Neutral Citation Number: [2018] EWHC 3138 (QB)

Case No: HQ17X01355

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2018

Before :

MRS JUSTICE O'FARRELL

- -

Between :

MARTIN PHILCOX	**Claimant**
- and -	
(1) ANDREW WILSON	**Defendants**
(2) KARL HARRISON	

- -
- -

Martin Philcox (in person)
Christopher Coltart QC and Rupert Allen (instructed by **Harrison Drury**) for the **Defendants**

Hearing dates: 8th November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. On 3 October 2018 this court dismissed the application by the Applicant, Mr Philcox, for permission to appeal against the order of Senior Master Fontaine dated 4 July 2018 as totally without merit. Pursuant to CPR 23.12 and 52.20 (5)-(6), the court is required to consider whether it is appropriate to make a civil restraint order against the Applicant.

Background

2. The Applicant's daughter was formally employed by a company called CGDM Limited ("CGDM"). CGDM provides the services of High Court Enforcement Officers ("HCEOs") to judgment creditors in order to enforce sums owing to them. CGDM employs the First Respondent, Mr Wilson, and formerly employed the Second Respondent, Mr Harrison.

3. In March 2014 Ms Philcox, the Applicant's daughter, was summarily dismissed by CGDM and commenced unfair dismissal proceedings against the company. The Applicant acted as his daughter's advocate in the proceedings before the Employment Tribunal, the Employment Appeals Tribunal and the Court of Appeal. Her case was dismissed at each stage. The Applicant also acted on behalf of Adrian Warlow, a colleague of Ms Philcox, who had also been summarily dismissed by CGDM. Mr Warlow's claim against the company was dismissed.

4. During the course of those proceedings, the Applicant made serious allegations against CGDM, including allegations of sexual discrimination and dishonest business practices. None of those allegations was accepted by the tribunals or the courts.

5. Following the conclusion of the above proceedings, the Applicant made complaints about CGDM and/or the Respondents to the police, HMRC, the Lord Chancellor, the Information Commissioner's Office and Companies House. He also made complaints about some of the professional advisers acting for the company. Save for a finding by the Information Commissioner's Office in respect of a potential infringement of the Data Protection Act 1998, none of the complaints was upheld.

6. The Applicant instituted two private prosecutions against the Respondents. Both prosecutions were taken over and discontinued by the Crown Prosecution Service, in the first case because it was evidentially deficient, and in the other case because it was not in the public interest to pursue it.

7. On 27 March 2017 the Applicant issued an application seeking an order that the Respondents' authorisation to act as HCEOs should be terminated pursuant to paragraph 12 of the High Court Enforcement Officers Regulations 2004. The witness statement filed by the Applicant in support of the application raised the following allegations, namely:

    i) the Respondents deliberately defrauded debtors by wrongly charging fees not legitimately incurred;

    ii) the Respondents defrauded HMRC between 2010 and 2014 by concealing benefits in kind;

iii) the Respondents deceived District Judge Burrows on 30 June 2015 in order to obtain the renewal of a bailiff certificate for Adrian Warlow;

iv) the Respondents engaged in the illegal operation of a goods vehicle on or about October 2012 and charged the judgement debtor haulage fees for its use;

v) a subsidiary of CGDM charged Fairfield Industries Limited £3,496 in respect of VAT without providing a VAT invoice;

vi) Mr Wilson failed to report the resignation of Mr Harrison as a director of CGDM to the Registrar of Companies within 14 days, contrary to section 167 of the Companies Act 2006; and

vii) the Respondents failed to ensure that CGDM complied with the Data Protection Act 1998.

8. On 5 June 2018, Senior Master Fontaine struck out those proceedings on the court's own initiative under the inherent jurisdiction of the court as an abuse of process and/or for failing to disclose any reasonable grounds for bringing a complaint. The allegations had been raised and dismissed during the course of the employment proceedings and/or did not disclose any legal basis for a complaint against the Respondents. Senior Master Fontaine found that the Applicant's motivation in bringing the proceedings was not as a matter of public interest but a vendetta against the former employers of his daughter, having failed to obtain the redress sought in the employment proceedings. The Senior Master determined that the application and proceedings were wholly without merit.

9. On 18 June 2018 the Applicant applied to set aside or stay the Order of 5 June 2018 and for permission to appeal. On 4 July 2018 Senior Master Fontaine ruled that those applications could be determined without a hearing pursuant to CPR 23.8(c), having found that the proceedings were wholly without merit. The applications were dismissed on the following grounds:

> "1. The application is dismissed, the applicant having failed to engage appropriately with the underlying grounds why the court reached the conclusion that the allegations made could not realistically form sufficient grounds for proceedings under Paragraph 12 of the High Court Enforcement Officers Regulations 2004.
>
> 2. Permission to appeal is refused, the Court finding that any such appeal would have no real prospect of success for the same reasons provided in the Order of 5 June 2018. The Applicant may renew his application to a High Court judge within 21 days of this order pursuant to CPR 52.3(3)."

10. The Applicant renewed his application for permission to appeal against the Order dated 5 June 2018. That application was heard by this court sitting in Court 37 on 3 October 2018. At the conclusion of the hearing, the court refused permission to appeal on the grounds that the application was an abuse of process and there was no real prospect of the appeal succeeding. I found that the application was totally without merit. The

reasons for the court's decision were explained in the extempore judgment given on 3 October 2018 and are set out in the approved transcript.

Parties' positions

11. The Respondents' position is that the court should now make an Extended Civil Restraint Order ("ECRO") against the Applicant for the maximum permitted period of two years. On behalf of the Respondents, Mr Coltart QC submits that the Applicant has pursued and is continuing to pursue a vendetta against the Respondents, driven by a misplaced sense of grievance arising from his daughter's dismissal by CGDM. There is no reason to think that the court's judgement of 3 October 2018 will stop the Applicant. Indeed, on 6 October 2018 he wrote to Mr Wilson enclosing a draft of a letter which he intended to send to each member of the High Court Enforcement Officers Association ("HCEOA"), inviting them to convene a general meeting to consider terminating Mr Wilson's membership of that association. The letter advanced the same allegations that the court had rejected as being totally without merit just three days earlier. The Applicant ignored a request by the Respondents' solicitors not to publish the letter or similar allegations to any third parties. He sent the letter to members of the HCEOA and copied it to the Lord Chancellor, the Home Affairs Select Committee and two charitable bodies. It appears that a copy was also sent to the CEO of the Civil Enforcement Agents Association.

12. Mr Coltart submits that the Applicant's conduct to date indicates that it is likely that he will seek to institute new proceedings relating to the same or similar matters in the future. A limited civil restraint order would serve no useful purpose in this case as it would only restrain him from making further applications in these proceedings, which are at an end following the court's refusal of the renewed application for permission to appeal. It is submitted that an ECRO would be a proportionate response to the continuing threat posed by the Applicant to the due administration of justice.

13. The Applicant's position is that it is unnecessary to make a civil restraint order against him. The Applicant has no intention of initiating any further civil proceedings against either of the Respondents. He is not aware of any facts or circumstances that would cause him to institute any such proceedings, although he notes that any order this court makes would have no effect in respect of criminal proceedings. The Applicant submits that the Respondents' motives in seeking an ECRO are not to prevent the Applicant from bringing unmeritorious proceedings against them in the County Court or High Court but solely to discredit him. The Applicant contends that the Respondents seek to legitimise an attempt by the Respondents' solicitor to defraud the Applicant of £26,185.90 in respect of VAT included in their initial statement of costs.

14. The Applicant submits that the Respondents have failed to act promptly in making applications to strike out the proceedings and for a civil restraint order. He disputes that the threshold for making an order has been crossed or that it is necessary to make any order given his clear statement that he does not intend to make any fresh claims or applications in the civil courts. If the court is minded to make a civil restraint order, the Applicant invites the court to adjourn the matter to allow the Judicial Conduct Investigations Office ("JCIO") to respond to his complaint made on 4 September 2018 and to allow the Ministry of Justice to respond to his complaint made on 17 September 2018.

The applicable test and principles

15. A civil restraint order is defined by CPR 2.3 (1) as:

> "an order restraining a party –
>
> (a) from making any further applications in current proceedings (a limited civil restraint order);
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> (b) from issuing certain claims or making certain applications in specified courts (an extended civil restraint order); or
>
> (c) from issuing any claim or making any application in specified courts (a general civil restraint order)."

16. CPR 3.11 provides that a practice direction may set out the circumstances in which the court has power to make a civil restraint order against a party to proceedings, the procedure for such applications and the consequences of the court making a civil restraint order.

17. Paragraph 3.1 of practice direction 3C provides that an ECRO may be made by a judge of the High Court:

> "where a party has persistently issued claims or made applications which are totally without merit."

18. Although a party may invite the court to make a civil restraint order, the court is entitled to make such order on its own motion. Where, as in this case, the court has made a finding that an application for permission to appeal was totally without merit, CPR 23.12 and 52.20(6) stipulate that it must consider whether it is appropriate to make a civil restraint order.

19. The effect of an ECRO in this case would be to restrain the Applicant from issuing claims or making applications in the High Court or any County Court concerning any matter involving, relating to, touching upon or leading to these proceedings without first obtaining the permission of a judge identified in the order. Paragraph 3.9 of the practice direction provides that any ECRO will be made for a specified period not exceeding 2 years.

20. The rationale for such civil restraint orders is explained in *Nowak v The Nursing and Midwifery Council and another* [2013] EWHC 1932 per Mr Justice Leggatt:

> "[58] As explained by the Court of Appeal in the leading case of Bhamjee v Forsdick [2004] 1 WLR 88, the rationale for the regime of civil restraint orders is that a litigant who makes claims or applications which have absolutely no merit harms the administration of justice by wasting the limited time and resources of the courts. Such claims and applications consume public funds and divert the courts from dealing with cases which have real merit. Litigants who repeatedly make hopeless claims or applications impose costs on others for no good purpose and

> usually at little or no cost to themselves. Typically such litigants have time on their hands and no means of paying any costs of litigation – so they are entitled to remission of court fees and the prospect of an order for costs against them is no deterrent. In these circumstances there is a strong public interest in protecting the court system from abuse by imposing an additional restraint on the use of the court's resources.
>
> [59] It is important to note that a civil restraint order does not prohibit access to the courts. It merely requires a person who has repeatedly made wholly unmeritorious claims or applications to have any new claim or application which falls within the scope of the order reviewed by a judge at the outset to determine whether it should be permitted to proceed. The purpose of a civil restraint order is simply to protect the court's process from abuse, and not to shut out claims or applications which are properly arguable."

21. As set out in *Nowak* at [63]-[70], in considering whether to make a civil restraint order and, if so, what form of order to make, there are three questions for the court:

    i) whether the litigant has persistently issued claims or made applications which are totally without merit ('the threshold issue');

    ii) whether an objective assessment of the risk which the litigant poses demonstrates that he will, if unrestrained, issue further claims or make further applications which are an abuse of the court's process ('exercise of discretion'); and

    iii) what order, if any, it is just and proportionate to make to address the risk identified ('the appropriate order').

22. In practice, the court will not make an ECRO unless there have been at least three totally without merit claims or applications: *CFC 26 Limited v Brown Shipley and Co Ltd* [2017] EWHC 1594 per Newey J at [13].

23. Practice direction 3C imposes an obligation on courts to ensure that their orders record where a claim or application is totally without merit. The absence of these words on the face of an order does not preclude a later court from taking such claim or application into account when considering whether the preconditions for an ECRO have been met. However, if the earlier order does not state expressly that the application or claim was totally without merit, the court must satisfy itself that it was in fact totally without merit: *R (Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990 per Brooke LJ at [67]-[68].

24. The court is entitled to have regard to the history of all claims and applications made which were totally without merit in deciding whether it has power to make an ECRO. The court is not limited to unmeritorious claims or applications made within a particular time frame, for example in the period since expiry of any previous civil restraint order: *Society of Lloyd's v Noel* [2015] EWHC 734 per Lewis J at [38]-[42]. To the extent that this differs from the test identified by Proudman J in *The Law Society of England and*

Wales v Otobo [2011] EWHC 2264 at [57], I consider that *Noel* sets out a correct statement of the test for the reasons given by Lewis J in that case.

25. The pre-condition for any civil restraint order requires the court to be satisfied that there is: *"an element of persistence in the irrational refusal to take no for an answer"*: *Bhamjee* (above) at [42].

26. Even where the pre-conditions for a ECRO have been made out, the court retains discretion to exercise the power and is not obliged to make such an order. An ECRO will be justified only if and to the extent that it is necessary to protect the court's process from abuse: *Nowak* at [68]; *Noel* at [47].

Threshold - persistent totally without merit claims or applications

27. The order of Senior Master Fontaine dated 5 June 2018 expressly records that the Applicant's application and the proceedings were totally without merit. The order of this court dated 3 October 2018 expressly records that the Applicant's renewed application for permission to appeal was totally without merit. Although the order of Senior Master Fontaine dated 4 July 2018 did not contain the express words "totally without merit", it is clear from the face of that order, the terms of which are set out above, that the Applicant's application to set aside the earlier order and/or for permission to appeal were considered by the Senior Master to be totally without merit.

28. Contrary to the Applicant's submission, practice direction 3C does not require the 'totally without merit' determination to be made in three distinct or unrelated claims or applications. It is sufficient that there are at least three separate orders made by the court based on findings that the claims or applications were unmeritorious. Therefore, a renewed application may count as an additional 'totally without merit' application for this purpose.

29. By reason of the above orders, the pre-condition for an ECRO, namely that a party has persistently issued claims or made applications which are totally without merit, is satisfied.

30. Further, the Respondents submit that the Applicant has a history of pursuing unmeritorious and vexatious claims and applications. Reliance is placed on proceedings brought by the Applicant against i) Newham London Borough Council, ii) the Civil Aviation Authority and iii) Epping Forest District Council.

31. In *Philcox v Hailstones & Another* (1992), the Applicant made allegations that employees of Newham LBC had made false and fraudulent statements. Brooke J made an order for security for costs against the Applicant, describing his appeal as: *"a prima facie abuse of the process of the court"*. The applicant sought permission to appeal against that ruling but Glidewell LJ refused permission, on the basis that the appeal was a prima facie abuse of process given the lack of evidence to support the allegations of fraud. Undeterred, the Applicant applied to set aside the orders of Brooke J and Glidewell LJ on the basis that they too had been obtained by fraud. That application was dismissed by Owen J as an abuse of process. The Applicant sought permission to appeal that order but it was refused by Russell and Leggatt LJJ on the basis that there was no merit in the application.

32. In *Philcox v Civil Aviation Authority* (1994) the Applicant was refused permission to plead allegations of misfeasance in public office against the CAA. His application for permission to appeal was refused by Steyn and Nourse LJJ as hopeless and unmeritorious. The Applicant sought to start criminal proceedings against the CAA. When his application for the issue of a summons was refused, he started judicial review proceedings. Permission to proceed to judicial review was refused by Simon Brown LJ and Scott Baker J, on the ground that the proposed criminal prosecution was a manifest abuse of process.

33. In *R v Epping Forest District Council ex.p. Philcox* (2000), Keene J refused to grant the Applicant permission to proceed to a second judicial review in which the Applicant wished to raise allegations of fraud and bias on the part of the council, concluding that they were unarguable. On a renewed application before the Court of Appeal, Simon Brown LJ described the Applicant's allegations against the Council's solicitor as: *"wholly mischievous and misconceived"*. Despite that, the Applicant started proceedings against the solicitor in the Solicitors Disciplinary Tribunal. Those proceedings were dismissed because there was no prima facie case. The Applicant appealed against that decision and, when that was dismissed, sought permission to appeal, which was refused.

34. The Respondents do not suggest that every aspect of the issues raised in those historic cases were wholly without merit. However, they submit that they demonstrate that the Applicant has the propensity to become obsessed with the disputes in which he is engaged and to make repeated totally without merit applications which constitute an abuse of the court's process.

35. The Applicant's submission is that the final outcome of some of those cases vindicated his underlying claims and that he was represented by solicitors and counsel in many of the court hearings. That may be so but it fails to address the criticism made by the Respondents that within those proceedings the Applicant made repeated, unfounded allegations of fraud and unmeritorious applications. The Applicant has noted in his written submissions that a common feature of the cases identified by the Respondents is that they involved allegations that one or more solicitors had abused their positions as officers of the court. However, the Applicant refuses to engage with the Respondents' argument that those allegations were rejected by the courts in each case as wholly unsubstantiated and therefore demonstrate a pattern of behaviour that constitutes an irrational refusal to take 'no' for an answer.

36. If it were necessary to consider the above historic cases as part of the threshold test set out in practice direction 3C, I would conclude that they provided ample evidence that the Applicant has persistently issued claims or made applications which are totally without merit.

37. For the above reasons, I am satisfied that the pre-conditions in practice direction 3C are met and the court has power to make an ECRO against the Applicant.

Discretion - assessment of the risk of future totally without merit applications

38. I am satisfied that an objective assessment of the risk which the Applicant poses demonstrates that he will, if unrestrained, issue further claims or make further applications which are an abuse of the court's process. The risk is clear and obvious

from the Applicant's history of making unfounded allegations of fraud or misconduct, pursuing such allegations through numerous legal avenues, appealing or applying to set aside any adverse orders, and ignoring the findings of judges, tribunals, the CPS and other regulatory bodies that his allegations are without merit.

39. The Applicant has stated in his written submissions, and repeated in court, that he has no present intention of starting or pursuing further civil proceedings against the Respondents. However, I note that that is on the basis that he cannot conceive of any circumstances in which he could bring further proceedings against the Respondents. The evidence indicates that he intends to pursue the Respondents by whatever means are open to him.

40. By letter dated 4 September 2018 the Applicant made a complaint to the JCIO in the following terms:

> "I complain that Senior Master Fontaine has improperly:
>
> (a) sought to conceal the full extent of a conflict of interest with the High Court Enforcement Officers Association Ltd and Mr Andrew Wilson;
>
> (b) allowed an official within the Ministry of Justice, who I believe is acting in the interests of Mr Andrew Wilson, to influence her in the discharge of her judicial duty."

41. By letter dated 17 September 2018 the Applicant made a complaint to the Ministry of Justice in the following terms:

> "I complain that one or more civil servants within the Ministry of Justice have, since January 2016, illegally sought:
>
> 1. to conceal the criminal activities of two High Court Enforcement Officers – Mr Andrew Wilson and Mr Karl Harrison;
>
> 2. to influence Senior Master Fontaine in the Queen's Bench Division of the High Court in the discharge of her judicial duties in relation to my application, under Regulation 12 of the HCEO Regulations 2004, to terminate the authority of Mr Wilson and Mr Harrison to act as HCEOs."

42. In his written submissions before this court, the Applicant makes an allegation of fraud against the Respondents' solicitors. On 22 June 2018 the Respondents' solicitors submitted to the Applicant its statement of costs in respect of the proceedings, including the sum of £26,185.90 in respect of VAT. On 26 July 2018 the Respondents' solicitors filed with the court an amended statement of costs, identical in all respects to the earlier statement save for deletion of the VAT previously claimed. On 26 July 2018 Senior Master Fontaine made an order for the Respondents' costs to be subject to a detailed assessment and ordered the Applicant to make a payment on account of such costs in the sum of £10,000. The Applicant alleges that this was an attempt by the solicitors to

defraud him of £26,185.90. He refuses to countenance the possibility that a mistake was made in the initial statement of costs which was subsequently corrected.

43. By letter dated 15 October 2018 to members of the HCEOA, the Applicant repeated his previous allegations against Mr Wilson and invited them to consider cancelling Mr Wilson's membership of the Association. The letter was copied to the Lord Chancellor, the Secretary of the House of Commons Home Affairs Committee and the charities, Citizens Advice and Stepchange.

44. The above actions indicate that, unless restrained, the Applicant will not give up. He will use any and all avenues open to him to continue his persecution of the Respondents and their advisers. This would include the initiation of any civil proceedings that the Applicant might conceive were open to him. For those reasons, in this case it is necessary to make a civil restraint order to protect the administration of justice from abuse.

Order

45. The court must assess what order it is just to make to address the risk identified and will make the least restrictive form of order shown to be required: *Nowak* at [70]. The wide-ranging nature of the Applicant's allegations, including new and unsubstantiated allegations of fraud and misconduct arising out of these proceedings, indicate that a limited civil restraint order would not be sufficient to protect the court system from abuse.

46. I am satisfied that it is reasonable and proportionate to make an ECRO against the Applicant in the terms of the draft submitted by the Respondents. For that reason, the court will order that the Applicant is restrained from issuing claims or making applications in the High Court or any County Court concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made without first obtaining the permission of this court for a period of 2 years from the date of this order.