Neutral Citation Number: [2021] EWHC 1416 (QB)

Case No: QB-2021-001629

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th May 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

VIDLER	**Applicant**
- and -	
CHIEF CONSTABLE OF HERTFORDSHIRE POLICE	**Respondent**

- -
- -

The **Applicant** in person

Hearing date: 7.5.21
Written submissions by letter: 15.5.21 (Respondent), 19.5.21 (Applicant)

Judgment as delivered to the parties in writing

- -

Approved Final Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. At an oral hearing in Court 14 at the Royal Courts of Justice on 7 May 2021 as the urgent applications judge I heard the Applicant's oral submissions in support of her application dated 4 May 2021 to set aside an order of Chamberlain J made on 26 March 2021. Chamberlain J's order had (i) refused the Applicant's application for an order for the return of her mobile phone by Hertfordshire police and (ii) ordered her to pay costs assessed at £410. At the oral hearing before me a point of substance crystallised, on which the Applicant was able to address me clearly. I adjourned mid-afternoon, and the hearing resumed. The upshot was that I concluded that I needed to give some directions, and get some greater clarity on one specific point, before proceeding to give my substantive judgment on the application, as I now do.

My first judgment and order

2. The position is all set out in a first judgment, which I delivered ex tempore on 7 May 2021, an approved written version of which was issued as [2021] EWHC 1197 (QB) and provided to the parties. In that judgment I explained that I had been "on the verge of dismissing [the] application" (first judgment paragraph 6), but that the communications before the Court and what I had been told by the Applicant left me with "a nagging doubt" as to whether retention of the mobile phone was without any real justification (first judgment paragraph 5). In order to deal with that point I gave directions for the parties, in sequence, to provide me with some further information and I made an order to enable that to take place (first judgment paragraph 4).

Proceeding to determine the application

3. I am quite satisfied that a full and fair opportunity has now been given to both parties to provide information on specific question which had inhibited me from proceeding to deal substantively with the application on 7 May 2021. I am also quite satisfied: that it is not necessary or appropriate in the interests of justice and having regard to the overriding objective to allow any further opportunity or convene any further hearing; and that I can now proceed to give my substantive judgment the application that on 7 May 2021, and deal with the other matter which is before me, to which I will return. I will release this second judgment in writing to the parties and in the public domain.

The explanation that bothered me

4. What had really bothered me (first judgment paragraphs 1 and 5) was that the Court had clearly and expressly been told by an email communication from the Police (5 May 2021 at 14:11) that the Applicant's mobile telephone "is being lawfully retained by the Police until the content can be exhibited as evidence". That email communication had not been seen by the Applicant until the Court took steps to ensure that this happened, on 7 May 2021. The Applicant had explained at the oral hearing that the relevant content had in fact been exhibited as evidence in the magistrates' proceedings (on, she said, 5 February 2021). Having been given an opportunity, during an adjournment of the oral hearing on 7 May 2021 for that purpose, to state "whether you accept that this is correct", the email response from the

Police went in a different direction. It described an "understanding" that "the telephone has been examined in some of the content downloaded". It stated that "the telephone needs to be retained by Police to complete examination for more potential evidence and just in case the download becomes corrupted or is disputed". That response did not appear to contest that the content had been "exhibited as evidence". It did not appear to maintain the reason previously given. It appeared to adopt a different explanation, but was somewhat vague (referring to an "understanding") and unsatisfactory (referring to retention of the phone "just in case").

Giving an opportunity

5. The steps I took in the Order which I made on 7 May 2021 did not require the Police to do anything. But it did give them the opportunity to provide greater clarity, before I proceeded to determine the application. My directions also permitted the Applicant an opportunity to reply.

The Police response

6. The Police took the opportunity afforded to them and have provided the Court, copied (as I directed) to an email address indirectly accessible to the Applicant, with a new statement of the position. By an email letter dated 14 May 2021 at 14:08 the following key points are made. (1) Pursuant to section 22 (1) of the Police and Criminal Evidence Act 1984 the Police have a statutory power to retain the mobile phone "so long as is necessary in all the circumstances", including for the dual purposes of "use as evidence at a trial for an offence" or "forensic examination or for investigation in connection with an offence' (section 22(2)(a)). (2) However, pursuant to section 22(4), nothing may be retained for either of the dual purposes "if a photograph or copy would be sufficient for that purpose". (3) In the Applicant's case the "evidential phone download" has indeed been served on the defence, the date being given of 4 April 2021. (4) However, in the magistrates proceedings the Applicant "denies the offence and more specifically denies that one message sent from her mobile to the victim was actually sent by her", and it is in those circumstances that "to return the mobile telephone to [the Applicant] prior to the criminal proceedings' conclusion could jeopardise the case"; that is "because the evidence on the telephone is disputed and a third party examination may be required prior to trial". (5) The Applicant has a route available to her of application to the magistrates' court dealing with the criminal case for return of the mobile telephone, if she maintains that retention is unjustified.

The Applicant's reply

7. My order gave the Applicant until 4pm on Friday 21 May 2021 to write a letter, provided by post and by the identified email route, "stating whether she maintains that retention of the phone is unjustified and, if so, why she says that". What happened, in the event, was that the Applicant attended at the Royal Courts of Justice and provided documents. What the Court did was to take steps to secure that those documents, having been scanned, was supplied to the Police by the email route referred to in my order. I indicated that I would consider the materials from the Applicant. I have done so. The materials from the Applicant included a letter dated 19 May 2021 from her which stated: "Hatfield Police have had no justified reason for keeping my phone since the 7 May 2020. Furthermore, the police were ordered to issue a statement/exhibit by St Albans Magistrates Court by 5 February 2021 which I

> received by my solicitor on 7 February in the post. The exhibit shows that you have all the evidence for court for October 2021 and therefore your refusal to give my mob[ile] back is quite frankly an act of pure spite".

Discussion

8. The most important point in all of this is that the Police maintain that the retention of the mobile phone is justified in circumstances where the applicant "denies the offence and more specifically denies that one message sent from her mobile to the victim was actually sent by her". That is the reason given why it remains "necessary in all the circumstances" to retain the phone and why "a photograph or copy" would not "be sufficient". That is a reasoned justification. It is clear. The Applicant does not contest the fact that she "denies the offence" nor that she "denies that a message sent from her mobile to the victim was actually sent by her". The Police do not dispute her contention that the "content" has been "exhibited as evidence", but they no longer rely on what they previously told the Court, namely that the phone was "being lawfully retained by the Police until the content can be exhibited as evidence". In these circumstances, my concerns as to whether the Police were giving the Court a reason which was not in fact accurate have been allayed: that reason is no longer relied on and a clear description – rather than a vague "understanding" or "just in case" – has now been provided to the Court to which, on the face of it, there is no answer.

Pursuit should be before the magistrates' court

9. In the light of that explanation, and the withdrawal of the previous inaccurate reason, I am also satisfied by what the that in all the circumstances any pursuit, or further pursuit, by the Applicant of issues relating to the retention of her mobile phone should be directed to the magistrates' court. That court which will have full visibility on what has been done and is being said in the proceedings before it.

Determination of the application to set aside Chamberlain J's order

10. In those circumstances I am quite satisfied that the appropriate course is to refuse the application to set aside the order of Chamberlain J. Now that the only point of concern relating to the substantive merits regarding retention of the mobile phone has been addressed and answered by the Police, it is sufficient to say this. There being on the material before the Court no substance in the claim being made as to unjustified retention of the mobile phone, it could not be necessary or appropriate in the interests of justice to allow the application to set aside Chamberlain J's order. I have explained that I also accept that the magistrates court is the appropriate forum for any pursuit of any further contention relating to the retention on return of the phone. In all the circumstances, it is not necessary for me to visit the 'procedural uphill struggle' which the Applicant faced in any event, which I set out in some detail at paragraphs 6 to 9 of the first judgment.

Chamberlain J's costs order

11. The costs order which Chamberlain J made stands.

The Police's further application for costs

12. The Police in the letter dated 14 May 2021 has asked for a further costs order in the sum of £210 "for the time it has taken to correspond with the Court and make enquiries with the officers concerned". That application for costs is refused. The problem that arose in this case was that the Court had been told something by the Police which appeared to be inaccurate, and which has indeed proved to be inaccurate. What the Court was told was that the mobile phone in this case was "being lawfully retained by the Police until the content can be exhibited as evidence". That was not correct. That was not, at the time it was stated, the reason why the mobile phone was being retained. The Applicant was right – and the Police having now been given two opportunities have not disputed this – when she said that content had already been "exhibited as evidence". What led to the Police to be given a further opportunity to provide clarification was the statement which had been made to the Court, which proved to have been incorrect, and which was not satisfactorily answered by a different description of an "understanding" and "just in case". It was right in the circumstances that the Police should have the opportunity to clarify and correct position which it had stated to this Court. But in my judgment there is absolutely no justification for a costs order against the Applicant for the Police availing themselves of that opportunity in those circumstances.

The two new applications and claim form

13. Alongside the Applicant's letter dated 19 May 2021 and the bundle of materials which she provided for the Court are two new applications together with a claim form which the Applicant has now issued. The first application is dated 16 May 2021 and seeks a Court order "for payment for attached expenses to be paid to my bank by close of business today 17/5/2021". The stated grounds for that first application are that this Court is dealing with the Applicant's case against the Police and "I was directed by [Mr] Justice Fordham to submit claim for payment". The second application is dated 19 May 2021 and is an application for "interim payment of expenses". The stated grounds for that second application include that the Applicant has a court order issued on 17 May 2021 for expenses to be paid, to which the Police has not adhered. The claim form is dated 7 May 2021 and is for damages for personal injuries inflicted upon arrest together with expenses relating to the Applicant's attempts to obtain return of her mobile phone.

Dealing with the two new applications

14. Pursuant to an order dated 17 May 2021 by Andrew Baker J, the first application is before me today having been referred to me "for determination or directions" when considering, pursuant to my order dated 7 May 2021, the application to set aside Chamberlain J's order of 26 March 2021. I am quite satisfied in the circumstances that it is appropriate and necessary, in the interests of justice and having regard to the overriding objective, that I also deal with the second application. It covers the same subject matter as the first application and refers to the order of Andrew Baker J which referred that first application to me. The second application requests that it be dealt with by a High Court Judge ("Justice").

15. I am satisfied that it is necessary and appropriate to dismiss the first application dated 16 May 2021 and to certify it as totally without merit. There is no identified basis, and I am quite unable to identify one, on which the Applicant will be entitled to recover the "expenses" applied for. The claim is entirely without foundation. Nor is it the

case, as the first application states, that I directed the Applicant to submit a claim for payment. What I did is set out in the first judgment and in the order of 7 May 2021. I am also satisfied that it is necessary and appropriate to dismiss the second application dated 19 May 2021 and certify is as totally without merit. The same points apply. Moreover, there is no court order – as is claimed – for expenses to be paid. The court order was the one dated 17 May 2021 by Andrew Baker J which I have described and which referred the first application to me. The second application is based on a mischaracterisation of that order. Having certified the two most recent applications as totally without merit, I record that I have considered whether any further order or direction is necessary or appropriate and I am satisfied that none is.

The claim form

16. I am satisfied that it is not appropriate for me to deal today with the claim form issued on 7 May 2021. There is no direction for that claim form to be before me today. It includes a claim for damages for personal injuries said to have been sustained on arrest. It is appropriate, however, to say this. It seems obvious to me that any such claim for damages for personal injuries, if one is being pursued, belongs in the county court and it would therefore be appropriate for that claim to be transferred to the county court or a claim issued in that court. I have already said that I can see no cause of action or basis for a claim in respect of expenses.

The description of court orders

17. I conclude by recording my disquiet about the way in which court orders have been described. I have seen in the papers the Applicant having described my order of 7 May 2021 as an order requiring the Police to return her mobile phone. I have also seen in the papers the Applicant having described Andrew Baker J's order as an order requiring the Police to pay expenses. Those orders speak for themselves. They did not, and do not, do those things.

My order today

18. I make the following order:

    (1) The Applicant's application dated 4 May 2021 to set aside the order of Chamberlain J on 26 March 2021 is refused.

    (2) The costs order made by Chamberlain J on 26 March 2021 stands.

    (3) The Respondent's application for a further costs order is refused.

    (4) The Applicant's application dated 16 May 2021 for an order requiring payment of expenses is dismissed and certified as totally without merit.

    (5) The Applicant's application dated 19 May 2021 for interim payment of expenses is dismissed and certified as totally without merit.

25.5.21