Permission for committal application – Public interest threshold requirements (JTR v NTL)

27/08/2015

Dispute Resolution analysis: Warby J has dealt with an application for permission seeking to commit one party to privacy litigation to prison. This application was made alleging that witness statements made in 2 prior actions were false in a number of ways. Those witness statements were endorsed with a statement of truth as required under the CPR. An anonymity order prevents the disclosure of the names of either of the parties. The judge considered affidavit evidence in support of the committal application. This evidence was contested. The judge ruled that a committal order would not be in the public interest. There were a number of reasons for this including the fact that the applicant did not have a strong case on the face of it because of the disputed facts, that a hearing to resolve this would take several days, the application was motivated by a vindictive intent and that the costs of resolving this would be borne by the respondent even if the committal application was dismissed. A judge must exercise considerable caution before allowing committal proceedings to go ahead.

Practical implications

Permission for committal application - requirements

JTR v HNL **[2015] EWHC 2298 (QB)**

Unless an application is made by the Attorney General, permission of the court is required if a party wishes to seek another's committal to prison for making a false statement of truth: CPR 81.18(1). The options given to the court on how to proceed are set out in CPR 81.14(6) and PD81 5.3. The court may direct that the matter be referred to the Attorney General to request him to consider whether to bring contempt proceedings: CPR 81.18(5) and PD81 5.3(3). If not, the court has two options. Firstly, it may grant permission and give such other directions as it thinks fit, including transferring the proceedings to another court or directing that it be listed for hearing before a single judge or a Divisional Court: CPR 81.14(6) and PD81 5.3(1) and (2). Secondly, the court may refuse permission, or give directions before deciding how to dispose of the application.

These powers have to be exercised in accordance with the overriding objective in CPR 1. PD 81 5.7 reminds litigants that "A person applying to commence such proceedings should consider whether the incident complained of does amount to contempt of court and whether the proceedings would further the overriding objective in Pt 1".

There have been four authorities which flesh out the applicable principles. In Kirk v. Walton Cox J said that she approached the case on the basis that:

- the discretion to grant permission should be exercised with great caution,
- there must be a strong *prima facie* case shown against the respondent,
- a judge should be careful not to stray at that stage into the merits of the case,

- a judge should consider whether the public interest requires the committal proceedings to be brought at all, and
- such proceedings must be proportionate and in accordance with the overriding objective.

Although under appeal on other grounds, in Makdessi the Court of Appeal also said that the discouragement of the making of false statements by litigants by way of false statements of truth is in the public interest both because of their effect on those involved in litigation and their effect upon our system of justice, which depends above all upon honesty.

The five principles to be applied were set out by Hooper LJ in Barnes v. Seabrook as follows:

- A person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it,
- It must be in the public interest for proceedings to be brought,
- The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings,
- Only limited weight should be attached to the likely penalty, and
- A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account.

Public interest in committal applications - requirements

In KJM Superbikes, the Court of Appeal emphasized that committal proceedings are public law proceedings, and that the decision whether to grant or withhold permission must be governed by an assessment of the public interest. In Barnes v. Seabrook Hooper LJ said these were the 4 factors a court took into account in deciding whether it was in the public interest to allow a committal application to go ahead:

- The case against the alleged contemnor must be a strong case. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance,
- The false statements must have been significant in the proceedings,
- The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings, and
- The pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality.

Formalities on a committal application

It should be noted that it is not sufficient to proceed on an application for permission to commit with a witness statement. CPR 81.14(1)(a) requires evidence relied on in support of an application for permission to bring committal proceedings to be contained in an affidavit. If permission is granted and proceedings for committal are then brought, the evidence in support of or in opposition to the application must be also given by affidavit: CPR81.14(1)

Facts

There had been 2 prior actions between the 2 parties – one was a privacy action and the other was termed other proceedings. In the privacy action an injunction was granted in favour of the party who is the Respondent to this application for permission to commit. Confidentiality orders (including pseudonymous initials) prevent disclosure of the parties' identities. Various allegations in the privacy action were made about group sex, use of prostitutes and drug taking. These allegations were denied by the Respondent and the Applicant was found to be a blackmailer and dishonest witness. Substantial costs in the privacy action in the Respondent's favour remain unpaid. An application was made for permission to seek the committal of the Respondent to prison. The Applicant alleged that witness statements made by the Respondent were false in a number of matters. The witness statement was endorsed with a statement of truth signed by the Respondent. The Respondent did not serve any other witness evidence in response but relied on the evidence in the main proceedings and the judge's rulings. Affidavit evidence is required on an application for permission to commit. The Applicant had failed to obtain affidavit evidence from a crucial witness. The judge refused permission to allow the application for committal to proceed.

Difficulties with the overriding objective and the proportionality of the committal application

The overriding objective means that a court has to deal with cases justly and at proportionate cost which includes ensuring that the parties are on an equal footing, expense is saved, cases are dealt with in ways which are proportionate (to the amount of money involved, to their importance, to the complexity of the issues, and to each side's financial position), cases are dealt with expeditiously and fairly, that an appropriate share of the court's resources is allotted to them, and that compliance with rules, practice directions or orders is enforced.

The judge round the fact that committal proceedings would be "satellite litigation" was not of itself particularly persuasive. All proceedings of this kind are necessarily collateral to some other proceeding and are not concerned with the resolution of civil rights or obligations between parties.

The judge said concerns as to proportionality could be catered for by editing the range of false allegations. The judge would not have allowed all of the 9 statements said by the Applicant to be false to go proceed. The judge said 2 of these items were too generalised and vague. To keep matters in proportion, the judge would not have allowed the drugs issue to go forward on an application to commit unless there had been clear evidence in support of this in the Applicant's affidavit in support. Similarly, the Affidavit itself and its 12 exhibits could have been condensed so that the allegations were more concise and focused only on the relevant matters.

Was there a strong *prima facie* case?

Not surprisingly the judge found that no such strong prima facie case was made out by the Applicant for the following 3 reasons.

- Whilst the Applicant had in my judgment a *prima facie* case on the evidence, it was not a strong one. There was a very real prospect that the evidence would be held to fall short of proving the Applicant's case to the criminal standard.
- Even if an Affidavit from AMS had been obtained and covered the further limited

investigations the judge felt was needed, he still considered that contested committal proceedings (which had to be fair to both sides) would be likely to last as much as two days. This would require findings of fact on matters which have not been tried before and credibility of both sides would continue to be a key factor. It would be hard to confine cross-examination on credit.

- It was unclear if the findings in the other proceedings would be admissible because of Hollington v F Hewthorn & Co Ltd **[1943] 2 All ER 35**. Even if they were, there would be rich potential for debate about their impact. The nature of the inquiry was different. The findings there would not be conclusive, even if admissible, against the Respondent. The standard of proof is the higher criminal standard in contempt proceedings.

Was the public interest test met?

The judge (applying KJM Superbikes) noted that there was no general rule as to when committal proceedings begun by a private party should be referred to the Attorney General. He said this was not a case where he should duck the responsibility of assessing the balance of the public interest in such proceedings being brought. The Applicant's counsel offered to pursue committal only through his solicitors and Counsel and the judge were satisfied that he could grant permission on such a condition. A condition of that kind would meet the Respondent's integrity and independence concerns.

The judge said there is a strong public interest in holding to account those who make false statements in their evidence to the court. This has a high importance in privacy proceedings.

In arriving at his public interest assessment the judge considered how important the matters were on which a party is alleged to have lied to the court. They had to be significant and the judgement in the privacy action indicates that the alleged lies would have made no difference at all. However that is not the test. A party accused of telling lies to a court in a witness statement cannot expect the court too readily to accept that the lies were not material, and on that ground refuse permission to seek committal. The court was bound to question why, if evidence was not material, it was given at all. Both parties owed the court a duty of full and frank disclosure. That required all matters which could be considered material to be disclosed.

The judge found that the public interest test was not met for a number of reasons (including the fact that a strong *prima facie* case was not made out). In addition the judge said the application failed the following four hurdles:

- Further factual investigations were needed. The Applicant had not paid the costs orders in the privacy action. This meant that the costs of these further investigations would effectively have to be paid by the Respondent even if the application failed. The judge noted that the Respondent had already incurred huge irrecoverable expense in preventing the Applicant from successfully blackmailing him. Public resources in terms of court and judicial time consumed would also be significant.
- There were reasonable grounds to believe that the Applicant's motives are vindictive. Whilst the Applicant couldn't gain materially from committal he could cause the Respondent loss by bringing committal proceedings for that purpose.
- The Applicant had stated his aim of evening up the scales as between him and the Respondent. This is a private aim and not a public interest purpose. Nor does it seem to me to be justified anyway. The Applicant has anonymity and so the findings

against him are not generally known. Committal proceedings would necessarily leave the scales in even balance. The reverse could happen with the Respondent being named and shamed publicly whilst the Applicant retains anonymity.

- Caution is required before permitting proceedings of this kind to go forward. Whilst the judge concluded that the public interest in holding to account those who lie to the court is considerable it was not weighty enough here to justify the consequences.

In the end, the judge said the public interest lay in drawing a line under this long-running saga rather than initiating a further expensive exploration of what did or did not happen in private between consenting adults on nearly 7 years ago.

Did the application meet the affidavit formalities?

The Applicant had filed and served an affidavit with her application which complied with CPR81.14(1). This affidavit set out an analysis of why the Applicant said the Respondent's witness statements in the privacy actions was false. The affidavit had 12 exhibits. These exhibits included correspondence, bank statements, the Applicant's diary and photographs.

An exhibit also included text messages passing between the Applicant and Respondent but it is not clear if these are a "document" within CPR81.14(1) or not. The judge said he had not ignored these texts in coming to his ruling but said in the absence of corroborative evidence to support the Applicant's explanation of them he did not consider they carried enough weight.

One crucial exhibit was a witness statement (which itself had further exhibits) made by a woman referred to as AMS. The Respondent's counsel objected to this AMS's witness statement going in on a committal application merely as an exhibit because he said its authenticity was in doubt. The judge noted that there had been ample opportunity for the Applicant to obtain an affidavit from AMS. He said he would have been very reluctant to grant permission without an Affidavit. Whilst the judge said this defect could have been cured in principle if he had granted permission conditional upon the production of such a further affidavit, in this case the judge ruled that this would not have been a satisfactory course given how long this matter has been hanging about.

Recent trends in committal applications

This case serves as a salutary reminder that where a court document – be it a claim form or witness statement - is endorsed with a statement of truth by a party, then if it is found to be false in a material way, that further proceedings or applications in relation to this can follow. For this reason, solicitors are often reluctant to endorse the statement of truth on a claim form on their client's behalf. This may be less so, where a claim has been drafted based wholly or mainly on authentic documents supplied by a client.

There have been a few county court cases this year mainly concerning local authorities or housing associations that have sought a committal order against defendants who have been in breach of prior court orders or injunctions. Proof in relation to a committal application is to the criminal standard rather than the lower civil standard. In the past judges have often been reluctant to make an immediate committal order preferring instead to adjourn the application, find technical defects to be made out or to issue a financial penalty or suspend any proposed

prison sentence instead. However judicial attitudes in relation to making a committal order appear to have hardened.

Before going to those, a similar case to **JTR** is EUI Limited v Hawkins & Presdee-Hughes in that this too concerns an application to commit to prison for making a number of untrue statements in court proceedings about an insurance claim concerning a car accident. The allegations were proved to the criminal standard. One defendant was sent to prison for 2 months. The other escaped more lightly with a prison sentence of 1 month suspended for 2 years.

In One Housing Group v Clifton a Respondent had been in clear breach of a previous court orders and the judge had viewed quite damning CCTV evidence too. He imposed a prison sentence of 10 months which he refused to suspend. In Guinness Partnership v Gardner an immediate prison sentence of 10 weeks was imposed. In Birmingham City Council v Bishton whilst an immediate prison sentence of 11 weeks was imposed, some terms were to run concurrently so that 6 weeks was the sentence to be served. Although Birmingham City Council v Khatoon concerned breach of an ASBO, it too was met with a committal application and an immediate prison sentence of 32 weeks in prison. Finally In Gloucester City Homes v Beard an immediate prison sentence of 9 weeks in prison was handed out.

Court details

1. Court: Queen's Bench Division, High Court of Justice
2. Judge: Mr Justice Warby
3. Date of judgment: 31 July 2015