counsel, we do not consider it to be "obvious" that this understanding was wrong. To the contrary, having read the Ontier report carefully several times, we regard Chamberlain J's approach as reflecting the ordinary and natural interpretation of the document, read in its context, and considering the circumstances in which it was deployed.

27 As we have said, on its face, it appears that the Ontier report was prepared and submitted by Ontier in their capacity as Dr Wright's solicitors. Ontier's letter of 5 August 2022 and the Ontier report itself both began by identifying the firm's role: "Ontier … acts for the claimant, Dr Craig Wright." The report was not commissioned, ordered or ordained by the court. We are unable to detect any element of compulsion in its production. The judge's clerk's email of 6 August 2022 did no more than set out the judge's expectations as to timing. The report therefore appears to have been volunteered by Ontier on behalf of Dr Wright, and it was subsequently relied on by his representatives at the hearing on 20 December 2022. The report contains clear statements reserving Dr Wright's position with regard to privilege in certain respects. The references the solicitors make to their duty to the court appear to us to be reassurances that they have been scrupulous in ensuring that they provide as much information as their professional duties to their client allow. It would be open to Dr Wright to challenge this view of the matter at a final hearing, but we see no grounds for excluding the evidence at this stage on the basis of these arguments.

28 At the present hearing, counsel advanced a variant of the arguments we have described, submitting that once the issues of authority and privilege had been raised in Dr Wright's second affidavit it became incumbent on the court, in these proceedings brought on its own initiative, to disprove Dr Wright's contentions to the criminal standard of proof before proceeding to a final hearing. In our judgment, this is wrong in principle and contrary to the authority we have cited. The Ontier report is admissible against Dr Wright. If, at a final hearing, he were to adduce evidence raising want of authority and privilege in answer to the case against him, then it would be necessary to consider whether that case had been proved to the criminal standard. But that test does not need to be applied at any earlier stage of the process.

29 The question that we do have to consider, in our view, is the second question addressed by the court in *Newell*, namely whether otherwise admissible evidence of admissions made by a defendant's lawyers acting with his ostensible authority should be excluded on grounds of fairness, under section 78 of the Police and Criminal Evidence Act 1984 or otherwise. The question raised by section 78 is whether the admission of the evidence would "have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." In *Newell*, the court concluded that this was the position, but it did so for reasons to do with

case management in criminal proceedings that, in our judgment, have no bearing on the issue which we have to decide. The conscious, deliberate and voluntary submission to the court of a detailed factual account of events advanced on behalf of a party to litigation by solicitors ostensibly acting on his behalf is not the analogue of a brief entry in an early case management document in a criminal court. The policy considerations that led the Court of Appeal to exclude the evidence under section 78 in *Newell* do not arise.

The Second Issue – Does Dr Wright have a case to answer?

30 In our opinion he does.

31 The argument to the contrary is that the Ontier report is "so inherently weak as to render its probative value starkly outweighed by its prejudicial effect." In support of that argument it is said that the report is:

> "At best, hearsay; at worst, a self-serving document created by the defendant's firm of solicitors to demonstrate that it had not been complicit in an alleged act of criminal contempt."

32 In our judgment, these arguments raise issues of fact that would fall for resolution at the end of the evidence. It is not necessary for this purpose to determine what is the correct classification of the contempt alleged in this case; it is enough to say that, in our assessment, a reasonable tribunal could conclude that the facts as disclosed by the admissible written material establish to the necessary standard the ingredients of contempt.

The Third Issue – Should Dr Wright be required to waive privilege?

33 This is an issue which we raised of our own initiative, in the light of Dr Wright's second affidavit. Dr Wright is not, of course, obliged to give any evidence in his own defence. He has the right to remain silent. But it struck us that if he were to give evidence about what had or had not passed between him and Ontier in relation to the production and filing of the Ontier report, he might thereby impliedly waive any privilege on which he otherwise might be entitled to rely in respect of related communications.

34 The analogy the court identified in pre-hearing exchanges was the waiver of privilege procedure followed in the criminal appellate jurisdiction by which an appellant who relies on alleged failings by his trial representatives is required to waive privilege to allow them to respond and assist the court. Mr Grey and Mr Callus have submitted that the analogy is, at best, imperfect, and that the question of whether a waiver is necessary or appropriate in circumstances such as those of this case is a complex one. We accept that there are differences between the two legal contexts which may be significant.

35 In the event, we do not need to reach any conclusion on this question for two reasons. The first is that Dr Wright has indicated, through counsel, that he accepts the general principle that if an independent investigation were undertaken and enquiries were made of Ontier, Dr Wright "would be minded to waive privilege as necessary to allow Ontier to respond." The second, more important, reason is that, for the reasons that follow, we have concluded that it is no longer in the public interest to pursue these proceedings.

The Overriding Objective

36 CPR 81.6(1) provides as follows:

> "If the court considers that a contempt of court … may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings."

37 For the reasons we have given, we consider, as did Chamberlain J, that there is admissible *prima facie* evidence that a contempt of court "may have been committed" by Dr Wright. When the court, as in this case, initiates contempt proceeding it will keep them under review. As it lacks investigatory powers and personnel, the court is ill-equipped to proceed with contempt proceedings where the underlying facts are disputed or where, as in this case, a raft of legal issues is raised. In such a case the court would consider inviting the Attorney General to take over the conduct of the proceedings in the public interest. In this case, when the contempt proceedings were commenced, the issues appeared factually straightforward. The issues have become complicated by Dr Wright's contention and evidence by affidavit that the Ontier report was submitted to the court against his express instructions and by the proliferation of legal issues raised by his legal representatives.

38 In light of the change in the parameters of this litigation, we have considered whether we should invite the Attorney General to take over the contempt proceedings against Dr Wright. Factors that point towards making such a referral are the fact that we are satisfied there is *prima facie* evidence of a breach by Dr Wright of the embargo on the draft judgment and the "clear message" from the Master of the Rolls in *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 WLR 1915 at [21] that "those who break embargoes can expect to find themselves the subject of contempt proceedings …"

39 The court is required to deal with cases, including proceedings for contempt of court, justly and at proportionate cost. This includes considerations of proportionality, allotting an appropriate share of the court's limited resources and enforcing compliance with rules, practice directions and orders (CPR 1.1). The primary purpose of contempt proceedings is to secure compliance with the court's orders. We are satisfied that Dr Wright is likely now fully to appreciate how seriously the court regards alleged breaches of the embargo placed on draft judgments to be handed down by the court. His apology, albeit conditional, appears to reflect this. The circumstances of the alleged breach mean that, even if proved, the court would likely impose a limited sanction. Measured against the resources the court would have to devote to the resolution of the issues raised, we consider the costs of the process would outweigh any tangible benefit to the administration of justice.

40 For these reasons, we have concluded that the summons should be discharged and these proceedings brought to an end.

LATER

41 Our provisional view is that there would be no justification for claiming any costs incurred in considering the material that we have been discussing as part of the costs that have been reserved. Because RPC and their clients are not here, we cannot make that decision, but we make that clear.

42 Nor can we, at present, see any basis on which the costs of considering that material could be claimed on any other basis and, on that footing, then we would expect your instructing solicitors to pass the material to RPC without delay. We do not consider we need to make a direction, but what we have in mind is, as you I think have outlined, the bundle and everything the court has seen in the course of this hearing, but obviously not the unredacted report which, as I have already made clear, I have not seen but my Lord has. It is the bundle, the skeleton arguments and the written submissions. I think that is what it comes to.

CERTIFICATE

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