IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2020] EWHC 3193 (QB)

QB-2020-002723

Royal Courts of Justice
The Strand
London, WC2A 2LL

Tuesday, 27 October 2020

IN THE MATTER OF AN APPLICATION FOR PERMISSION FOR HM SOLICITOR GENERAL TO APPLY FOR AN ORDER OF COMMITTAL UNDER PART 81 OF THE CIVIL PROCEDURE RULES

Before:

THE RIGHT HONOURABLE LADY JUSTICE CARR DBE
and
THE HONOURABLE MR JUSTICE JEREMY BAKER

B E T W E E N :

HER MAJESTY'S SOLICITOR GENERAL — Applicant

- and -

EMMA HAMILTON-TOOGOOD — Respondent

MR HAYES appeared on behalf of the Applicant.

THE RESPONDENT was not present and was not represented.

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1 By a Part 8 Claim Form dated 4 August 2020 Her Majesty's Solicitor General seeks permission to bring committal proceedings for contempt of court against Emma Hamilton-Toogood, now twenty-three years' old ("the Respondent"). Part III of CPR Part 81 applies, since the application is for committal for interference with the due administration of justice in connection with criminal proceedings. No application for committal may be made without the permission of the court.

2 The Respondent is alleged to be in contempt on the following two counts:

i) Making a series of three video recordings of court proceedings between 12 and 13 August 2019. This would be a contempt under s. 9(1)(a) of the Contempt of Court Act 1981 ("the 1981 Act") and a summary only criminal offence contrary to s. 41(a) of the Criminal Justice Act 1925 ("the 1925 Act").
ii) Publishing those recordings between 12 and 13 August 2019. The publication would be a summary only criminal offence under s. 41(b) of the 1925 Act, and the disposal of the recordings with a view to publication would be a contempt under s. 9(1)(b) of the 1981 Act.

3 The application for permission is supported by an affidavit of Thomas Guest, head of criminal casework at the Attorney General's office, sworn on 29 July 2020. It is not necessary for present purposes to rehearse its contents in full detail.

4 In summary only, therefore, the Respondent's partner, Gavin Price, was prosecuted for various weapons and driving offences. His trial took place on 12 and 13 August 2019 in the Crown Court at the Isle of Wight. Mr Price represented himself. The Respondent, whom the police recognised at court as being Mr Price's partner, accompanied him to court on both days.

5 There is evidence that there were court signs at entry, in the waiting area, and at the entrance to the public galleries notifying the public that the recording of proceedings and the use of mobile phones in court were prohibited. There is evidence that a notice in the public waiting area stated that breach of the prohibition could result in a fine or imprisonment.

6 There is evidence that the Respondent, whilst in the public gallery during the trial of her partner, made the recordings in question, probably on her mobile telephone, and then "live-streamed" them through her Facebook account, as the police discovered on 14 August 2019. By that stage Mr Price had been convicted on all counts and remanded into custody. One recording is forty-five minutes' long; one twenty-six minutes' long; and one nine minutes' long.

7 There is also evidence of a post on the Respondent's Facebook account apparently showing someone warning her in the week before Mr Price's trial to be careful not to get caught recording legal proceedings. There is evidence that, when arrested on suspicion of contempt, the Respondent stated that she only "did it for evidence"; and that when she was charged she stated, "I'm sorry". That charge was later correctly withdrawn since an offence of contempt of court is not a criminal matter. The matter was instead referred to the Attorney General.

Service and the Respondent's non-appearance today

8 Efforts at personal service of notice that Her Majesty's Solicitor General was considering proceedings against the Respondent for contempt in March 2020 were unsuccessful. The Government Legal Department ("GLD") then e-mailed the Respondent, prompting a response from the Respondent's e-mail account on 6 April 2020 from someone purporting to act for her. The GLD understandably requested that the Respondent herself contact the GLD. She did not do so. Once proceedings had been commenced in August 2020, efforts at personal service again failed.

9 On 21 September 2020 Lavender J made an order under CPR Part 81.14(2) that personal service of the claim form and application for permission and accompanying documents be dispensed with, and that service could be effected on the Respondent by e-mail to her e-mail address and/or by post to her residential address. The Respondent was duly served by e-mail sent on 21 September 2020, which amongst other things gave clear notice of today's application hearing. The relevant documents were also posted through the Respondent's letterbox on 24 September 2020. Today's hearing bundle, in hard copy, was sent by special delivery to the Respondent on 21 October. She signed for it on 22 October.

10 The Respondent has not attended today's hearing, nor did she give notice of intention to defend pursuant to CPR Part 81.14(5). There has been an e-mail response dated 22 October 2020 from someone identifying him or herself as "Emma's friend", again purporting to act for the Respondent, in the following terms:

> "Emma has asked me to bring her learning difficulties to your attention, so I attach a number of documents to give an overview of them. She is simply not intelligent enough to understand the situation or to grasp the seriousness of the matter and has been unable to acquire legal representation for this case, so is relying on the help of her friends. I fail to see how any case involving Emma would be a fair trial as she is at a distinct disadvantage."

11 Various documents were attached to the email, which we have considered. Some are historic and out of date, but it does appear that the Respondent has some learning difficulties and possibly mental health problems as well.

12 In the early hours of this morning someone again calling him or herself "Emma's friend" e-mailed the court and the GLD. In that e-mail the author stated that he or she was writing on Emma's behalf, with the Respondent's permission, because the Respondent was not competent to deal with this herself. The e-mail stated that, despite the Respondent having sought it, legal representation had been declined by everyone whom the Respondent had approached so far. The e-mail stated that the Respondent was financially unable to get to London. She was, however, willing to travel to a local court or police station on the Isle of Wight for a video link, although she was unlikely to get a fair trial without legal representation.

13 The e-mail stated that the Respondent had proven to be extremely apologetic and full of remorse. She did not realise that she had done anything wrong until she was arrested in August 2019. That remorse was demonstrated by the fact that she immediately confessed to what she had done when arrested.

14 The author refers to s.4 of the Contempt of Court Act 1981 and suggests that whilst the author was not legally trained, he or she believed that there was no interference with the course of justice. The author stated that it was appreciated that today's hearing was a permission hearing, and that it might proceed in the Respondent's absence. The author indicated that he or she hoped that the Respondent would be given time to seek legal representation for any future hearing, and to be informed of the outcome of today's hearing as soon as possible.

15 I am satisfied that due service of the proceedings, including of the application for permission, has been effected. I consider that it is appropriate to proceed in the absence of the Respondent for today's purposes, having considered, amongst other things, the helpful factors identified by Cobb J in *Sanchez v Oboz & Another* [2015] EWHC 235 (Fam) at [5], albeit in the context of a substantive committal hearing:

> "….
>
> i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;
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> ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;
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> iii) Whether any reason has been advanced for their non-appearance;
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> iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence);
>
> v) Whether an adjournment would be likely to secure the attendance of the respondents, or at least facilitate their representation;
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> vi) The extent of the disadvantage to the respondents in not being able to present their account of events;
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> vii) Whether undue prejudice would be caused to the applicant by any delay;
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> viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;
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> ix) The terms of the 'overriding objective' (rule 1.1 FPR 2010), including the obligation on the court to deal with the case 'justly', including doing so 'expeditiously and fairly' (r.1.1(2)), and taking 'any … step or make any… order for the purposes of … furthering the overriding objective' (r.4.1(3)(o))…."

16 First, whilst a significant step in the process, it is important to note that the question for the court today is not whether a contempt has in fact been committed but rather whether proceedings should be brought to establish whether it has or not. The Respondent will have

the opportunity to appear, and with legal representation if she chooses, at the full hearing, if one is ordered.

17 It is clear, as I have said, that the Respondent has been served with the relevant documents, including the notice of this hearing. It has not been suggested that she is not in a position to understand the time and date of a hearing such as this, and she appears to have the assistance of friends. The communications from the GLD have emphasised to her in simple terms that, "[t]his is a serious matter". The Respondent has had ample opportunity to explain herself, and indeed in the most recent e-mail has made some substantive representations on whether or not committal proceedings should be allowed to proceed.

18 In my judgment it is in the interests of all for these proceedings to be dealt with as expeditiously as possible. In short, it would not be dealing with the case justly for there to be an adjournment.

Permission ruling

19 Criminal contempt is in essence based on conduct that denotes wilful defiance of or disrespect towards the court, or that wilfully challenges or affronts the authority of the court as the guardian of the rule of law, and which thus interferes with the due administration of justice. Permission should not be granted unless the application discloses a reasonable basis for seeking committal, which it is in the public interest to pursue. The court will need to be satisfied that there is a *prima facie* case: *Her Majesty's Solicitor General v Holmes* [2019] EWHC 1483 (Admin) at [41] - [47]:

> "[41] For the reasons set out below, we consider that the applicable test for permission is twofold:
>
> (a) Has the applicant demonstrated at least a *prima facie* case of contempt?
>
> (b) If so, is it in the public interest that an application to commit should be made?
>
> [42] As to the first stage, it is clear that the applicant must show at least a *prima facie* case of contempt. To seek an order for committal for contempt of court is a serious step, and it is therefore appropriate that there is a proper threshold which the applicant needs to cross in order to satisfy this court that permission to seek such an order should be granted. At the same time, this should not become a provisional assessment of the merits.
>
> [43] A number of the authorities talk about the need for a strong *prima facie* case. That is the threshold expressed by the Court of Appeal in *Tinkler v Elliott* [2014] EWCA Civ 564 at [44]:
>
> 'The correct legal approach to the determination of an application for permission to bring committal proceedings was not in dispute on this appeal. The judge correctly summarised the relevant and well-known principles in paragraph 23 of his judgment as follows:…
>
> Permission should not be granted unless a strong *prima facie* case has been shown against the alleged contemnor- see *Malgar Limited*

v RE Leach (Engineering) Limited [1999] EWHC 843 (Ch), *Kirk v Walton* [2008] EWHC 1780 (QB), Cox J at paragraph 29 and *Berry Piling Systems Limited v Sheer Projects Limited* (ante) at Paragraph 30(a).'

That same approach was adopted by Birss J in *Grosvenor Chemicals Limited v UPL Deutschland Gmbh* [2017] EWHC 1893 at [105]-[118]. Both cases were concerned with false statements of truth.

[44] Mr Eardley submitted that in a case concerned with the disruption of a trial, the test of a strong *prima facie* case may set the bar too high. His argument was that, because those authorities were concerned with private litigants who were bringing contempt proceedings against the other side where the statements of truth that they had signed had been demonstrated to be incorrect, a higher threshold may be understandable in such cases, so as to discourage frivolous applications. His submission was that the same would not apply to contempts in the face of the court.

[45] We consider that there is some force in this argument. Detailed considerations at the permission stage about the precise strength of the application to commit for contempt in the face of the court are to be discouraged. But we do not need to decide the point because, as is apparent from S. 7 below, there is here on the facts a strong *prima facie* case anyway. So for present purposes, we are content to say simply that the applicant must demonstrate at least a *prima facie* case of contempt in the face of the court.

[46] On a related topic, Mr Eardley argued that, where the applicant was a Law Officer, a lower threshold should be applied to any application that he/she might make. We are uncomfortable with that submission as it stands: the applicable test should not vary depending on the identity of the applicant. But we accept that the fact that the application is being made by a Law Officer, independent of the parties and with no vested interest in the outcome of the underlying proceedings, is plainly a relevant consideration for the Divisional Court to take into account when considering whether there is at least a *prima facie* case. Moreover, the fact that the Law Officer is making the application is important to any consideration of the second stage, namely the public interest.

[47] As to that, in *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1540 at [79], the Court of Appeal said:

'The critical question, in this and every case, is whether or not it is in the public interest that an application to commit should be made. That is not an issue of fact but a question of judgment.'

Although that was an application brought by a private individual seeking permission to commit a litigant having made a false statement of truth, the same question must arise on any permission application in committal cases. Indeed, we consider that it is the

issue which overlays everything else on an application for permission to seek an order for committal for contempt in the face of the court."

20 In *Her Majesty's Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB) at [23] and [98] - [101] it was similarly stated as follows:

"[23] We heard the permission application on 14 May 2019, at the Central Criminal Court. Three main issues arose for our decision: was permission required for all three limbs of the Attorney General's application; what were the threshold tests to be applied; and should permission be granted? We concluded that permission was required for each limb of the application; that the Court should examine each limb separately and give permission to proceed if, and only if, it was satisfied that the application disclosed a reasonable basis for seeking committal, which it was in the public interest to pursue and that these threshold requirements were met. We announced our conclusion, and granted permission, reserving our reasons, which we give at the end of the present judgment…..

The threshold test

[98] Part 81 says nothing about the test for granting permission. It was common ground before us that each ground of committal must be considered separately (*Patel v Patel* [2017] EWHC 1588 (Ch)), and that the Court will not give permission unless it considers that it is in the public interest that an application to commit should be made, that being a question of judgment, not one of fact (*Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1540 [79]). Mr Furlong submitted that there is also a merits threshold: before it grants permission, the Court should require the applicant to show a 'strong *prima facie* case'. He relied on a series of decisions on applications for permission to commit individual litigants for making false statements of truth.

[99] It is true that those or similar words have been used on a number of occasions to identify the threshold for granting permission to pursue committal for contempt by false statements. Examples are afforded by *Kirk v Walton* [2008] EWHC 1780 (QB) [29] (Cox J), *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280 [2009] 1 WLR 2411 [17] (Moore-Bick LJ), *Barnes (t/a Pool Motors) v Seabrook* [2010] EWHC 1849 (Admin) [41] (Hooper LJ), *Tinkler v Elliott* [2014] EWCA Civ 564 [44] (Gloster LJ), *Patel v Patel* [21] (Marcus Smith J), and *Grosvenor Chemicals Ltd v UPL Deutschland Gmbh* [2017] EWHC 1893 (Ch) [105]-[118] (Birss J). We were not persuaded, however, by Mr Furlong's submission that consistency required the same criterion to be adopted in the present context.

[100] The cases cited reflect the caution with which the Court will approach an attempt by one party to civil litigation to have another party sent to prison for telling lies. Proceedings by a Law Officer with the aim of protecting the administration of justice are different

> in kind. The difference is reflected in the rules about committal for false statements. The Attorney General can apply for committal on those grounds, but if he does so he is exempted from the need to obtain the Court's permission: see CPR 81.18(1)(b) and (3)(b). That is not the position in proceedings of the kind before us now. But they too are proceedings brought by a disinterested public authority, the aim of which is to protect the administration of justice. There is no case that holds, in any context, that a Law Officer must show a strong *prima facie* case in order to pursue committal. The Court will of course examine the case advanced by the Attorney General. It will consider the public interest. It will not grant permission to pursue any grounds which appear fanciful, fail to disclose a reasonable basis for committal, or are for any reason an abuse of the court's process. In our judgment, it is unnecessary and would be undesirable to import the test of 'strong *prima facie* case', and to subject an application of this kind to a preliminary vetting on its merits. We note that in *Solicitor General v Holmes* at [45] this Court identified the applicable threshold as a *'prima facie* case' and observed that 'detailed consideration at the permission stage about the precise strength of the application to commit for contempt in the face of the court are to be discouraged.' We take the same view about applications of the kind that are before us.
>
> [101] As for the public interest, Mr Furlong submitted that one aspect of this is proportionality. Again, the authority cited for that proposition comes from the different context of committal applications brought by civil litigants over allegedly false statements of truth. The present case involves a contest between an individual and a representative of the State. In that context, due weight will be given to the judgment of the Law Officer. The gravity of the conduct alleged will be a relevant consideration; the Court might decline permission to pursue matters it considered relatively trivial. But it is hard to envisage a Law Officer presenting such an application. In our judgment, it would be wrong to circumscribe the public interest requirement with notions of proportionality that are more apt for litigation between citizens."

20 I am satisfied that it is appropriate to grant permission. There is a reasonable basis for seeking committal. There is at least a *prime face* case that the Respondent deliberately made recordings of a Crown Court trial, and deliberately disposed of them with a view to publication via her Facebook account. There may be a lively debate as to whether any further *mens rea* is required. If it is, there is also a clear *prima facie* case that the Respondent knew that her actions were prohibited in law. As indicated, someone on behalf of the Respondent has referred to s. 4 of the Contempt of Court Act 1981. That section, however, does not apply to recordings made or photographs taken in court.

21 Beyond that, the public interest requires the proceedings to be brought. Prohibitions against unauthorised recording and publishing of criminal proceedings are there for a good reason, namely to uphold the integrity of the trial process. The unauthorised use of mobile phones to record criminal proceedings, and the subsequent dissemination of the material on social media, is a matter of significant concern: see, for example *HM Attorney General v Paterson* [2019] EWHC 1914 (QB) at [19].

22 I note that the Respondent apologised to the police for her conduct and spent a night in custody on suspicion of contempt of court. I do not consider that those matters eliminate the need for committal proceedings to be pursued to establish the contempt, and ensure appropriate sanction, if the contempt is made out. The alleged conduct is sufficiently serious to warrant an application for committal. On the case of Her Majesty's Solicitor General, the Respondent, in defiance of clear warnings both from a member of the public and signs at court, made repeated video recordings of Crown Court proceedings at some of their most sensitive moments: the empanelment of the jury; the giving of evidence by the defendant and the delivery of verdicts. The recordings were available to view live on Facebook, and thereafter available for download. They were indeed downloaded, hundreds of times. The situation was aggravated by the fact that Mr Price and persons in the public gallery, where the Respondent is said to have been recording, were seeking to disrupt proceedings.

23 It is noted that summary criminal proceedings could have been brought in respect of the offences under s. 41 of the 1925 Act (with a maximum penalty of a relatively low level fine). Such proceedings would not have reflected the gravity of the alleged conduct: see *HM Solicitor General v Cox & Another* [2016] EWHC 1241 (QB); [2016] 2 Cr App R 15 at [31]:

> "The fact that taking photographs in court and publishing them are criminal offences, does not prevent those acts being punishable as contempts of court as, for the reasons we have given, these actions pose serious risks to and interfere with the due administration of justice: the court obviously has power, as it needs, to deal immediately with anyone seen taking photographs, in order to maintain control over its proceedings, and to avoid it standing powerless while the law designed to protect the administration of justice is broken before it. With the current technical capabilities of mobile phones and the internet, such photographs can be published almost immediately, or e-mailed from the phone for later retrieval or use by others. Whilst the later publication of such photographs may not be a contempt in the face of the court, it is still a contempt, quite apart from the fact that it is a criminal offence, since publication for a variety of reasons may be the very purpose behind the taking of the photograph illegally. While a summary criminal charge may be the appropriate response to some illegal photography, there are other cases in which it will not be and needs either swifter or more condign action by the court to uphold the due administration of justice; this was such a case. It clearly required the Attorney General to bring proceedings for contempt, taking into account the gravity of the risks and of the interference with the due administration of justice."

In any event, it is appropriate for all matters to be considered together.

24 I have of course taken into account the recent communication from an unidentified person or persons purportedly on behalf of the Respondent, in which reference is made to the Respondent having learning difficulties, possible mental health difficulties, and being unable to obtain legal representation. The evidence before the court on question of the Respondent's personal circumstances is not, however, such as to warrant refusing permission and proceeding to the next stage, given the gravity of the conduct, and the

question of public interest overall. It may be that in the event of any contempt being proven, those personal circumstances may amount to strong mitigation.

25 As for legal representation, my understanding is that the Respondent is entitled to legal aid as of right on an application for committal such as this: see *The All England Lawn Tennis Club Championships Limited & Another v Mckay* [2019] EWHC 3065 (QB) at [29(a)]:

> "As the LAA accepts, a respondent to High Court committal proceedings alleging breach of an order (such as Mr McKay) is entitled to Legal Aid as of right (i.e. without any assessment of his means or of whether it is in the interests of justice for representation to be provided): see [12] above."

26 I strongly encourage the Respondent to seek legal Aid and representation for the next hearing. She should attend the next hearing, and she needs to understand that if she does not, the hearing can proceed in her absence.

27 For all these reasons, I would grant permission to proceed with the application.

28 Finally, I should record that CPR Part 81 was amended by the Civil Procedure (Amendment No. 3) Rules 2020/747 with effect from 1 October 2020. Amongst other things, the amendment provides materially that if permission to apply for an order for committal is needed, and the application relates to criminal proceedings, the question of permission shall be determined by a single judge of the Administrative Court.

29 As discussed with Mr Hayes, who has appeared today on behalf of Her Majesty's Solicitor General, and for whose representation and submissions we express our thanks, I do not consider that those changes apply to an extant application. The matter does not however need to be determined one way or the other. To the extent that the new rule does apply to extant applications such as this, issued before 1 October 2020, I grant permission as a single judge of the Administrative Court. And on what I currently consider to be the better view, namely that the new rule does not apply to applications issued before 1 October 2020, I invite my Lord, Jeremy Baker J, to indicate whether or not he agrees with my judgment.

MR JUSTICE JEREMY BAKER: I agree.

CERTIFICATE

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This transcript has been approved by the Judge.