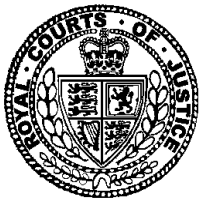

Neutral Citation Number: **[2021] EWHC 2806 (QB)**

Case No: QB-2020-004003

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 October 2021

Before :

MR JUSTICE RITCHIE

- -

Between :

KEVIN O'HARA

Claimant

- and -

JEREMY WHITBY-SMITH

Defendant

Mr Richard Egleton (O'Hara Solicitors) for the Claimants
Mr Paul Mitchell QC (Kingswell-Berney) for the Defendants

Hearing dates: 19 October 2021

- -

Approved Judgment

.....

Mr Justice Ritchie:

The parties

[1] The Claimant is a solicitor who used to employ and then be in partnership with the Defendant who is also a solicitor.

The background

[2] The parties have fallen out and are involved in litigation over legal aid fees received by the partnership when they worked together. A claim is being brought against the Claimant and the Defendant as partners in a former firm of solicitors by the Lord Chancellor on behalf of the Legal Service Commission for recoupment of overpaid fees. Both Defendants issued Part 20 claims and that action is proceeding in Brighton county court.

The hearing

[3] This application was heard on 19 October 2021 and in a draft judgment I invited submissions on costs by 4pm on 22nd October 2021.

The application

[4] The court was informed by Claimant's counsel in his submissions on the costs application that:

> "October 2020- Part 8 Claim Form and Affidavit in Support sent to the Court together with a cheque for £528 (the appropriate fee for a Part 8 Claim Form)
> 13 November 2020- The Court administration allocate the number QB-2020-004003 to the Part 8 Claim upon the cheque being presented and cleared (page 8 of the attachments.
> 1 December 2020- Letter from Marve Campell of Queen's Bench Claims (see annexes to the Skeleton Argument of 18 October 2021) which said as follows:-
> *"The Master does not determine contempt applications (CPR81.3(2)) but invites the Applicant to revise his material and to supply a statement as to why he says his existing or revised material is appropriate (in the light of the new CPR81) prior to the Master considering whether to refer the matter to the Judge.*
> *The Court will await your response before considering whether or not to seal the Claim Form."*
> And that on 2nd December the Claimants solicitors wrote to the court stating:
> *"It would seem on the above analysis, that the Master is correct and the Part 8 Claim Form is no longer required to be used for the application under consideration. We return the Application in Form N60(sic) which appears to be the approved form for making a committal application, to which the Affidavit you retain can relate. The fee for the Committal application is £255 whereas we have paid £528 for a Part 8 Claim Form. We are therefore due a refund of £273."*

[5] On the 2nd of December 2020 the Claimant sought to issue an application in form N600. This was not a part 8 application as is expressly stated on the top of the form. The Claimant was represented by his own firm O'Hara solicitors. In answer to question 3 which asks who should be served with the application? the Claimant put in the name of the Defendant and gave his address. Under the question at part 4 the form states:

> "The written evidence of the Claimant in support of this application, in the format of an affidavit or affirmation, is attached to this application.
> If permission is required to make this application, the application for permission (headed "application for permission") must be included in this application."

[6] The form then goes on to give warnings to the Defendant about what may happen if the Defendant is found in contempt and at para 5 the Claimant filled in that the application was brought under CPR rule 81.3 (5)(b).

[7] That provision relates to applications for committal for contempt based on the Defendant making false statements in filed court documents under a statement of truth. Permission is needed before such applications can proceed to a substantive hearing. The Claimant accepted in submissions and in the form N600 that the permission of the court was required to progress the application. Indeed the asserted contempts were allegations that the Defendant had made false statements in documents verified by a statement of truth. In support an affidavit from the Claimant was referred to. Most of the allegedly false statements related to the Defendant's dealings as a solicitor with a case called *Perry v Sherchen and others* in which the Claimant alleged that the Defendant failed to account to the Legal Aid Board or Legal Services Commission for fees received on behalf of Mr. Perry leading to the proceedings being bought by the Lord Chancellor against the Claimant and the Defendant.

[8] In paragraph 12 of the form N600 the Claimant laid out two paragraphs supporting his application for permission. The first set out that the application should not be dealt with in the county court action because it was a procedural matter and not a substantive matter. In the second paragraph the Claimant set out the false statements listed in 8 subparagraphs.

[9] It will be a matter for the single judge on the substantive application to determine whether permission is granted.

[10] In the affidavit in support sworn by the Claimant he specifically referred to the application form as a "part 8 claim form" but that arose because the affidavit was originally sent with a part 8 application to the court in October 2020 just when the rules were changing.

Service

[11] It is agreed as a fact that the Claimant's application form was not served on the Defendant in good time or at all for more than 10 months and was only provided to the Defendant the day before this hearing. Considering that committal for contempt may involve being sent to prison I do not consider that the Claimant has proceeded in a fair or reasonable manner in refusing to serve the application and evidence on the Defendant. I will explain this view below.

The chronology

[12] The chronology of this application can be set out shortly.

[13] After receiving the application in form N 600 dated the 2nd of December 2020 from the Claimant the court never sealed it.

[14] The Administrative section of the Queen's Bench division made an administrative order which is undated. It was made by Martin Lee and appears to require the Claimant to file with the court, within seven days, a copy of the order of the Queen's Bench Division dated the 7th of April 2021, by which the claim was transferred into the Administrative court. It went on to say that the administrative officer was minded to transfer the case to the SW region of the Administrative court which is administered out of Cardiff. The parties had liberty to oppose the transfer according to the order and if there was any opposition and then the transfer decision would be made by a Queen's Bench Division judge.

[15] The next document chronologically that I can find on the court Cefile is an order made by Mrs Justice Steyn on the 28th of May 2021 noting that the claim was transferred to the Administrative court on the 16th of April 2021. That order appears to have been made because on the 2nd of December 2020 the Claimant wrote to the court stating that the Claimant thought that the Administrative court was the correct division. Mrs Justice Steyn considered that the Queen's Bench Division was the correct division, refused to transfer the case to the Western Division and suggested it be listed before a single judge in the Queen's Bench Division for a permission hearing.

[16] On the 6th of August 2021 there is a note that master Eastman transferred the case to master Dagnall.

[17] This application was then listed before me on the 19th of October 2021 for a 1hour hearing. There was a flurry of last-minute skeletons, bundles and authorities filed on the court electronic file yesterday (18 October 2021).

The issue

[18] After the case was opened it became clear that the Claimant was seeking to adjourn the application for permission to pursue the committal application and for this court to decide whether the Defendant had locus to be heard on the permission application.

[19] The Defendant encouraged me to hear the application for locus and I decided that that would be a good use of the hour allocated. So the issue before me is: does the Defendant have locus to be heard on the application for permission to bring proceedings for committal for contempt?

Evidence

[20] In the various bundles before me the following evidence is provided: an affidavit from the Claimant, two affidavits from Mr. Vaughan, an affidavit from Sarah Styles, an affidavit from Mr. David Oglander and an affidavit from Mr. Collings.

Facts

[21] There does not seem to be any dispute on the facts. The Claimant sought to issue the contempt application in December 2020 and thought that it would be put before a judge and the permission issue would be decided ex-parte. Then if the permission

was granted the Claimant intended to serve the permitted application on the Defendant.

[22] The Defendant was never served with the application. After being told to do so by the court listing office, on 8th September the Claimant informed the Defendant of the hearing date.

[23] The Defendant wishes to be heard at the permission hearing.

Submissions

[24] The Claimant's counsel, in his skeleton and in submissions to me, proceeded on the basis that the old procedure for applying for permission still applied in this case despite the changes to CPR rule 81 which were made in October 2020. It was the Claimant's submission that the application would be sent to the court, dealt with on paper or at a hearing ex-parte and if permission was obtained only then would details of the judge and the date of permission be written onto the application which would be formally issued, stamped and then served on the Defendant.

[25] The Claimant relied, as authority for that submission, on the practice direction to the old CPR rule 81 paragraph 11 which is still set out at page 2464 of the 2021 Supreme Court Practice.

[26] I permitted the Defendant's counsel to address me in relation to locus and the correct procedure for a permission application. In the Defendant's submissions the Claimant had issued the application incorrectly believing that it was a part 8 application. I was referred to CPR rule 81.3 (1) which states: -

> "a contempt application made in existing High Court or county court proceedings is made by an application under part 23 in those proceedings whether or not the application is made against a party to those proceedings."

[27] The Defendant asserted that these allegations arose from the proceedings between the Lord Chancellor and the Claimant and the Defendant and the proper way to issue this application, should have been using CPR part 23. The Defendant also relied on CPR rule 81.3(3) which states:

> "a contempt application in relation to alleged interference with the due administration of justice otherwise than in existing High Court or county court proceedings is made by an application to the High Court under part 8."

This application is not "otherwise than in existing proceedings" submits the Defendant so part 8 does not apply.

The need for permission

[28] Subclause 5 of CPR rule 81.3 states:

> "Permission to make a contempt application is required where the application is made in relation to:
>
> (a) interference with the due administration of justice accept in relation to existing High Court or county court proceedings;

> (b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement".

Both parties agree that the Claimant's application is made under subrule (b).

[29] Subrule 6 of CPR 81.3 states:

> "If permission to make the application is needed, the application for permission shall be included in the contempt application, which will proceed to a full hearing only if permission is granted."

Form N600 caters for this and the Claimant filled in the relevant parts applying for permission within the application.

Which type of application was appropriate?

[30] Turning then to CPR rule 23, this rule generally governs applications made on notice within proceedings. The general rule is that a party must file an application on notice to the other party. Pursuant to CPR rule 23.4 a copy of the application notice must be served on each other party. Pursuant to CPR rule 23.7 a copy of the application notice must be served as soon as practicable after it is filed and in any event at least three days before the court is to deal with the application. Finally, pursuant to CPR rule 23.11, where the Claimant or any Defendant fails to attend the hearing the court may proceed in his absence.

[31] The Defendant submits that the Claimant has issued the wrong application (under part eight) on the right form and should have issued his application under part 23. Also, that the Claimant has failed to get the application stamped and properly issued. Additionally, that the Claimant has failed to serve the application and the evidence in support on the Defendant. Finally that, whether or not the process is defective, the Defendant has locus to be heard on the application for permission.

[32] In reply the Claimant's counsel accepted that the original application to commit was in effect treated as an old style part 8 application by the Claimant. He explained that because it was drafted in October of 2020 when the rules were changing the Claimant's lawyers (the Claimant's own firm) had become confused. He accepted that CPR rule 81.3 "talked about" issuing applications under part 23. The Claimant blamed the court for allowing the application to go before a High Court judge without ever stamping it or issuing it. The Claimant stuck to his submission that the permission application should be dealt with under what he submitted was the old procedure: namely ex-parte, without notice to the Defendant and only after permission has been granted would the Defendant be put on notice.

[33] Claimant's counsel understood that the practice direction to CPR part 81 had been revoked in October 2020 but his reliance upon paragraph 11 of that revoked practice direction was, in his submission, some sort of vestigial existing practice despite the abolition of the practice direction itself. He went on to argue by analogy from the notes to CPR rule 81.3.4 that the first hearing to determine whether permission is granted must be ex-parte otherwise there wouldn't be any need for a renewal (if the permission was rejected) hearing which would be carried out orally and inter parties.

[34] I have been able to look at the affidavit of the Claimant, Mr O'Hara and the first affidavit of Mr. Vaughan filed on behalf of the Defendant. The court did not allocate time to read Mr. Vaughan's second affidavit or the affidavits of the other witnesses nor was I asked to do so for the purposes of the locus issue.

[35] Whilst I have not seen the pleadings in the claim brought by the Lord Chancellor on behalf of the Legal Services Commission against the Claimant and the Defendant, it is asserted in the Defendant's skeleton that the Defendant's actions in the case of *Perry* form part of the factual dispute involved in that action. That action is continuing in Brighton county court. Therefore, I consider that it was logical for Claimant's counsel to accept that this application for contempt was issued "in relation to existing county court proceedings" and which should have been made under part 23.

[36] I rule that the application should have been processed and progressed under CPR part 23.

Service

[37] CPR rule 81.5 governs service of the contempt application and requires, unless the court directs otherwise in accordance with part 6, that a contempt application and any evidence in support must be served on the Defendant. I find that it was not served.

The Law on locus

Submissions

[38] A bundle of authorities was filed by Claimant's counsel which included *Zurich v Romain [2018] EWHC 3383*, a decision of Mr. Justice Goose. That case involved committal proceedings for contempt in which the Claimant needed to ask for permission. The case preceded under the old CPR part 81 not the new. The court heard oral submissions from both the Claimant and the Defendant. On a procedural point Mr. Justice Goose decided that the court was entitled to consider such permission applications first on paper without an oral hearing and relied on CPR rule 81.14 which so stated. Then, if refused, at an oral hearing. Of course, that rule 81.14 was abolished in October 2020 so I find little assistance in that decision.

[39] The Claimant also relied on the Court of Appeal decision in that same case reported at *[2019] EWCA Civ 851*. It concerned the substantive elements of the application and I do not find any assistance in it.

[40] In the Defendant's bundle of authorities I was referred to *Cole v Carpenter [2020] EWHC 3155*, a decision of Mr. Justice Trower, who had before him an application for permission to pursue a contempt application. I note that locus was not an issue and both parties were heard. At paragraph 25 the judge stated:

> "CPR part 81 has been completely re drafted. As I have just explained the circumstances in which the court's permission to make a contempt application is required are now different from the circumstances in which permission was required to make a committal application under the former CPR part 81. Nonetheless, neither party contended that the principles applicable to the grant of permission in circumstances in which a person is alleged to have made a false statement in a document verified by a statement of truth, have changed."

[41] I also take into account the notes to the Supreme Court Practice at paragraphs 81.3.10 and 11 (at pages 2429 running through to 2432). In particular the case of *Stobart Group v Elliott [2014] EWCA Civ 564*, at paragraph 44, in which the Court of Appeal summarised the approach to be taken by the court when determining an application for permission to bring committal proceedings arising from false statements in documents with statements of truth. Many factors are taken into account but in particular there is a public interest test for such applications which must be passed before the application will be permitted to go forward.

[42] There is clear guidance also in *Patel v Patel [2017] EWHC 1588*, a decision of Mr. Justice Marcus Smith, particularly at paragraphs 17 to 21, to the effect that the court has to keep a very close eye on whether satellite litigation should be allowed or whether the issues that are raised in the application for contempt are better dealt with in the main litigation, especially when the main litigation is the source of the complaints.

[43] I of course am not dealing with the permission application at this stage. I am just dealing whether the Respondent has the right to be heard on the permission application.

Rulings

[44] Taking the above into account. Taking into account that under part 23 the application must be served on the Defendant.

[45] Taking into account that permission is required in applications based on assertions of false statements covered by statements of truth in civil proceedings and noting that the substance of the application needs to be carefully considered from the point of view of preventing satellite litigation and that the Defendant's submissions and evidence on that and whether the issues could better be determined in the main action will be highly relevant to that issue.

[46] Taking into account that court has to decide whether the application is in the public interest and that the Defendant's submissions and evidence on that and whether the issues could better be determined in the main action will be highly relevant to that issue.

[47] Finally taking into account that the new CPR rule 81 is wholly different in procedure from the old one, I have come to the conclusion that the Defendant has locus to put evidence before the court and to make representations on the application for permission and whether it should be granted.

[48] I reject the Claimant's assertion that the old practice direction, which has been abolished, still applies to new cases. It does not.

[49] Therefore, the Defendant has succeeded in the application before me to gain or declare that he has locus.

[50] By the same token the Claimant's application to adjourn the issue relation to the Defendant's locus to another date is dismissed.

Costs

[51] That brings me to the question of what should be done in relation to the inappropriate procedure followed by the Claimant. The Claimant issued by sending a part 8 form to the court in October 2020. The offered fee was accepted and a QBD claim number was given to the application.

[52] By December 2020 the Claimant had submitted the same application on form N600, which specifically says it is not a part 8 application. I rule that the application was live from the date of allocation of the case number and the acceptance of the fee. It was in the wrong form but that was curable and was cured by the submission of the N600 to the court. In any event this was a part 23 application within existing proceedings.

[53] However the Claimant treated the application on form N600 like a part 8 application and treated it as an application that did not have to be sealed, issued and served, but instead would go before a single judge without the Defendant being present or in the know. That was a completely inappropriate way forward. The Claimant seeks to blame the court office for being complicit in this error, but I reject any administrative errors as having any causative relevance. Lawyers should know the law and the procedure.

[54] As a result of the Claimant's inappropriate procedure the Defendant was left with the sword of Damocles hanging over his head for at least eleven months. On the Defendant's case threats were made by the Claimant to issue these committal proceedings long before December 2020. The Defendant has not been served with the committal application (which contained the application for permission) and so has not known what he was to face.

[55] Throughout all of this time the Claimant have refused to accept that the Defendant was entitled to be heard on the permission application.

[56] I award the Defendant the costs of the hearing and the preparation for the hearing to be paid by the Claimant in any event.

Assessment:

[57] In my draft judgment sent out a few days ago I stated:

> "I may summarily assess the costs or order that they be paid on the standard basis to be assessed if not agreed. In either event I am minded to order a payment on account of costs by the Claimant to the Defendant of 60% of the statement of costs filed by the Defendant by 4pm on the 14th day after this judgment is handed down.
>
> However, before I make this part of the order final I invite both parties to provide written submissions on costs to me, through my Clerk, before 4:00 PM on Friday the 22nd of October. I do this because by the time the hearing had run over by 30 minutes there was no further time for me to give an extempore judgment or to hear arguments on costs. I intend to consider the arguments on costs and to make the costs ruling thereafter without oral argument."

[58] I am most grateful to both counsel for making submissions on assessment of costs.

[59] Claimant's counsel went quite a bit further in his written submissions and tried (a) to edit the judgment and (b) to submit that there were no existing proceedings so the court had no power to order costs because no application had been issued.

[60] I reject that submission. If that submission had been right the Claimant would not have been able to gain judgment on the locus issue and his application to adjourn was without any foundation. In the even both the Claimant and the Defendant sought to argue out the locus issue and both invited the court to adjourn over the permission application.

[61] I have already ruled that the permission application was alive from the date the case number was given and the fee was received. To use the precise words of CPR rule 81.3(1) it was "made" "in existing proceedings" when the case number was allocated to it. Albeit those proceedings existed in the Brighton county court.

[62] As to the basis of the assessment: I do not accept that the indemnity basis would be the correct basis for the assessment. Although the Claimant got himself into a muddle and acted less than reasonably refusing to serve a copy of the N600 and evidence in support on the Defendants, I do not consider that his behaviour was "out of the norm" and to a sufficient extent.

[63] Having considered the written submissions on costs I order that the Defendant's costs of the application are to be paid by the Claimant to be assessed on the standard basis if not agreed.

[64] I will make an order for payment on account of costs of £15,000. I do not consider that I have heard sufficiently detailed submissions on the Defendant's statement of costs to award more and I take into account the rather large sums in that document (£77,569) and the Claimant's counsel's submissions thereon. I have therefore altered my provisional view about awarding 60% of the sums set out.

Directions

[65] That leaves one further matter, which is whether any directions are required to regularise the application and to allow it to go forwards to the permission hearing. I have the power to make these under CPR rule 81.7.

[66] Does this court have power to cure the defects in the Claimant's approach to this application? Under the old CPR rule 81 Practice Direction para 16.2 the court had express power so to do. I consider that this court retains that power, see *Deutsche Bank AG v Sebastian Holdings Inc and ors [2020] EWHC 3536 (Comm)* per Cockerell J at para [148]:

> "148. Had it been necessary to do so I would have found that despite the abolition of the specific power under the PD, the Court has the power to cure such defects where there has been no prejudice. That certainly seems to have been the approach taken by Foxton J in the recent case of *Integral Petroleum v Petrogat [2020] EWHC 558 (Comm)* where he held that one allegation of breach was too

> generalised, but that this had not caused any prejudice and permitted the claimant to amend the Application Notice to add further particulars. A similar approach can be seen in the case of *SK v HD [2013] EWHC 2436 (Fam)*."

[67] I consider that the most efficient way forwards is for the form N600 that has been drafted and formed the basis of the hearing before me today to be issued and sealed by the court office in the Queen Bench Division under part 23 by 4pm on 27 October 2021. If the application is not issued by that date it is struck out.

[68] The application and the evidence in support shall be served on the Defendant within seven days of it being issued.

[69] The Defendant shall serve and file his evidence in response within 14 days of service of the application.

[70] In relation to evidence in support, I make no order on this but remind the parties that on a permission application the public interest criteria must be satisfied.

[71] If issued in time, the application for permission to pursue committal proceedings shall be listed before a single High Court judge in the Queen's Bench Division with a time estimate of 3 hours and pre hearing reading time of half a day on the first open date after 1st November 2021.

[72] I also direct that the parties will file no more than **one bundle of documents** bookmarked and containing all of the documents set out chronologically no less than 3 days before the hearing.

[73] I also direct that the parties will file **one bundle of authorities** in chronological order, three days before the hearing. And I direct that the parties will file and exchange skeleton arguments no less than three days before the hearing.

[74] I direct that the Defendant will draw up the order consequent on this judgment and deliver it to my Clerk by 4:00 PM on Friday the 22nd of October. The Claimant does not have the right to comment on or redraft the Order. I will complete that order by making the costs decision as soon as I can thereafter.

[75] For the sake of clarity, the orders set out above are effective from the date of handing down of this judgment.

Ritchie J

Post script

[76] I am grateful to both counsel for assisting in correcting typing and grammar and some factual errors in the draft judgment.

[77] Any application for permission to appeal should be submitted after judgment has been handed down (for the avoidance of doubt the Claimant's application for permission made in his submissions on costs is premature).

End