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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2023] EWHC 1225 (KB)



No. QB-2021-000760

The Royal Courts of Justice
Fetter Lane
London, EC4A 1NL

Thursday, 4 May 2023

Before:

HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the High Court)

B E T W E E N :

METROLINE LIMITED

Claimant

- and -

MR DIEGO BARBOSA ARAUJO

Defendant

MISS A KARSERAS (instructed by Weightmans LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

JUDGE WALDEN-SMITH:

- 1 This is the substantive hearing of a committal application for contempt, brought by Metroline Limited against Mr Diego Barbosa Araujo, with respect to allegations that he knowingly made false statements in documents, which he supported by statements of truth, and that those documents have, additionally, interfered with the due administration of justice.
- 2 I dealt with this matter at the permission stage and, therefore, I am familiar with the background to the matter. The application for permission was heard by me on 5 May 2022. On that occasion, Mr Araujo did not attend or make any representations, but I was satisfied that he had been duly served with the proceedings and had been given proper notice of the hearing.
- 3 Within the order that I made on 5 May 2021, I granted permission to bring committal proceedings with respect to six allegations of contempt, which I will return to in a moment, and the defendant, Mr Araujo, was given permission to respond to the committal application by the filing and service of witness statement evidence within 28 days of the order. Mr Araujo has not served any evidence upon the claimant and has not provided evidence of any sort in response to the evidence that was provided by the claimant's employees, in particular, Mr Marriott and Mr Wolfson, who attended court today in order to give oral evidence if so required.
- 4 There was an order subsequent to the order that I made amending my original directions. The order of Lavender J on 15 September 2021 was to allow for substituted service by way of first-class post to the defendant's last known address, at that time being 36 Wellington Road, London E17 6LS.
- 5 In addition to these proceedings, there has been an attempt to deal with the costs of the original claim brought by the claimant. The costs proceedings are being dealt with within the Central London County Court. On 27 June 2022, the costs of the original action were assessed in the sum of £17,469.44, which, as is the usual order, the defendant was obliged to pay within 14 days. He did not pay and, on 7 October 2022, the claimant applied for an order that the debtor attend court to provide information about his means and any other information needed to enforce the order that had been made on 27 June with respect to the outstanding costs. By then, the costs outstanding had increased to being in excess of £20,000.
- 6 On 23 December 2022, an order was made for the defendant to attend the county court at Central London on 21 February 2023 before a court officer in order to provide information about his means, and any other information needed to enforce the judgment or order, and a penal notice was attached to that order saying, "You must obey this order. If you do not, you may be sent to prison for contempt of court". The defendant did not attend that hearing and he has not attended this substantive committal hearing today. It is quite clear to me that this defendant is avoiding taking part in these proceedings, having brought them initially and then discontinued them.
- 7 In order to put some context to this case, the proceedings were brought by Mr Araujo alleging that the claimant's bus collided with the rear of his motorcycle on 21 January 2019. His allegation was that the motorcycle sustained damage, both to the rear and substantial damage to the offside of the motorcycle, which was deemed to be a total loss. He claimed that the pre-action value of the motorcycle was £802.82, but, because it was so damaged, he

was required to hire a replacement motorcycle. He alleged that he was impecunious and that, as a result, he had had to hire a replacement motorcycle from 27 January 2019, some eight days after the accident, through to 9 November 2019, for which he claimed hire charges in his schedule of loss in the sum of £48,511.92: what might be considered to be an extraordinary figure in light of the value of the motorcycle he says that he lost.

- 8 In addition, he says that he suffered damage to a mobile phone in the sum of £569 and a helmet in the sum of £79.99, in addition to a loss of earnings.
- 9 Metroline Limited endeavoured to see the bike, in order that it could be inspected. I have seen evidence from an enquiry agent that establishes that for a period during June 2019 the bike was outside his property. One of the allegations that is raised against the defendant, in support of this application for committal for contempt, is that he was informing the claimant that the motorcycle had been sold and disposed of and was outside his control at a time when enquiry agents were saying that it was still parked outside or near to his property. Obviously, those are matters that will need to be explored further.
- 10 The fundamental issue in this case, and the reason why the claimant has brought these contempt proceedings and been given permission to do so, is that the claimant was in the fortunate position that it had dashcam footage which showed the incident as it took place on 21 January. I have not seen that footage again recently, but my recollection from May 2021 is that the motorcycle was positioned by the defendant in the centre of the road in order for him to take a right-hand turn and the bus driver, inadvertently, touched the back of the motorcycle as he was behind that motorcycle. The footage does not show the motorcycle falling to the ground or being damaged along the left side at all. In fact, from my recollection, the dashcam shows the bus driver and the defendant having a conversation together and the defendant putting the motorcycle to the side of the road.
- 11 Once that major discrepancy was pointed out to the defendant, he has put forward a case to say that he, in fact, was not pushed off the bike by the bus in a way that the bike fell to the ground causing damage, but that he was so upset by what had happened that he threw the bike to the ground and that had caused damage. Naturally, the claimant says that, if that were the case, which is not accepted, that is an intervening act which would mean it was not liable for any damage caused to the motorcycle in that way.
- 12 The claimant in the proceedings discontinued his claim in light of those developments, which has given rise to the costs proceedings.
- 13 That discontinuance took place on 10 March 2020 and, on 3 March 2021, the application for permission to bring the committal proceedings was issued. As I have already indicated, I heard that application and granted permission to proceed on 5 May 2021.
- 14 The six allegations of contempt, as set out in the details of claim, are as follows. First, that the defendant knowingly made a statement of truth in his witness statement, when he said that he had sold the motorcycle on 3 June 2019, that it had been collected on that day and that he had no idea what happened to his vehicle after that date.
- 15 The second allegation of contempt is that there was interference with the due administration of justice by the defendant's attempt to bring a claim for the pre-action value of the motorcycle and hire charges on false pretences when he knew that those claims could not properly be brought.

- 16 Thirdly, he had interfered with the due administration of justice by preventing the claimant from inspecting the motorcycle: the inspection of the motorcycle being, of course, very important in a case of this nature.
- 17 Fourthly, it was alleged that he had knowingly made a false statement of truth in his witness statement of 15 November 2019, either where he said that Bravos Motorcycles had advised that they did not want to purchase it or, in his supplemental witness statement on 29 February 2020, where he said that they had, in fact, agreed to buy the motorcycle on 3 June 2019. The point being made by the claimant is that at least one of those statements, both signed by statements of truth, was untrue, and that the defendant must have knowingly made an untrue statement.
- 18 The fifth particular is that he made a false claim with respect to his damaged mobile phone. The sixth claim is that he had interfered with due administration of justice in not reporting that repairs had been carried out to his motorcycle.
- 19 Those allegations, although relating to what is a relatively straightforward claim in damages, are allegations of the utmost seriousness. If the claimant is right, with respect to those allegations, then the defendant has wilfully sought to interfere with the administration of justice by presenting a case that he knew that he could not make out for the purpose of recovering moneys to which he knew that he was not entitled. Such action, if made out, strikes at the very heart of the civil justice system and the ability of the court to be able to determine issues properly and fairly. There must, fundamentally, be honesty in the bringing of claims in order that those who are in some way harmed by tortuous behaviour can properly recover damages for what they have suffered. The court is not to be mis-used as a means of extracting moneys from a party who has either not committed a tortuous wrong at all, or there is an exaggeration or embellishment of the nature and extent of a wrong.
- 20 The hearing today is of great significance to the claimant, not simply because of this particular incident, but, as I appreciate from the evidence that has been presented before me, because false claims have a fundamental and detrimental impact upon the claimant being able to run its business in an appropriate way. I do fully appreciate that the claimant will have considered long and hard whether it was appropriate to bring such committal proceedings in this case, recognising, as it would have done, not only the investments of time and moneys that the claimant would need to spend but also the time that the court would need to provide for such a case to be heard.
- 21 Today, in the absence of the defendant, the claimant asks, first, that the court consider hearing the case in his absence and, if not willing to do so, then to consider the issue of a warrant for his arrest in order that he attends at any future hearing.
- 22 CPR 81.4(1)(o) provides:
- “that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt.”
- 23 That provision of the CPR, therefore, clearly gives the court power to proceed in the defendant’s absence. In this case, it has been made clear to the defendant from the outset of this claim being brought that – and I quote from the claim form:

“If you do not attend the hearing, the court may proceed in your absence. Whether or not you attend, the court will only find you in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt.”

24 This defendant has failed to attend court with respect to the costs proceedings, as I have already indicated in the face of a penal notice. He has also failed to attend the earlier proceedings when I granted permission for contempt proceedings to be brought. Those two matters give a fairly clear indication that this defendant has made a conscious decision that he was not going to engage with these proceedings.

25 The difficulty for the claimant in bringing this matter before the court today and asking it to be heard in the absence of the defendant is that service has undoubtedly been very short. That is no criticism of the claimant who has endeavoured to serve the defendant appropriately in various ways, and, on 28 March 2023, a letter was sent to Mr Araujo, in accordance with the order providing substituted service by first-class post. The letter was addressed to him, stating that the case had been listed for a contempt of court hearing on 3 May – that is yesterday – at the Royal Courts of Justice, with the hearing anticipated to last one day. The letter went on to say that:

“The court will notify the parties of the exact time of the hearing on 2 May 2023. You MUST attend the hearing. There can be potentially very serious consequences for failure to attend. For example, the judge may issue a bench warrant for your arrest if you fail to turn up. Furthermore, the court, in your absence, may sentence you to up to two years in prison in the event that you are found to be in contempt of court.

I strongly urge you to take immediate independent legal advice in connection with this correspondence and to arrange for legal representation at the upcoming hearing. Your legal representative will be able to advise you on the merits or otherwise of making an admission in relation to the contempt charges. I am unable to offer you any legal advice in this respect.”

That is signed by Chris Ball, a partner of Weightmans, who has also provided the court with evidence updating the situation.

26 I have today and yesterday, received a number of additional statements, including a statement from Michelle Reilly dated 3 May 2023 and a further statement from her dated today, 4 May 2023; evidence from a process server, Mr Timothy Evans, on 3 May 2023; and a statement with a number of exhibits from Chris Ball dated 2 May 2021.

27 The position with respect to service is that notification was given on 28 March 2023 that this hearing was to take place on 3 May and it is, in fact, taking place today, 4 May. The reason for that is simply that there was a two-day window for the hearing and, although the initial indication was that it was to be heard on 3 May 2023, it has been put in today. The claimant, itself, was not aware of that until it discovered from the cause list that the case was not listed yesterday and, as soon as it was aware of that, it provided notification to the defendant. That, of course, would be late notification, but I am not concerned about that change of date of one day. There is no suggestion that the defendant, in fact, turned up yesterday, confused that it should have been on 3 May. It is not unusual for a hearing to

commence not on the original date but a date later. It may, of course, have been a different thing had the change been to put the case in a day early. My concern lies with where service of the letter took place. The letter I have referred to, dated 28 March 2023, was sent to 36 Wellington Road and was not returned. That was, at the time it was sent by the claimant, the address that the claimant's solicitors had for the defendant. In fact, he had moved out of that property, and it appears from the information that the claimant has discovered through enquiry agents, he moved to a property at 33 Westwood Road. That change of address was notified to the solicitors acting for the claimant on 27 April 2023; consequently, that was subsequent to the service of the letter dated 28 March 2023. However, given that the tracing indicated that he had moved to 33 Westwood Road on 26 February 2023, I cannot be satisfied that he received the letter dated 28 March 2023. Although it was not returned on that occasion, that could well be simply because there were no new residents in that property as at 28 March or, alternatively, a first letter sent to that individual was not dealt with by the new residents.

- 28 On 17 April 2023, another letter that was sent to the defendant at 36 Wellington Road was returned by the residents. Again, on 17 April 2023, the solicitors acting for the claimant properly believed the address of Mr Araujo was 36 Wellington Road, but, on that occasion, the documents, having been received on 21 April 2023, were returned.
- 29 Documentation was duly sent once the new address was found by tracing agents on 27 April 2023, notifying the defendant of this hearing on 3 May 2023. That letter was addressed to 33 Westwood rather than Westward Road, but at the proper postcode of E4 8LZ. That documentation included the original letter of 28 March 2023, providing, amongst other things, the date of the hearing of 3 May, skeleton arguments and the bundle setting out all the evidence and documentation relevant for this hearing.
- 30 It is again no fault of the claimant, but the fact that that letter was sent on 27 April 2023 and there has been a long Bank Holiday in between means that, in fact, the letter containing the relevant documentation is not deemed to have been served until 2 May. That is Tuesday of this week.
- 31 The claimant backed up the service by first-class post by instructing a process server, Mr Timothy Evans, to attend at the property and, on 28 April, Friday of last week, an attempt was made to serve that letter with the enclosures. The process server did so by attending the first-floor maisonette, but having not received any response on Sunday 30 April, he endeavoured to serve but with no response. Finally, on 1 May he tried to serve the documentation but was unable to post the documentation through the letterbox due to its bulky size.
- 32 There was a conversation with a woman at the property who confirmed that the defendant did occupy the property. That provides some evidence that the letter informing Mr Araujo of the hearing today was received by the defendant. That encounter was on Wednesday (yesterday) at 12.50 p.m. I will quote the statement from Timothy Evans, who then attended. He says that he left the documents in a sealed addressed envelope inside the doorway of the address and he says:

“At the time of delivery I met with an adult female who confirmed residency of the respondent at the address and advised he was not in at that time.”

The letter that Mr Evans was then endeavouring to serve was notifying Mr Araujo that the hearing was to take place today and not yesterday.

- 33 However, within approximately half an hour of that encounter, at 1.23 p.m. on 3 May, the solicitor, Michelle Reilly, received a voicemail message, which had been transferred via her firm's telephone system (so she could not confirm the telephone number of the caller), but that message, and I quote, was as follows:

“Hello, good afternoon, I've just received a letter for Diego Araujo. Well, my cousin opened the door to someone and she said that this person lived here but she got mistaken. Now, this person does not live here so I am just letting you know. In the letter it says to contact Michelle Reilly, so, yeah, I don't know her, I've never heard of this person. It is Margaret Alatissia”.

- 34 So far as that encounter is concerned, the evidence of the tracing agent is that there are two women, one of whom is called Margaret, who have high connectivity with this address, along with the defendant. It is impossible to say, of course, on the basis of what has been provided, but there is an implication, at least, that the individual phoning is in some way related to the defendant and was, effectively, giving a false trail with respect to whether or not he was there.
- 35 The difficulty, as I have referred to before, is the fact that, even if satisfied, as I am, that the claimant has complied with the service requirements and in accordance with the order for substituted service by notifying the defendant of this hearing – notifying the defendant first of the hearing on 3 May and providing all the necessary documentation and then notifying him of the change of date – that service has been extremely late through no fault of the claimant. Had the defendant remained in the property he had been in, he would have been served back in late March. As it is, the earliest that I can be satisfied that he was served with the documentation was Tuesday of this week, two days ago, with notification of the change of date yesterday.
- 36 Given the seriousness of this matter and that this is a substantive hearing with respect to committal for contempt and the potential consequences of any finding of contempt beyond reasonable doubt I am not minded, taking into account the matters contained in the checklist set out by Cockerill J in the case of *ICBC Standard Bank PLC & Ors v. Erdenet Mining Corporation LLC* [2017] EWHC 3135, that this is a matter where the proceedings should continue in the absence of the defendant.
- 37 Going through the checklist, I am satisfied that the defendant has been served with the relevant documents, including notice of the hearing, that the defendant has failed to advance any reason for his non-appearance and that his previous behaviour, both within these particular contempt proceedings but also within the costs aspect of this case, indicates that he has made the determination not to attend. The disadvantage to him in not presenting his account of events is, of course, obvious, but he has been given opportunity to do so by reason of the order I made and has made a determination not to provide evidence. The prejudice to the claimant, both by way of costs and time, is of course, significant.
- 38 However, looking at the checklist, I have to consider whether there is sufficient notice to enable the defendant to prepare for this hearing and I have to consider whether there is undue prejudice to the forensic process by reason of the absence of the defendant and the overriding objective. Had there been notice given at an earlier stage, in the way that notice

has now been given, then I would have been of the view that this is a case appropriate to proceed with in the absence of the defendant. He has been given the opportunity to take part in the past and has failed to do so and he is, and has been, aware of the fact that permission was given for these proceedings to continue to a substantive hearing with opportunity to give his own evidence.

- 39 The difficulty, as I have set out in the course of submissions, is the lateness of the service with respect to this particular hearing and, given the significance of the matters, I do not consider that it would be appropriate to proceed in his absence at this time.
- 40 Nonetheless, given I am satisfied that there has been service and that the defendant has throughout this matter been given the opportunity to attend and, given all the evidence pointing towards the fact that the defendant will not take part in these proceedings unless he is compelled to do so, I am willing, and consider it essential, to grant a warrant for his attendance at the next hearing of this matter. Without such a warrant, I consider it highly likely that he will not attend and the claimant will be left again with seeking to have this matter dealt with in his absence.
- 41 Consequently, my ruling is that the case will not proceed today in his absence, but a warrant should be issued in order for him to attend at the next hearing of this matter.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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